Cabrillo Pacific University
College of Law
3620 AERO COURT, SAN DIEGO, CA. 92123

NATIONAL UNIVERSITY LIBRARY

SAN DIEGO

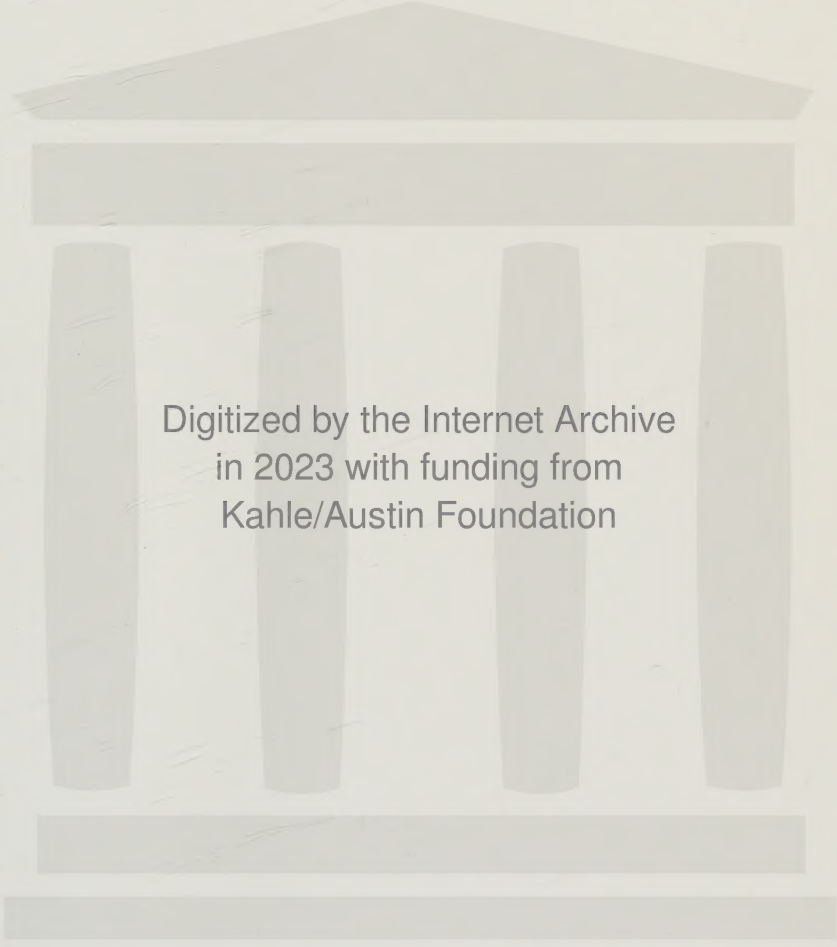
NON-CIRCULATING

CALIFORNIA REPORTER REFERENCES

138 CALIFORNIA APPELLATE REPORTS, 2d SERIES

Cal.App. Page	P.2d Vol.	P.2d Page
1	291	68
7	291	150
16	291	47
18	291	53
25	291	527
33	291	68
35	291	155
59	291	538
63	291	111
74	291	98
82	291	194
92	291	169
98	291	91
104	291	118
108	291	134
123	292	39
139	291	38
143	291	558
152	291	79
159	291	107
165	291	41
169	291	193
172	291	88
178	291	120
183	291	191
187	291	534
194	291	142
199	291	77
203	291	52
205	291	186
211	292	651
216	291	49
222	291	542
222	292	270
228	291	547
239	291	545
243	291	517
251	291	575
265	291	555
269	291	572
269	292	572
274	291	957
280	291	969
291	292	52
303	291	501
307	291	532
311	292	60
317	292	15
329	291	982
333	292	23
346	291	960
350	291	987
356	291	963
360	291	984
363	291	976
370	292	48
375	292	31
387	291	995
397	291	951
402	291	1005
406	291	1001
412	291	965
419	291	954
423	291	986
425	291	980
428	291	991
435	292	3
443	292	1
448	292	71
459	292	66
467	292	78
479	292	225
482	292	85
490	292	230
494	292	63
499	292	226
505	292	267
510	292	595
518	292	927
531	292	303
538	292	286
541	292	655
554	292	282
559	292	310
565	292	298
568	292	274
575	292	297
577	292	632
586	292	559
598	292	278
605	292	264
610	292	247
616	292	251
621	292	254
627	292	293
634	292	288
642	292	638
647	292	270
652	292	233
663	292	314
671	292	257
676	292	261
680	292	300
685	292	574
691	292	535
692	292	623
698	292	567
702	292	549
706	292	581
711	292	934
719	292	906
725	292	585
727	292	587
740	292	529
747	292	941
763	292	626
773	292	663
795	292	645
803	292	649
807	292	600
815	292	536
817	292	533
820	292	676
829	292	573
831	292	909
843	292	556
849	292	570
852	292	522
862	292	537
867	292	547
871	292	552
878	292	642
883	292	618
891	291	203
894	291	601
899	291	1013
902	291	584
906	292	681
909	292	90



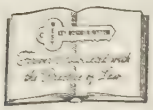

Digitized by the Internet Archive
in 2023 with funding from
Kahle/Austin Foundation

https://archive.org/details/californiareport0000unse_j6t4

CALIFORNIA REPORTER

Covering Cases Reported in

PACIFIC REPORTER
Second Series



297 P.2d—298 P.2d

Cite by Volume and Page
of the
PACIFIC REPORTER
SECOND SERIES
Thus:
297 P.2d 1

ST. PAUL, MINN.
WEST PUBLISHING CO.
1956

COPYRIGHT, 1956, BY WEST PUBLISHING CO.
Pacific Reporter, Second Series, Vol. 297, Nos. 1-4;
Vol. 298, Nos. 1-3.

COPYRIGHT, 1956, BY WEST PUBLISHING CO.

TABLE OF CONTENTS

	Page
Judges and Officers	V
Table of Cases Reported	XIII

JUDGES AND OFFICERS

SUPREME COURT

Chief Justice

PHIL S. GIBSON San Francisco

Associate Justices

JOHN W. SHENK San Francisco
JESSE W. CARTER San Francisco
ROGER J. TRAYNOR San Francisco
B. REY SCHAUER San Francisco
HOMER R. SPENCE San Francisco
MARSHALL F. McCOMB San Francisco

Clerks

William I. Sullivan	Clerk	San Francisco
Harry M. Gardiser	Chief Deputy Clerk	San Francisco
Raymond J. Bell	Deputy Clerk	San Francisco
Joseph M. Rogers	Deputy Clerk	San Francisco
Paul Dinoia	Deputy Clerk	San Francisco
A. F. Bradovich	Deputy Clerk	Sacramento
Henry P. Crabtree	Deputy Clerk	Los Angeles
David Blomgren	Deputy Clerk	Los Angeles

Attorney General

EDMUND G. BROWN San Francisco

DISTRICT COURTS OF APPEALS

FIRST DISTRICT—SAN FRANCISCO

Division 1

PRESIDING JUSTICE

RAYMOND E. PETERS San Francisco

ASSOCIATE JUSTICES

A. F. BRAY San Francisco
FRED B. WOOD San Francisco

Division 2

PRESIDING JUSTICE

JOHN T. NOURSE San Francisco

ASSOCIATE JUSTICES

MAURICE T. DOOLING, Jr. San Francisco
HERBERT C. KAUFMAN San Francisco

CLERKS

WALTER S. CHISHOLM Clerk San Francisco
L. R. ELKINGTON Deputy Clerk San Francisco
G. E. BISHEL Deputy Clerk San Francisco

SECOND DISTRICT—LOS ANGELES

Division 1

PRESIDING JUSTICE

THOMAS P. WHITE Los Angeles

ASSOCIATE JUSTICES

WILLIAM C. DORAN Los Angeles
WALTER J. FOURT Los Angeles

Division 2

PRESIDING JUSTICE

MINOR MOORE Los Angeles

ASSOCIATE JUSTICES

W. TURNEY FOX Los Angeles
ALLEN W. ASHBURN Los Angeles

DISTRICT COURTS OF APPEALS—Continued

Division 3

PRESIDING JUSTICE

CLEMENT L. SHINN Los Angeles

ASSOCIATE JUSTICES

PARKER WOOD Los Angeles
PAUL VALLÉE Los Angeles

CLERKS

JAMES E. BROWN Clerk Los Angeles
EUGENE B. STANLEY Chief Deputy Clerk Los Angeles
JOHN ALLEY Deputy Clerk Los Angeles
CLAY ROBBINS, JR. Deputy Clerk Los Angeles

THIRD DISTRICT—SACRAMENTO

PRESIDING JUSTICE

B. F. VAN DYKE Sacramento

ASSOCIATE JUSTICES

PAUL PEEK Sacramento
ANDREW R. SCHOTTKY Sacramento

CLERKS

L. A. ENDRES Clerk Sacramento
THOMAS J. DILLON Deputy Clerk Sacramento

FOURTH DISTRICT

Fresno—San Bernardino—San Diego

PRESIDING JUSTICE

CHARLES R. BARNARD Fresno

ASSOCIATE JUSTICES

LLOYD E. GRIFFIN San Diego
STANLEY MUSSELL San Bernardino

CLERKS

EARL J. VERDECKBERG Clerk San Diego
LLOYD E. HIDDEN Deputy Clerk San Bernardino
ROY M. BOSTWICK Deputy Clerk Fresno
GEORGE J. KOBELIN Deputy Clerk San Diego

APPELLATE DEPARTMENT, SUPERIOR COURT

ALAMEDA COUNTY

PRESIDING JUDGE

S. VICTOR WAGLER Oakland

JUDGES

RALPH E. HOYT Oakland
THOMAS J. LEDWICH Oakland

CONTRA COSTA COUNTY

PRESIDING JUDGE

HAROLD JACOBY Martinez

JUDGES

HOMER W. PATTERSON Martinez
NORMAN A. GREGG Martinez

FRESNO COUNTY

PRESIDING JUDGE

ARTHUR C. SHEPARD Fresno

JUDGES

STROTHER P. WALTON Fresno
MILO POPOVICH Fresno

KERN COUNTY

PRESIDING JUDGE

ROBERT B. LAMBERT Bakersfield

JUDGES

W. L. BRADSHAW Bakersfield
NORMAN F. MAIN Bakersfield

LOS ANGELES COUNTY

PRESIDING JUDGE

EDWARD T. BISHOP Los Angeles

JUDGES

JULIUS V. PATROSSO Los Angeles
FRANK G. SWAIN Los Angeles
KURTZ KAUFFMAN Los Angeles

CLERK

J. J. MACGREGOR Los Angeles

MARIN COUNTY

PRESIDING JUDGE

JORDAN L. MARTINELLI San Rafael

JUDGES

THOMAS F. KEATING San Rafael
CARLOS RAYMOND FREITAS San Rafael

APPELLATE DEPARTMENT, SUPERIOR COURT
—Continued

MONTEREY COUNTY

JUDGE

ANTHONY BRAZIL Salinas

ORANGE COUNTY

PRESIDING JUDGE

FRANKLIN G. WEST Santa Ana

JUDGES

ROBERT GARDNER Santa Ana
RAYMOND THOMPSON Santa Ana

RIVERSIDE COUNTY

PRESIDING JUDGE

OAKLEY K. MORTON Riverside

JUDGES

RUSSELL S. WAITE Riverside
JOHN G. GABBERT Riverside

SACRAMENTO COUNTY

PRESIDING JUDGE

GROVER W. BEDEAU Sacramento

JUDGES

JOHN QUINCY BROWN Sacramento
JAY L. HENRY Sacramento

SAN BERNARDINO COUNTY

PRESIDING JUDGE

MARTIN J. COUGHLIN San Bernardino

JUDGES

ARCHIE D. MITCHELL San Bernardino
CARL B. HILLIARD San Bernardino

SAN DIEGO COUNTY

PRESIDING JUDGE

L. N. TURRENTINE San Diego

JUDGES

ROBERT B. BURCH San Diego
WILLIAM A. GLEN San Diego

APPELLATE DEPARTMENT, SUPERIOR COURT —Continued

SAN FRANCISCO COUNTY

PRESIDING JUDGE

PRESTON DEVINE San Francisco

JUDGES

EDWARD MOLKENBUHR San Francisco
DANIEL R. SHOEMAKER San Francisco

CLERK

JOSEPH F. WHITMAN San Francisco

SAN JOAQUIN COUNTY

PRESIDING JUDGE

THOMAS B. QUINN Stockton

JUDGES

R. M. DUNNE Stockton
M. G. WOODWARD Stockton

SAN MATEO COUNTY

PRESIDING JUDGE

AYLETT R. COTTON Redwood City

JUDGES

EDMUND SCOTT Redwood City
MURRAY DRAPER Redwood City

SANTA BARBARA COUNTY

JUDGE

ATWELL WESTWICK Santa Barbara

SANTA CLARA COUNTY

PRESIDING JUDGE

JOHN D. FOLEY San Jose

JUDGES

WILLIAM F. JAMES San Jose
EDWIN J. OWENS San Jose

SANTA CRUZ COUNTY

JUDGE

JAMES L. ATTERIDGE Santa Cruz

APPELLATE DEPARTMENT, SUPERIOR COURT
—Continued

SOLANO COUNTY

JUDGE

JOSEPH M. RAINES Fairfield

SONOMA COUNTY

PRESIDING JUDGE

HILLIARD COMSTOCK Santa Rosa

JUDGES

DONALD GEARY Santa Rosa
CHARLES J. McGOLDRICK Santa Rosa

STANISLAUS COUNTY

PRESIDING JUDGE

DAVID F. BUSH Modesto

JUDGES

H. L. CHAMBERLAIN Modesto
FRANK C. DAMRELL Modesto

VENTURA COUNTY

PRESIDING JUDGE

CHARLES F. BLACKSTOCK Ventura

JUDGES

WILLIAM A. REPPY Ventura
E. PERRY CHURCHILL Ventura

CASES REPORTED

Vols. 297–298 P.2d

	P.2d Vol.	Page
Acosta; People v., App.	298	29
Agajanian v. Cuccio, App.	297	755
Alameda County; Lundberg v., Sup.	298	1
Albert; Damiani v., App.	297	1022
Allen v. Gardner, App.	298	585
Allen; People v., App.	298	714
Aller Business Representative of Local 659, I.A.T.S.E., Petition of, App.	298	128
American Cancer Soc. v. Church Divinity School of the Pacific, two cases, App.	297	783
American Trust Co.; Uhl v., App.	297	493
Anderson v. W. R. Chamberlin & Co., App.	298	901
Anderson's Estate, In re, App.	298	105
Antone; People v., App.	297	88
Armendariz; People v., App.	297	79
Aro; Kaukonen v., App.	298	611
Atherley v. MacDonald, Young & Nelson, Inc., App.	298	700
Atkinson v. Wilcken, App.	298	147
Automotriz Del Golfo De California S. A. De C. V. v. Resnick, App.	297	109
Automotriz Del Golfo De California S. A. De C. V. v. Resnick, App.	298	33
Badham; Bergan v., Super.	297	815
Bailey v. Leeper, App.	298	684
Bailey v. Superior Court In and For Shasta County, App.	297	795
Baker; Richard v., App.	297	674
Baker v. Van Dolzer, App.	298	86
Balestrieri v. Sullivan, App.	298	688
Bank of America Nat. Trust & Sav. Ass'n; Cecil v., App.	297	810
Bank of America Nat. Trust & Sav. Ass'n; Cecil v., App.	298	24
Bank of America Nat. Trust & Sav. Ass'n; Fry v., App.	298	34
Bank of America Nat. Trust & Sav. Ass'n; Hurlimann v., App.	297	682
Bank of America Nat. Trust & Sav. Ass'n v. Long Beach Federal Sav. & Loan Ass'n, App.	297	443
Banks v. Culver, App.	297	105
Barnard v. Municipal Court of City and County of San Francisco, App.	298	679
Baum; Pearson v., App.	297	707
Bay Meadows Hotel; Snyder v., App.	297	485
Bayshore Const. Co. v. Karsh, App.	298	635
Beatty Safway Scaffold Co.; Spencer v., App.	297	746
Beneficial Fire & Cas. Ins. Co. v. Kurt Hitke & Co., Sup.	297	428
Bent Const. Co.; Van Meter v., Sup.	297	644
Bergan v. Badham, Super.	297	815
Berkeley Unified School Dist. of Alameda County v. City of Berkeley, App.	297	710
Bias v. Bias, App.	298	102
Bing Crosby Minute Maid Corp. v. Eaton, Sup.	297	5
Biscailuz; Hayward Lumber & Inv. Co. v., App.	297	46
Blackman; Herman v., App.	298	649

P.2d

	Vol.	Page
Gasumat and Gasumat No. 2; Silver v., App.	297	1018
General Mills, Inc.; Glane v., App.	298	626
Gideon v. Superior Court In and For Los Angeles County, App.	297	84
Gilliam; People v., App.	297	468
Glane v. General Mills, Inc., App.	298	626
Gonzales v. International Ass'n of Machinists, App.	298	92
Gonzales; People v., App.	297	50
Gordon; Oppenheimer v., App.	297	808
Gore; Jones v., App.	297	474
Grasso; People v., App.	298	131
Gregor; People v., App.	297	734
Griswold v. Department of Alcoholic Beverage Control, App.	297	762
Hagenbuch v. Kosky, App.	298	875
Hall v. City of Taft, App.	297	686
Harbor Laundry Co. v. Commercial Steel Corp., App.	298	555
Hawkinson; Taylor v., App.	298	919
Hayward Lumber & Inv. Co. v. Biscailuz, App.	297	46
Henry; People v., App.	298	80
Henry; Philpot v., App.	297	1029
Herbert Aller Business Representative of Local 659, I.A.T.S.E., Petition of, App.	298	128
Herman v. Blackman, App.	298	649
Highland Realty Co. v. City of San Anselmo, Sup.	298	15
Highland Realty Co. v. City of San Rafael, Sup.	298	15
Hobby v. City of Sonora, App.	298	578
Holland v. Paddock, App.	298	587
Hollingbery; Snyder v., App.	297	485
Hood; People v., App.	297	52
Hopalong Cassidy, Inc.; Karp v., Sup.	297	425
Hornung v. Tavares, App.	298	887
Howard v. Howard, App.	298	48
Hubbell v. City of Los Angeles, App.	297	724
Hubbs v. Department of Mental Hygiene of State, App.	298	545
Hudson v. Rainville, Sup.	297	434
Hunt; Napoli v., App.	297	653
Hurlimann v. Bank of America Nat. Trust & Sav. Ass'n, App.	297	682
Hutchinson v. Dow, App.	297	38
Ideal Hotel; Epperson v., App.	297	141
Ikner; People v., App.	298	45
Ince; People v., App.	297	27
Industrial Acc. Commission; City and County of San Francisco v., App.	298	651
Industrial Acc. Commission; Lambreton v., Sup.	297	9
Industrial Acc. Commission of Cal.; Sutton v., Sup.	298	857
Industrial Acc. Commission of Cal.; Wiseman v., Sup.	297	649
Insurance Commission; Davis Auto Exchange v., App.	298	914
Insurance Commission; Taliaferro v., App.	298	914
International Ass'n of Machinists; Gonzales v., App.	298	92
James I. Barnes Const. Co.; Slovick v., App.	298	923
Jaurequi; People v., App.	298	896
Jennings; People v., App.	298	56
Johnson; San Bernardino County v., App.	297	21
Johnson; Uhl v., App.	297	493
Johnston; Mitchell v., Super.	298	170
Johnston; Mitchell Realty v., Super.	298	170
Jones v. Gore, App.	297	474
Jones v. Maynard, App.	297	461

P.2d

	Vol.	Page
Kaiser v. Mansfield, App.	297	98
Karp v. Hopalong Cassidy, Inc., two cases, Sup.	297	425
Karsh v. Bayshore Const. Co., App.	298	635
Karsh; Martin v., App.	298	635
Kaukonen v. Aro, App.	298	611
Kaynar Mfg. Co. v. Superior Court In and For Los Angeles County, App.	297	502
Keeler v. Superior Court of Cal. In and For Sacramento County, Sup.	297	967
Keeney's Estate, In re, Sup.	297	636
Kelley Kar Co. v. Maryland Cas. Co., App.	298	590
Kemmer v. Kemmer, App.	298	26
Knoblock v. Waale-Camplan Co., App.	297	765
Kosky v. Hagenbuch, App.	298	875
Kurt Hitke & Co.; Beneficial Fire & Cas. Ins. Co. v., Sup.	297	428
La Canada Acres; Richard v., App.	297	674
Lakin; Rippee v., App.	298	643
Lambreton v. Industrial Acc. Commission, Sup.	297	9
Lamoreux v. San Diego and Arizona Eastern Ry. Co., App.	298	658
Lanan & Snow Lumber Co.; Dwyer v., App.	297	490
Langley v. Schumacker, Sup.	297	977
Lawrence; People v., App.	297	144
Leeper; Bailey v., App.	298	684
Lelande v. People, App.	297	72
Lemoge Elec. v. San Mateo County, Sup.	297	638
Lewis & Queen v. N. M. Ball Sons, App.	297	120
Little; People v., App.	298	548
Local 659, I.A.T.S.E. v. Color Corp. of America, App.	298	128
Loew's Inc.; Wilson v., App.	298	152
Lombardo; Tucker v., App.	298	562
Long Beach Federal Sav. & Loan Ass'n; Bank of America Nat. Trust & Sav. Ass'n v., App.	297	443
Lorenz v. Board of Medical Examiners, Sup.	298	537
Los Angeles County; Wicktor v., App.	297	115
Los Angeles County Pioneer Soc., In re, App.	297	72
Low; Craney v., Sup.	298	860
Lundberg v. Alameda County, Sup.	298	1
McCarthy v. Tally, Sup.	297	981
McCaughan, Application of, App.	298	871
MacDonald, Young & Nelson, Inc.; Atherley v., App.	298	700
McKee; Simone v., App.	298	667
McMann; Frazier v., Sup.	297	636
Malleck v. Superior Court In and For City and County of San Francisco, App.	298	115
Mansfield; Kaiser v., App.	297	98
Martin v. Karsh, App.	298	635
Maryland Cas. Co.; Kelley Kar Co. v., App.	298	590
Masson's Estate, In re, App.	298	619
Maxwell Cafe, Inc. v. Department of Alcoholic Beverage Control, App.	298	64
Maynard; Jones v., App.	297	461
Mead; Richard v., App.	297	689
Mears; People v., App.	298	40
Meeks v. Bridges, App.	297	671
Mendes; Epperson v., App.	297	141
Merkouris; People v., Sup.	297	999
Messenger v. Messenger, Sup.	297	988
Metts v. Central Standard Life Ins. Co. of Ill., App.	298	621
Miller v. Schlitz Brewing Co., App.	297	1024

	Vol.	Page
Millington; Cardoza v., App.	297	778
Minks; Oppenheimer v., App.	297	67
Minnicar's Estate, In re, App.	297	105
Mitchell v. Johnston, Super.	298	170
Mitchell Realty v. Johnston, Super.	298	170
Moniz v. Moniz, App.	298	710
Muller v. Muller, three cases, App.	297	789
Municipal Court of City and County of San Francisco; Barnard v., App.	298	679
Murphy v. Wilson, App.	297	22
Napoli v. Hunt, App.	297	653
National Distillers Products Corp. v. City and County of San Francisco, App.	297	61
N. M. Ball Sons; Lewis & Queen v., App.	297	120
Norton; People v., App.	297	439
Oakland, City of, v. Oakland Unified School Dist. of Alameda County, App.	297	752
Oakland Unified School Dist. of Alameda County; City of Oakland v., App.	297	752
Oppenheim v. Reiter, App.	298	868
Oppenheimer v. Gordon, App.	297	808
Oppenheimer v. Minks, App.	297	67
Oppenheimer v. Union Pac. R. Co., App.	297	700
Paddock v. Holland, App.	298	587
Pearson v. Baum, App.	297	707
Peet v. Schurter, App.	298	142
People v. Acosta, App.	298	29
People v. Allen, App.	298	714
People v. Antone, App.	297	88
People v. Armendariz, App.	297	79
People v. Bock Leung Chew, App.	298	118
People v. Boorman, App.	297	741
People v. Bruce, App.	297	437
People v. Cagle, App.	297	44
People v. Cahan, App.	297	715
People v. Carpenter, App.	297	498
People v. Chester, App.	298	695
People v. Cluchey, App.	298	633
People v. Costa, App.	297	667
People v. Cowles, Super.	298	732
People v. Denne, App.	297	451
People v. Edwards, App.	298	664
People v. Fite, App.	297	448
People v. Gilliam, App.	297	468
People v. Gonzales, App.	297	50
People v. Grasso, App.	298	131
People v. Gregor, App.	297	734
People v. Henry, App.	298	80
People v. Hood, App.	297	52
People v. Ikner, App.	298	45
People v. Ince, App.	297	27
People v. Jaurequi, App.	298	896
People v. Jennings, App.	298	56
People v. Lawrence, App.	297	144
People; Lelande v., App.	297	72
People v. Little, App.	298	548
People v. Mears, App.	298	40
People v. Merkouris, Sup.	297	999
People v. Norton, App.	297	439

	Vol.	Page
People v. Reinschreiber, App.	297	658
People v. Schraier, App.	297	81
People v. Sheppard, App.	297	814
People v. Smith, App.	298	540
People v. Stanfield, App.	297	517
People v. Suarez, App.	298	895
People v. Suggs, App.	297	1039
People v. S. & E. Homebuilders, Inc., App.	298	53
People v. Tillman, App.	298	631
People v. Tucker, App.	298	558
People v. Vienne, App.	297	1027
People v. Washington, App.	298	879
People v. Weight, App.	297	38
People v. Wilkins, App.	297	42
People v. Williams, App.	297	759
People By and Through Dept. of Public Works v. Dunn, Sup.	297	964
Philpot v. Henry, App.	297	1029
Pleasant Val. Lima Bean Growers and Warehouse Ass'n v. Cal-Farm Ins. Co., App.	298	109
Provost v. Worrall, App.	298	726
Rainville; Hudson v., Sup.	297	434
Reinschreiber; People v., App.	297	658
Reiter; Oppenheim v., App.	298	868
Resnick; Automotriz Del Golfo De California S. A. De C. V. v., App.	297	109
Resnick; Automotriz Del Golfo De California S. A. De C. V. v., App.	298	33
Reynolds v. Fraysher, App.	297	466
Richard v. Baker, App.	297	674
Richard v. La Canada Acres, App.	297	674
Richard v. Mead, App.	297	680
Rippee v. Ed Lakin Finance Co., App.	298	643
Rippee v. Lakin, App.	298	643
Ritter v. Salsbery, Super.	298	166
Roberts v. Western Pac. R. Co., App.	298	120
Robinson, Application of, App.	298	656
Rocha v. Rocha, App.	297	505
Rodeo Land & Water Co.; Elliott v., App.	297	129
Rotblatt; Sidney v., App.	298	880
Salsbery; Ritter v., Super.	298	166
Sam McKee & Co.; Simone v., App.	298	667
San Bernardino County v. Johnson, App.	297	21
San Diego and Arizona Eastern Ry. Co.; Lamoreux v., App.	298	658
San Francisco, City and County of, v. Industrial Acc. Commission, App.	298	651
San Gabriel Val. Ready-Mixt v. Casillas, App.	298	76
San Mateo County; Lemoge Elec. v., Sup.	297	638
Schlitz Brewing Co.; Miller v., App.	297	1024
Schneider; Zoeller v., App.	297	40
Schraier; People v., App.	297	81
Schuler v. Winstanley, App.	297	512
Schumacker; Langley v., Sup.	297	977
Schurter; Peet v., App.	298	142
Schwartz; Silver v., App.	297	1018
Sears; Flinspach v., App.	297	146
Security Title Ins. Co.; Diel v., App.	298	873
Sepulveda Park Apartments; Edler v., App.	297	508
Sheppard; People v., App.	297	814
Sherman's Estate, In re, Sup.	297	425

	Vol.	Page
Shields Co. v. Collins Elec. Co., App.	298	673
Sidney v. Rotblatt, App.	298	880
Signal Van & Storage; Culp v., Super.	298	162
Silva; Southern Public Utility Dist. v., App.	297	705
Silver v. Gasumat and Gasumat No. 2, App.	297	1018
Silver v. Schwartz, App.	297	1018
Simas v. City of Oakland, App.	298	149
Simone v. McKee, App.	298	667
Simone v. Sam McKee & Co., App.	298	667
Slagle; Valley Elec. Co. of Sacramento v., App.	297	702
Slovick v. James I. Barnes Const. Co., App.	298	923
Smith; People v., App.	298	540
Smith v. Smith, Sup.	297	633
Smith v. Wise, App.	298	616
Snyder v. Bay Meadows Hotel, App.	297	485
Snyder v. Hollingbery, App.	297	485
Southern Cal. Permanente Medical Group; Winkler v., App.	297	728
Southern Pac. Co.; Van Horn v., App.	297	479
Southern Public Utility Dist. v. Silva, App.	297	705
Spencer v. Beatty Safway Scaffold Co., App.	297	746
Spray v. Winstanley, App.	297	512
Spremo; Cullen v., App.	298	579
Stanfield; People v., App.	297	517
State; Walker v., App.	297	1036
State Bar; Tonini v., Sup.	297	1
Stauffer's Estate, In re, App.	297	1029
Stoloff; Frampton v., App.	298	10
Suarez; People v., App.	298	895
Suggs; People v., App.	297	1039
Sullivan v. Balestrieri, App.	298	688
Sunset Securities Co. v. Coward McCann, Inc., App.	297	137
Superior Court In and For City and County of San Francisco; Malleck v., App.	298	115
Superior Court In and For Los Angeles County; Carter v., App.	298	598
Superior Court In and For Los Angeles County; Gideon v., App.	297	84
Superior Court In and For Los Angeles County; Kaynar Mfg. Co. v., App.	297	592
Superior Court In and For Placer County; Wallace v., App.	298	69
Superior Court In and For Shasta County; Bailey v., App.	297	795
Superior Court of Cal., In and For City and County of San Francisco; Dow v., App.	297	30
Superior Court of Cal. In and For Los Angeles County; Chesin v., App.	298	593
Superior Court of Cal. In and For Los Angeles County; Eisenberg v., App.	297	803
Superior Court of Cal. In and For Sacramento County; Keeler v., Sup.	297	967
Sutton v. Industrial Acc. Commission of Cal., Sup.	298	857
S. & E. Homebuilders, Inc.; People v., App.	298	53
Taliaferro v. Insurance Commission, App.	298	914
Tally v. McCarthy, Sup.	297	981
Tavares; Frank v., App.	298	887
Tavares; Hornung v., App.	298	887
Taylor v. Hawkinson, App.	298	919
Thomas v. Buttress & McClellan, Inc., App.	297	768
Thompson v. Thompson, App.	298	866
Tillman; People v., App.	298	631
Tischhauser v. Tischhauser, App.	298	551
Tonini v. State Bar, Sup.	297	1

	Vol.	Page
Tucker v. Lombardo, App.	298	562
Tucker; People v., App.	298	558
Turner; De Armond v., App.	297	57
Turner Steel Erection Co.; W. B. Camp & Sons, Inc. v., App.	297	125
Uhl v. American Trust Co., App.	297	493
Uhl v. Johnson, App.	297	493
Unger v. Campau, App.	298	891
Union Pac. R. Co.; Oppenheimer v., App.	297	700
Valley Elec. Co. of Sacramento v. Slagle, App.	297	702
Van Dolzer; Baker v., App.	298	86
Van Horn v. Southern Pac. Co., App.	297	479
Van Meter v. Bent Const. Co., Sup.	297	644
Verdusco; Conrad v., App.	298	638
Vienne; People v., App.	297	1027
Waale-Camplan Co. v. Crookshanks, App.	297	765
Waale-Camplan Co.; Knoblock v., App.	297	765
Walker v. State, App.	297	1036
Wallace v. Superior Court In and For Placer County, App.	298	69
Washington; People v., App.	298	879
W. B. Camp & Sons, Inc. v. Turner Steel Erection Co., App.	297	125
Weight; People v., App.	297	38
Wells v. Comstock, Sup.	297	961
Wells Fargo Bank & Union Trust Co.; Emge v., App.	298	619
Wendland v. City of Alameda, Sup.	298	863
Wesson v. Wesson, App.	297	450
Western Pac. R. Co.; Roberts v., App.	298	120
Wicktor v. Los Angeles County, App.	297	115
Wilcken; Atkinson v., App.	298	117
Wilkins; People v., App.	297	42
Williams; People v., App.	297	759
Wilson v. Loew's Inc., two cases, App.	298	152
Wilson; Murphy v., App.	297	22
Winkler v. Southern Cal. Permanente Medical Group, App.	297	728
Winstanley; Schuler v., App.	297	512
Winstanley v. Spray, App.	297	512
Wise; Smith v., App.	298	616
Wiseman v. Industrial Acc. Commission of Cal., Sup.	297	649
Worrall; Provost v., App.	298	726
W. R. Chamberlin & Co.; Anderson v., App.	298	901
Zoeller v. Schneider, App.	297	40

†

CALIFORNIA REPORTER

297 PACIFIC REPORTER
SECOND SERIES

CALIFORNIA REPORTER

297 PACIFIC REPORTER
SECOND SERIES

WEST KEY NUMBER SYSTEM

46 Cal.2d 491

Edward Milton TONINI and Robert P. MacDonald, Petitioners,

v.

The STATE BAR of California, Respondent.

S. F. 19421.

Supreme Court of California.
In Bank.

May 15, 1956.

Rehearing Denied June 6, 1956.

Proceeding brought for review of a recommendation of the Board of Governors of the State Bar that petitioners be suspended from practice of law for period of three years. The Supreme Court held that evidence sustained Board's findings as to violation of the Professional Conduct Rule against solicitation of professional employment, and that the punishment recommended was not excessive.

Order accordingly.

Carter, J., dissented.

1. Attorney and Client ⇐57

In disciplinary proceeding against attorney, findings of fact by Board of Bar Governors are not binding on Supreme Court, which will weigh and pass on sufficiency of evidence to sustain such findings.

2. Attorney and Client ⇐57

Burden is upon petitioner, seeking a review of Board of Bar Governors' recommendation of disciplinary action, to show that findings of Board are not supported by evidence or that recommendation of Board of Bar Governors is erroneous or unlawful.

3. Attorney and Client ⇐53(2)

Evidence supported findings of Board of Bar Governors as to "ambulance chasing" in violation of Rules of Professional Conduct. Rules of Professional Conduct, rule 2, West's Ann.Bus. & Prof.Code following section 6076.

4. Attorney and Client ⇐32

Professional conduct rule prohibiting solicitation of professional employment was designed to prohibit unprofessional conduct in obtaining contracts of employment. Rules of Professional Conduct, rule 2, West's Ann.Bus. & Prof.Code following section 6076.

5. Attorney and Client ⇐58

On record presented in a disciplinary proceeding, suspension from practice of law for period of three years was not excessive punishment for violation of professional conduct rule against solicitation of professional employment. Rules of Professional Conduct, rule 2, West's Ann.Bus. & Prof.Code following section 6076.

George G. Olshausen, San Francisco, for petitioners.

Garrett H. Elmore, San Francisco, for respondent.

PER CURIAM.

This is a proceeding to review a recommendation of the Board of Governors of The State Bar that petitioners be suspended from the practice of law for a period of three years.

Two show cause orders directed to petitioners were consolidated for hearing. They charged petitioners with having solic-

ited legal business from some ten persons, most of whom had suffered injuries in accidents, in violation of rule 2, section a, Rules of Professional Conduct (33 Cal.2d 27).[1]

The Board of Governors found the charges sustained and recommended that petitioners be suspended for one year on each count of the orders to show cause. In addition, the board recommended that petitioner Tonini's suspension on counts involving Walter F. Horn, Anthony J. Vargas, and the father of Ronald Reed, a minor, be made to run consecutively, the suspension on all other counts to run concurrently therewith. The same recommendation was made concerning petitioner MacDonald, except that the three counts recommended to run consecutively related to Eric Haak, Bessie Manson and Sylvan Lehman.

Petitioners' Contentions

[1–3] *First: That the findings of the Board of Governors are not supported by the evidence.*

This claim is untenable. The rule is settled that in a disciplinary proceeding against an attorney, findings of fact by local administrative committees and the Board of Bar Governors are not binding on the Supreme Court, which will weigh and pass on the sufficiency of the evidence to sustain the findings of the Board of Bar Governors.

It is also settled that the burden is upon the petitioner seeking a review of the Board of Bar Governors' recommendation to show that the findings are not supported by the evidence or that the recommendation of the Board of Bar Governors is erroneous or unlawful. Clark v. State Bar, 39 Cal.2d 161, at page 165 [1], [2], 246 P.2d 1.

Applying the foregoing rules to the record in the instant proceeding, it discloses that petitioner Tonini was admitted to practice law in 1946, and that petitioner MacDonald was admitted to practice law in 1951. Neither petitioner has been the subject of any previous disciplinary proceeding.

On the evening of Saturday, April 10, 1954, Sylvan Lehman was walking with Clara Mohr at Post and Leavenworth Streets, San Francisco. They were struck by an automobile while crossing Post Street at about 8 p. m. Mr. Lehman sustained a fractured hip and was taken to the City and County Hospital, thence to Mt. Zion Hospital about midnight. The following morning Mr. Lehman was called upon by petitioner MacDonald at Mt. Zion regarding his injuries, and he signed a contract employing Mr. MacDonald the following day.

Miss Mohr, 66 years of age, was injured in the same accident, sustaining a broken leg. The same course as to hospitalization was followed in her case as in that of Mr. Lehman. On the following morning petitioner MacDonald called upon her at the hospital and talked to her about employment in the case. The following day she signed a contract with him whereby he was employed to represent her.

About 11 p. m. on May 26, 1954, Erik Haak was involved in a collision at the intersection of Turk and Franklin Streets, sustaining a fractured neck and lesser injuries. He was taken to Emergency Hospital and then to Stanford Lane Hospital. The first or second day after the accident petitioner MacDonald called upon him at the hospital and solicited employment.

Marie Sisk was struck by a Greyhound bus about 7 p. m. on June 9, 1954. She died on the evening of the third day thereafter, having been in a comatose condition in Franklin Hospital after the accident and during the short period of illness. A man identifying himself as "Attorney MacDonald or his representative" telephoned Thomas Sisk, father-in-law of Marie Sisk, for the purpose of locating his daughter and also a sister of Marie Sisk in order that he might talk to them regarding the "injuries" to Marie. On the morning of June 13, petitioner MacDonald appeared

1. Rule 2, section a, Rules of Professional Conduct reads: "A member of the State Bar shall not solicit professional employment by advertisement or otherwise."

at the family home in Southern California for the purpose of contacting and interviewing L. P. Sisk, the surviving husband of Marie Sisk.

On June 17, 1954, Mrs. Adele Harvey suffered minor injuries in an automobile collision. She was taken to Central Emergency Hospital for hospitalization by police officers investigating the accident. The next morning she was contacted by telephone by a man identifying himself as "Mr. MacDonald, a representative of Mr. Tonini." The caller stated he wanted to see her about the accident. An appointment was arranged for noon that day at petitioners' offices. She did not keep the appointment, and the person who had previously telephoned called again that afternoon wanting to know why she had not come down to the office, and he offered to come to her house.

On August 5, 1954, Walter Horn, a machinist, was seriously injured when struck by an automobile at 5th and Jessie Streets at 2:10 in the morning. He was taken in a semi-conscious condition to Central Emergency Hospital, where he was registered as "Walter Harm." About 7 a. m. of that day he was transferred to the City and County Hospital. Petitioner Tonini saw the injured man at the City and County Hospital twice on August 5 (the day of the accident), once briefly in the late afternoon and then a couple of hours later in the evening, at which time a contract of employment was signed by Mr. Horn. At the time Mr. Horn was admitted to the hospital he had an alcoholic breath and was extremely shaky, so much so that the nurses placed side boards or side rails on his bed to prevent him from falling out of it.

Early in the morning the following day, August 6, petitioner Tonini returned to the hospital and certain events took place regarding the verification of a complaint in an action, "Walter Harm, Plaintiff, vs. Allen E. Hertel et al." Petitioner Tonini signed the name "Walter Harm" as the person verifying a complaint he had prepared and later filed.

At this time Mr. Horn was able to sign his own name, as is indicated by the fact that on the same date he had signed a "Request for Admission and Agreement to Reimburse."

To the verification is affixed petitioner Tonini's signature as a notary public. Petitioner Tonini signed the verification with the intention of concealing Mr. Horn's mental condition at the time from defendants in the action which he was filing. This was done so that the inference would not be drawn that Mr. Horn was not then alert and lucid.

An examination of the complaint indicates on its face that petitioner endeavored to make it appear that Walter *Harm* who signed the complaint was a different person from the person taking the notarial acknowledgment to the complaint.

There was no attempt to comply with the requirements of section 446 of the Code of Civil Procedure,[2] to-wit, that when a pleading is verified by a person other than a party to the proceeding, the affidavit accompanying it shall state the reasons why the party did not verify the complaint.

On August 30, 1954, the seven year old son of William R. Reed was badly injured in an accident in San Francisco. About 7 p. m. Mr. Reed, his wife, and neighbors went to the City and County Hospital. The Reeds returned to San Jose in the early morning hours of August 31. In the afternoon of that day Mr. Reed called at the office of a San Jose attorney who had previously represented him. Shortly after midnight of the same day petitioner Tonini, identifying himself as attorney Badliaco of San Francisco, telephoned Mr. Reed. He solicited the case and asked Mr. Reed to come right up to San Francisco. Mr. Reed refused, and suggested 10 a. m. the next day, at which time he went to petitioners' office. There petitioner Tonini re-

2. Section 446 of the Code of Civil Procedure reads in part as follows: "When the pleading is verified by the attorney, or any other person except one of the parties, he shall set forth in the affidavit the reasons why it is not made by one of the parties."

vealed his true identity. Petitioner Tonini told Mr. Reed to make arrangements to go to an attorney in San Jose (Mr. Manina), described as "his partner."

On September 23, 1954, about 8 p. m., Mr. Clarence Urdahl, a janitor, was struck by an automobile. He was first taken to Park Emergency Hospital, then removed to the Southern Pacific Hospital. He sustained serious injuries. Peter Gray (whose family name was Garadis), an experienced claims investigator and adjuster and licensed as an insurance and real estate broker, was a long-time acquaintance of petitioner Tonini. About 7 a. m. the following morning petitioner Tonini telephoned Mr. Gray and asked him to call on Mr. Urdahl, whom petitioner described as "a client of his who was in the hospital whom he was supposed to go see on that morning and that he was unable to get there himself, but could later in that day." Petitioner Tonini supplied Mr. Gray with the name of the hospital and room number.

Mr. Gray went to see Mr. Urdahl, discussed the accident and fees on behalf of petitioner Tonini and obtained Mr. Urdahl's signature to a fee contract which he (Gray) had prepared in his own handwriting.

Mr. MacDonald stated that at approximately 9 a. m. the same morning, petitioner Tonini phoned from his office to his home saying, "I have got a new client in the SP Hospital. Pete Garadis has seen this man, and he, the man, has signed a 25 per cent contract. Go out." Petitioner MacDonald went to the hospital about 10 or 11 a. m., as an associate of petitioner Tonini, and had a conference with Mr. Urdahl.

At noon on the same day Mr. Gray saw petitioner MacDonald at his law office when he brought the paper signed by Mr. Urdahl. He told petitioner MacDonald that it was "the memorandum Mr. Urdahl signed"; that "Mr. Tonini had called him [Gray] and asked him to go see the man." The same afternoon petitioner MacDonald again called on Mr. Urdahl at the hospital.

On October 28, 1954, Anthony Vargas was injured while driving a mail truck which collided with another vehicle. He was taken to Central Emergency Hospital, where he remained about one half hour. He then reported back to the Post Office garage and went home. The evening of the next day Mr. Vargas found a card under his doorstep, that of petitioner Tonini, on the reverse of which was written, "Anthony Vargas, call me at home, GLenwood 3-7336, call collect, Tonini." The following day Mr. Vargas called the telephone number and talked with petitioner Tonini. The latter said he had placed the card under the doorstep; "that he would like to be engaged as my attorney" and to get in touch with him at his office. Mr. Vargas later met Mr. MacDonald in his law office and discussed the case.

The record further discloses that none of the persons involved in the accidents was known to, or had an acquaintance with, or was a former client of either petitioner, and that the visits and solicitations were without prior request or communication from the claimants or anyone authorized to act on their behalf.

Petitioner Tonini on several other occasions caused his clients to engage in fictitious transactions, and he failed on occasions to make a proper accounting to his clients.

On the night before a committee hearing of The State Bar, petitioners went to the home of Mrs. Manson, and petitioner Tonini told her she should hear what he had to say before she appeared to testify and that it would mean something to her if she did. Mrs. Manson testified: "He wanted to know did I have to come down here (State Bar) * * * he would like to talk to me before I came down." She told him, "they (the State Bar) want to get you for everything because they asked me about everything * * * they found out everything * * * and how you got me, too." Thereupon, Tonini allegedly made the statement that she should come down to his office, even if she had to get a substitute, "because it might mean something and hear what I have to say first, before you go up there (State Bar)."

The foregoing evidence clearly supports the findings that petitioners were pursuing

the practice familiarly known as "ambulance chasing", see Howe v. State Bar, 212 Cal. 222, 225, 298 P. 25, and thus were violating rule 2, section a, Rules of Professional Conduct, supra.

[4, 5] *Second: That the punishment recommended by the Board of Bar Governors was excessive.*

Such contention is devoid of merit. The rule which petitioners violated was designed to prohibit unprofessional conduct in obtaining contracts of employment.

In the present proceeding the record discloses a callous and brazen indifference to the obligations of an attorney, with the object of personal gain. Under these circumstances petitioners should be removed from the practice of law for a substantial period of time in order that they may realize the error of their ways and rehabilitate themselves before again resuming a place in the ranks of the legal profession.

In Waterman v. State Bar, 14 Cal.2d 224, 93 P.2d 95, an attorney with a prior record, admitting three charges of ambulance chasing and who gave false testimony to the committee, was disbarred.

In Mayer v. State Bar, 2 Cal.2d 71, 39 P.2d 206, an attorney who persisted in advertising for divorce business during a one-year suspension for such conduct, was disbarred.

It is ordered that petitioners be suspended from the practice of the law in this state for the period of three years commencing thirty days after the date of the filing of this order.

CARTER, Justice.

I dissent.

While I agree with the majority that the record discloses unprofessional conduct of a somewhat serious nature on the part of both petitioners, I am of the opinion that the discipline ordered is too severe. Taking into consideration the age and professional experience of both petitioners and the nature of the unprofessional conduct on their part as disclosed by the record, it is my opinion that a suspension from practice for the period of one year would be more in harmony with the discipline imposed for similar conduct in other cases which have come before this court.

It should be obvious that a three-year suspension from practice of law is almost equivalent to disbarment, and I do not believe that such severe punishment should be imposed on young, inexperienced lawyers for the character of conduct disclosed by the record here.

For the foregoing reasons I would suspend petitioners from the practice of law for the period of one year.

Rehearing denied; CARTER, J., dissenting.



46 Cal.2d 484

BING CROSBY MINUTE MAID CORPORATION (a Corporation), Plaintiff and Appellant,

v.

Wallazz B. EATON, Sr., Defendant and Appellant.

L. A. 23978.

Supreme Court of California.

In Bank.

May 15, 1956.

Action by corporation's judgment creditor against shareholder to recover difference between par value of stock issued to defendant and fair value of consideration paid therefor. The Superior Court of San Diego County, Elmer W. Heald, J., granted a new trial after judgment for plaintiff, and plaintiff appealed from the order and defendant appealed from the judgment for plaintiff. The Supreme Court, Shenk, J., held that liability of holder of watered stock to corporation's creditor is based on the misrepresentation theory in California, and hence new trial was properly granted because of absence of finding on issuance of reliance by plaintiff.

Order granting new trial affirmed, and appeal from judgment dismissed.

Opinion, 288 P.2d 98, vacated.

1. Corporations ⇐232(1)

A shareholder is ordinarily not personally liable for corporation's debts, and undertakes only the risk that his shares may become worthless; but there are exceptions to the rule, as where subscriber pays in only part of what he agreed to pay. West's Ann.Corp.Code, §§ 1300, 1306.

2. Corporations ⇐269(3)

In action by corporation's judgment creditor against shareholder to recover difference between par value of stock issued to him and fair value of consideration paid for stock, evidence did not support finding that shareholder had agreed to pay par value for shares registered in his name. West's Ann.Corp.Code, §§ 1300, 1306.

3. Corporations ⇐232(1)

Holders of watered stock are generally held liable to corporation's creditors for difference between par value of stock and amount paid in.

4. Escrows ⇐8(1)

Fact that shares registered in stockholder's name were placed in escrow pursuant to statutory authority did not affect rights of future creditors of corporation against shareholder, where the escrow afforded no special protection to future creditors. West's Ann.Corp.Code, § 25508.

5. Evidence ⇐265(18)

In action by corporation's judgment creditor against shareholder to recover difference between par value of stock issued to him and fair value of consideration paid for stock, admissions of plaintiff's district manager that when plaintiff extended credit to corporation, it was believed that original capital of the corporation amounted to only $25,000, would support finding that plaintiff did not rely on any misrepresentation arising out of issuance of watered stock.

6. Corporations ⇐232(1)

In California, the liability of a holder of watered stock to corporation's creditors may only be based on the misrepresentation theory, and hence creditor must have relied on misrepresentation arising out of issuance of watered stock.

7. Corporations ⇐269(1)

Reliance by corporation's judgment creditor on misrepresentation arising out of issuance of watered stock is not to be conclusively presumed as basis for recovery from holder of watered stock.

8. New Trial ⇐61

In action by corporation's judgment creditor against shareholder to recover difference betwen par value of stock registered in defendant's name and value of consideration paid therefor, trial court properly ordered new trial because of absence of finding on issue of plaintiff's reliance on issuance of watered stock.

Luce, Forward, Kunzel & Scripps and Edgar A. Luce, Jr., San Diego, for plaintiff and appellant.

Edmund G. Brown, Atty. Gen., and Ralph W. Scott, Deputy Atty. Gen., amici curiae for plaintiff and appellant.

Sloane & Fisher, San Diego, for defendant and appellant.

SHENK, Justice.

The plaintiff appeals from an order granting a new trial after judgment in its favor. The defendant appeals from the judgment.

As a judgment creditor of a corporation the plaintiff brought this action against a shareholder of the corporation to recover the difference between the par value of stock issued to him and the fair value of the consideration he paid for the stock. At the conclusion of the trial, the court, sitting without a jury, made findings of fact and conclusions of law and entered judgment for the plaintiff. In support of his motion for a new trial the defendant assigned certain alleged defects in the findings as errors of law.

The defendant formed a corporation to acquire his going frozen foods business. The Commissioner of Corporations issued a permit authorizing the corporation to sell and issue not more than 4,500 shares of $10 par value stock to the defendant and other named individuals in consideration of the transfer of the business. The permit provided that 1,022 shares be deposited in escrow and not be transferred without the written consent of the Commissioner, and that the escrowed shares not be sold or

issued until the prospective shareholders named in the permit waived certain rights to dividends and to participation in any distribution of assets.

The defendant transferred his business to the corporation. The corporation placed 1,022 shares in escrow in his name pursuant to the provisions of the permit. The remaining 3,478 shares were issued outright to the defendant and after three years were transferred to the other persons named in the permit. Although the 1,022 shares were listed on the corporate records as held by the defendant (accompanied by the notation "escrowed"), they were never released from escrow. The corporation had financial difficulties and executed an assignment of its assets for the benefit of creditors to a credit association. The plaintiff recovered a judgment against the corporation for $21,246.42. A writ of execution on the judgment was returned unsatisfied.

The trial court found that the value to the corporation of the consideration from the defendant was $34,780.83; that 4,500 shares of stock having a par value of $10 each were issued to the defendant and he became the owner of those shares; that subsequent to the issue of the shares the corporation purchased merchandise from the plaintiff and has not yet paid for all of it; that some $15,000 of the judgment the plaintiff recovered from the corporation remains unsatisfied, and that the corporation is insolvent.

The judgment for the plaintiff was for $10,219.17—approximately the par value of the 1,022 shares of stock placed in escrow. The judgment was based on the trial court's conclusion that the defendant was liable for the difference between the par value of the 4,500 shares and the value of the consideration the defendant paid for them.

The plaintiff contends that the trial court's findings of fact were supported by the evidence and required a judgment in its favor, and therefore that it was error to grant a new trial. The defendant contends that the order granting a new trial was proper because (1) the finding that he was the owner of 4,500 shares was unsupported by the evidence, and (2) the trial court failed to make a finding on a material issue raised by his answer.

[1, 2] In this state a shareholder is ordinarily not personally liable for the debts of the corporation; he undertakes only the risk that his shares may become worthless. See repeal of Cal.Const. art. XII, § 3, at general election, Nov. 4, 1930; repeal of former Civ.Code section 322, Stats.1931, ch. 257, p. 444; Kaysser v. McNaughton, 6 Cal.2d 248, 251–255, 57 P.2d 927. There are, however, certain exceptions to this rule of limited liability. For example, a subscriber to shares who pays in only part of what he agreed to pay is liable to creditors for the balance. Corp.Code, §§ 1300, 1306. Although the trial court in the present case found that the defendant had agreed to pay par value for the 4,500 shares registered in his name, the record on appeal discloses no evidence supporting this finding. Therefore, the defendant's liability cannot be predicated upon the theory that a subscribing shareholder is liable for the full consideration agreed to be paid for the shares.

[3] The plaintiff seeks to base its recovery on the only other exception to the limited liability rule that the record could support, namely, liability for holding watered stock, which is stock issued in return for properties or services worth less than its par value. Accordingly, this case calls for an analysis of the rights of a creditor of an insolvent corporation against a holder of watered stock. Holders of watered stock are generally held liable to the corporation's creditors for the difference between the par value of the stock and the amount paid in.

[4] The defendant's first contention is that because of the escrow he never became an owner of the 1,022 shares and that he therefore never acquired such title to the 1,022 shares as would enable a creditor to proceed against him for their par value. Section 25508 of the Corporations Code authorizes the Commissioner of Corporations to require that shares be placed in escrow. This authority has frequently been exercised for the protection of the public. The escrow in the present case permitted

the defendant to retain some, but not all, of the incidents of ownership in the 1,022 shares. Although he could not transfer the shares, it appears that despite the escrow he was entitled to count them in determining the extent of his rights to vote and to participate in dividends and asset distributions. The critical feature of the escrow for purposes of the present case is the absence of any restriction on representations that the escrowed shares were outstanding and fully paid. Although the escrow contained provisions designed to protect future stockholders, it afforded no special protection to future creditors of the corporation. Therefore, the escrow did not affect the rights of future creditors and it would appear that despite the escrow the defendant acquired sufficient title to the 1,022 shares to permit the plaintiff to proceed against him for their par value.

The defendant's second contention is that the trial court failed to make a finding on a material issue raised by his answer.

The liability of a holder of watered stock has been based on one of two theories: the misrepresentation theory or the statutory obligation theory. The misrepresentation theory is the one accepted in most jurisdictions. The courts view the issue of watered stock as a misrepresentation of the corporation's capital. Creditors who rely on this misrepresentation are entitled to recover the "water" from the holders of the watered shares. See cases collected in Ballantine, Corporations, rev. ed. 1946, sec. 350; Dodd and Baker, Cases and Materials on Corporations, 2d ed. 1951, pp. 786–789; 11 Fletcher, Cyclopedia of the Law of Private Corporations, rev. and perm. ed. 1932, sec. 5232, p. 568, n. 64, sec. 5233, pp. 577–579; Bonbright, "Shareholders' Defenses Against Liability to Creditors on Watered Stock," 1925, 25 Col.L.Rev. 408, 412, 420–421.

Statutes expressly prohibiting watered stock are commonplace today. See statutes collected in 11 Fletcher, Cyclopedia of the Law of Private Corporations, rev. and perm. ed. 1932, sec. 5209. In some jurisdictions where they have been enacted, the statutory obligation theory has been applied. See cases collected in 7 A.L.R. 983–986; Dodd and Baker, Cases and Materials on Corporations, 2d ed. 1951, p. 795, n. 7. Under that theory the holder of watered stock is held responsible to creditors whether or not they have relied on an overvaluation of corporate capital.

[5] In his answer the defendant alleged that in extending credit to the corporation the plaintiff did not rely on the par value of the shares issued, but only on independent investigation and reports as to the corporation's current cash position, its physical assets and its business experience. At the trial the plaintiff's district manager admitted that during the period when the plaintiff extended credit to the corporation, (1) the district manager believed that the original capital of the corporation amounted to only $25,000, and (2) the only financial statement of the corporation that the plaintiff ever saw showed a capital stock account of less than $33,000. These admissions would be sufficient to support a finding that the plaintiff did not rely on any misrepresentation arising out of the issuance of watered stock. The court made no finding on the issue of reliance. If the misrepresentation theory prevails in California, that issue was material and the defendant was entitled to a finding thereon. Code Civ.Proc. § 632; see Edgar v. Hitch, 46 Cal.2d 309, 294 P.2d 3. If the statutory obligation theory prevails, the fact that the plaintiff did not rely on any misrepresentation arising out of the issuance of watered stock is irrelevant and accordingly a finding on the issue of reliance would be surplusage.

[6] It is therefore necessary to determine which theory prevails in this state. The plaintiff concedes that before the enactment of section 1110 of the Corporations Code (originally Civ.Code, § 299) in 1931, the misrepresentation theory was the only one available to creditors seeking to recover from holders of watered stock. See Clark v. Tompkins, 205 Cal. 373, 270 P. 946; Spencer v. Anderson, 193 Cal. 1, 6, 222 P. 355, 35 A.L.R. 822; Rhode v. Dock-Hop Co., 184 Cal. 367, 194 P. 11, 12 A.L.R. 437. However, he contends that the enactment

of that section reflected a legislative intent to impose on the holders of watered stock a statutory obligation to creditors to make good the "water." Section 1110 provides that "The value of the consideration to be received by a corporation for the issue of shares having par value shall be at least equal to the par value thereof, except that: (a) A corporation may issue par value shares, as fully paid up, at less than par, if the board of directors determines that such shares cannot be sold at par. * * *" The statute does not expressly impose an obligation to creditors. Most jurisdictions having similar statutes have applied the misrepresentation theory obviously on the ground that creditors are sufficiently protected against stock watering schemes under that theory. See cases collected in Ballantine, Corporations, rev. ed. 1946, sec. 351, pp. 809–812; Dodd and Baker, Cases and Materials on Corporations, 2d ed. 1951, pp. 785–786; 11 Fletcher, Cyclopedia of the Law of Private Corporations, rev. and perm. ed. 1932, sec. 5209; Bonbright, "Shareholders' Defenses Against Liability to Creditors on Watered Stock," 1925, 25 Col.L.Rev. 408, 414–416, 422. In view of the cases in this state prior to 1931 adopting the misrepresentation theory, it is reasonable to assume that the Legislature would have used clear language expressing an intent to broaden the basis of liability of holders of watered stock had it entertained such an intention. In this state the liability of a holder of watered stock may only be based on the misrepresentation theory.

[7, 8] The plaintiff contends that even under the misrepresentation theory a creditor's reliance on the misrepresentation arising out of the issuance of watered stock should be conclusively presumed. This contention is without substantial merit. If it should prevail, the misrepresentation theory and the statutory obligation theory would be essentially identical. This court has held that under the misrepresentation theory a person who extended credit to a corporation (1) before the watered stock was issued, Clark v. Tomkins, supra, 205 Cal. 373, 270 P. 946, or (2) with full knowledge that watered stock was outstanding, Sherman v. S. K. D. Oil Co., 185 Cal. 534, 197 P. 799; Sherman v. Harley, 178 Cal. 584, 174 P. 901, 7 A.L.R. 950. See also Spencer v. Anderson, supra, 193 Cal. 1, 6, 222 P. 355; Rhode v. Dock-Hop Co., supra, 184 Cal. 367, 378, 194 P. 11; R. H. Herron Co. v. Shaw, 165 Cal. 668, 671–672, 133 P. 488, cannot recover from the holders of the watered stock. These decisions indicate that under the misrepresentation theory reliance by the creditor is a prerequisite to the liability of a holder of watered stock. The trial court was therefore justified in ordering a new trial because of the absence of a finding on that issue. It is unnecessary to further consider the defendant's appeal from the judgment.

The order granting the new trial is affirmed. The appeal from the judgment is dismissed.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.



46 Cal.2d 498

Cesar LAMBRETON, Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION of the State of California, Bowers Manufacturing Company, Inc., a corporation, and Pacific Indemnity Company, a corporation, Respondents.

L. A. 23976.

Supreme Court of California.
In Bank.
May 18, 1956.

Rehearing Denied June 12, 1956.

Workmen's compensation proceeding in which claimant sought annulment of Industrial Accident Commission's order dismissing claim for increased compensation on ground of employer's alleged serious and wilful misconduct. The Supreme Court, Schauer, J., held that, where original claim

did not state that serious and wilful misconduct of employer was claimed but expressly stated that employer was grossly negligent in maintenance of press which caused claimant's injury, original claim could not serve as basis for subsequent amendment setting forth the charge of serious and wilful misconduct, but such amendment would impose an entirely new and different legal liability upon employer, and, therefore, claim of serious and wilful misconduct of employer was barred in view of fact that more than 12 months had elapsed from date of injury at time of filing of such amendment.

Order affirmed.

Carter, J., dissented.

Opinion, 288 P.2d 164, vacated.

1. Workmen's Compensation ⇐1281

Where, in workmen's compensation proceeding, original claim did not state that serious and wilful misconduct of employer was claimed but expressly stated that employer was grossly negligent in maintenance of press which caused claimant's injury, original claim could not serve as basis for subsequent amendment setting forth the charge of serious and wilful misconduct, and, therefore, claim of serious and wilful misconduct of employer was barred in view of fact that more than 12 months had elapsed from date of injury at time of filing of such amendment. West's Ann.Labor Code, §§ 3756–3759, 4553, 5407; West's Ann.Insurance Code, §§ 11661, 11662.

2. Workmen's Compensation ⇐939

Normal benefits automatically follow from an injury within covered employment relationship, but the additional award based on serious and wilful misconduct of employer is an additional award which, although denominated in regard for administrative purposes as increased compensation, is actually of nature of a penalty imposed only in proceedings commenced within 12 months from date of injury and only upon proof of aggravated criminal or quasi-criminal behavior which constitutes serious and wilful misconduct and against which employer cannot purchase insurance. West's Ann.Insurance Code, §§ 11661, 11662; West's Ann.Labor Code, §§ 3756–3759, 4553, 5407.

3. Workmen's Compensation ⇐939

Normal workmen's compensation benefits and benefits based on serious and wilful misconduct of employer are cumulative, rather than merely alternative, and are at least as different in essential facts and theories as are negligence and serious and wilful misconduct. West's Ann.Insurance Code, §§ 11661, 11662; West's Ann.Labor Code, §§ 3756–3759, 4553.

4. Pleading ⇐243

For purpose of determining whether an amendment to a pleading is possible, the cause of action referred to as furnishing test means only the legal obligation which is sought to be enforced against defendant.

Alexander Ruiz, Los Angeles, for petitioner.

Everett A. Corten, Edward A. Sarkisian, San Francisco, Daniels, Elson & Mathews, Los Angeles, Silverberg & Fahrney and Milton H. Silverberg, Long Beach, for respondents.

SCHAUER, Justice.

[1] Petitioner seeks annulment of an order of respondent Industrial Accident Commission dismissing his claim for the increased compensation provided by section 4553 of the Labor Code in case of serious and wilful misconduct of the employer. The dismissal was based upon the ground that the claim was barred by the limitations provisions of section 5407 of the same code. We have concluded that the claim was properly dismissed, and that the order should be affirmed.

Section 5407 provides that "The period within which may be commenced proceedings for the collection of compensation on the ground of serious and wilful misconduct of the employer, under provisions of section 4553, is as follows:

"(a) Twelve months from the date of injury. This period shall not be extended by * * * the filing of application for compensation benefits under other provisions of this division."

Petitioner was injured on June 10, 1953. On July 13, 1953, he filed through his attorney an application for compensation benefits on a printed form furnished by the commission and entitled "Application for Adjustment of Claim." After the printed words alleging that petitioner "sustained injury arising out of and in the course of the employment, as follows:" the following was filled in: "Punch press broke so that it punched twice in rapid succession," resulting in injury to petitioner's right hand. The line starting with the printed words "The reason for filing this claim is:" was filled in: "Partial disability of claimant. Claimant alleges that employer was grossly negligent in maintenance of the press."

The commission gave the parties notice of hearing for September 21, 1953, which stated no issue of serious and wilful misconduct of the employer, but by stipulation of the parties the matter was taken off calendar to be reset at the request of either party. On October 22, 1954, petitioner filed a substitution of attorneys. On December 17, 1954, the new attorney filed on petitioner's behalf a document entitled "Amendment (By Interlineation)" in which it was stated that in place of the allegation that "Claimant alleges that employer was grossly negligent in maintenance of the press, * * * claimant alleges as follows:" That on the date of injury, June 10, 1953, the employer "Bowers Mfg. Company operated and maintained a certain punch press in its place of manufacturing in violation of section 3601(b) Title 8, of the California Administration Code, in that all points of operation guards were not properly set up, adjusted or maintained in safe and efficient working order," and that petitioner was injured as "a proximate result of said serious and wilful misconduct." It was prayed that in addition to the normal award the employer "be assessed extraordinary damages for serious and wilful misconduct."

The matter came on for hearing in January, 1955, and the parties appeared, but upon stipulation it was continued to a later date upon all issues. By letter the employer raised the issue of the statute of limitations as to the misconduct issue, pointing out that more than twelve months from the date of injury had elapsed before the employe commenced proceedings to collect compensation for the special liability which is provided for in cases where an employer has been guilty of serious and wilful misconduct. The commission agreed with the employer and on March 4, 1955, the proceeding for benefits based on the asserted misconduct was ordered dismissed.

As ground for annulment of the commission's order petitioner contends that his first application for benefits, filed July 13, 1953, sufficiently presented the misconduct issue to constitute the commencement of proceedings for the collection of additional compensation by reason thereof, while the employer and the commission urge that the issue was first raised with the filing of the so-called amendment on December 17, 1954, and that because such filing occurred more than twelve months from the date of injury the misconduct issue was barred by the limitations statute and the application for benefits based thereon was properly dismissed. (See Lab.Code, § 5407.)

In Peterson v. Industrial Accident Comm. (1947), 81 Cal.App.2d 352, 183 P.2d 927, the employe, who was injured in January, 1941, and had received compensation until September 22, 1941, filed his first claim in October, 1941, stating that he "sustained injury * * * as follows: the excavation in which applicant was working caved in due to the fact that the walls of the excavation were not properly shored up," and that the reason for filing the claim was that a question had arisen as to whether "the applicant has recovered and is now able to resume work and does not suffer from any permanent disability." At a hearing in December, 1941, the referee stated the sole issue was "nature, extent and duration of disability," and counsel for all parties agreed. When the employe's counsel sought to elicit evidence concerning the shoring up the referee said, "That is not in issue. If you want to raise the issue, you will have to do it." Counsel replied, "Yes, I think we probably should raise that"; the referee then said, "Additional Issue: Was injury proximately caused by serious

and willful misconduct of the employer?"; and counsel for the employe stated that he would file a supplemental application setting forth the basis on which misconduct was claimed, with particular reference to certain safety orders. No supplemental application was filed, and after several continuances the matter was ordered off calendar in 1942. In 1946 it was again noticed for hearing, a "new" application was seemingly filed, an order was made that "the application will be considered as an amended application," an additional issue of "statute of limitations" was stated, and a hearing was had on all issues, including serious and wilful misconduct. Normal benefits were thereupon awarded, as well as an increased benefit based on the asserted misconduct. On the employer's petition for review the award of an increased benefit was annulled on the ground that, although "there is, and should be, great liberality in the matter of amendments this amendment in 1946, bringing in a new and different issue which must be separately 'commenced,' could not relate back and be effective as of a date in 1941, in the face of the clear provisions of section 5407 of the Labor Code. While considerable informality in proceedings before the commission is permitted, and properly so, the meaning and effect of these statutory provisions cannot be entirely set aside, and some attempt must be made to comply with them and to raise issues in the manner and within the time there provided." (At pages 359–360 of 81 Cal.App.2d, at page 931 of 183 P.2d).

In the Peterson case it would have been more nearly justifiable than in the present one to permit the so-called amendment stating misconduct, to relate back to the original date of filing the claim, inasmuch as there the employer was on specific notice within twelve months from the date of injury that the employe intended to claim serious and wilful misconduct. In the present case, however, the original claim not only did not state that serious and wilful misconduct was claimed but it expressly stated that the "employer was grossly negligent in maintenance of the press." As this court has repeatedly emphasized (see Mercer-Fraser Co. v. Industrial Accident Comm. (1953), 40 Cal.2d 102, 117, 120, 251 P.2d 955; Hawaiian Pineapple Co. v. Industrial Accident Comm. (1953), 40 Cal.2d 656, 662–663, 255 P.2d 431; Lynch v. Birdwell (1955), 44 Cal.2d 839, 847–848, 285 P.2d 919), serious and wilful misconduct means something different from and much more than negligence, however, gross; such misconduct is basically the antithesis of negligence; and the two types of behavior are mutually exclusive. It follows that the original claim could not serve as the basis for a later "amendment" setting forth a charge of serious and wilful misconduct which would impose an entirely new and different legal liability on the employer. At no time within twelve months from the date of injury was it even suggested in this case that such a charge would be made.

Petitioner nevertheless, in reliance upon Wennerholm v. Stanford University School of Medicine (1942), 20 Cal.2d 713, 128 P.2d 522, 141 A.L.R. 1358 (see also LeCyr v. Dow (1939), 30 Cal.App.2d 457, 462–463, 86 P.2d 900), urges that "Liberality is indulged in by the courts in permitting amendments, and no reason appears why a proceeding before the Industrial Accident Commission should be more technical." In the Wennerholm case the following appears: "The ground of general demurrer principally urged by the defendants is that the cause of action is barred by the statute of limitations. This contention is based on the theory that the fifth amended complaint charging fraud states a new and different cause of action from that for negligence stated in the original complaint. *Unless* the amended complaint sets forth an *entirely different cause of action* from the original, however, the amended complaint, for the purposes of the statute of limitations, must be deemed filed as of the date of the original complaint. [Citations.] The modern rule, where amendment is sought after the statute of limitations has run, is that the amended complaint will be deemed filed as of the date of the original complaint so long as recovery is sought in each complaint upon the *same general set of facts*. [Citations.] A *mere change in legal theory* will not subject the amended complaint to the bar of the

statute of limitations. [Citations.] In the present case the only substantial difference between the factual siutations set forth in the original and the fifth amended complaint is that the former charged that the representations were negligently made while the latter charges that they were made with knowledge of their falsity. Despite the change in legal theory from an action for negligence to one for fraud, it cannot be said that an entirely different cause of action is stated. Therefore the latter complaint is not barred by the statute of limitations." (At pages 717–718 of 20 Cal.2d, at page 524 of 128 P.2d; italics added.) And in the Wennerholm case the relief sought by the amended complaint remained the same; i. e., damages for the injuries allegedly ensuing from the misrepresentations.

[2–4] However, in proceedings before the Industrial Accident Commission, a claim for normal benefits and a claim for increased benefits by reason of serious and wilful misconduct are *not* sought upon the same general set of facts, nor do they involve merely a difference or change in legal theory. The relief sought is not the same; the legal liability is not the same; and the "proceedings" to recover the benefits as respectively provided are recognized as being different. Lab.Code, § 5407.) Normal benefits automatically follow from an injury within a covered employment relationship, whereas the additional award based on serious and wilful misconduct of the employer is an *additional* award which, although denominated and regarded for administrative purposes as "increased compensation," [1] is actually of the nature of a penalty, which is imposed only in "proceedings" commenced within "Twelve months from the date of injury" (Lab.Code, § 5407), and only upon proof of the aggravated criminal or quasi-criminal behavior which constitutes serious and wilful misconduct, and against which the employer cannot purchase insurance. (Mercer-Fraser Co. v. Industrial Accident Comm. (1953), supra, 40 Cal.2d 102, 108, 121, 251 P.2d 955, and authorities there cited; Ins.Code, § 11661.) Thus the two types of benefits are cumulative, rather than merely alternative, and are at least as different in essential supporting facts and legal theory as are negligence and serious and wilful misconduct. As pointed out in Frost v. Witter (1901), 132 Cal. 421, 426, 64 P. 705, "for the purpose of determining whether amendment is possible, the 'cause of action' referred to as furnishing the test means only the legal obligation which it is sought to enforce against the defendant." (Klopstock v. Superior Court (1941), 17 Cal.2d 13, 20, 108 P.2d 906, 135 A.L.R. 318.) Here, as shown above, the legal obligation to pay normal benefits is one obligation, while that to pay additional compensation by reason of serious and wilful misconduct is an entirely distinct and further obligation. From what has been said, it follows that a claim specifically alleging gross negligence not only does not constitute the commencement of proceedings to collect additional compensation based on the statutorily defined misconduct of the employer but implicitly negatives existence of a basis for such proceedings. Hence, the commission, bound by the statute, as are we, correctly held that the misconduct issue was raised too late.

The employer points out, further, that under the provisions of sections 3756 through 3759 of the Labor Code (see also Ins.Code, § 11662[2]) the insurer will be substituted in place of the employer and the latter dismissed, in proceedings for normal

1. Such concept was deemed necessary in order to sustain jurisdiction in the Industrial Accident Commission to make the additional award. (E. Clemens Horst Co. v. Industrial Accident Comm. (1920), 184 Cal. 180, 192–193, 193 P. 105, 16 A.L.R. 611.

2. Insurance Code, section 11662: "Whenever any employer is insured against liability for compensation with any insurer, such insurer is subrogated to the rights of the employer to recover losses arising out of any of the following acts by the insurer:

"(a) Assuming the liability of the employer for compensation in the manner provided by the law relating thereto.

"(b) Payment of any compensation for which the employer is liable.

"Such insurer may enforce any such subrogated rights in its own name."

benefits, whereas the employer must himself defend against a claim for extra benefits based on his alleged misconduct, against which, as already mentioned herein, he cannot insure. The legal liabilities or obligations for the two types of benefits are thus again shown to be essentially different. (See Klopstock v. Superior Court (1941), supra, 17 Cal.2d 13, 20, 108 P.2d 906.)

By reason of our conclusion that the commission correctly dismissed the proceeding for additional compensation on the ground of serious and wilful misconduct because the so-called "amendment" was filed more than twelve months from the date of injury, no useful purpose would be served by discussing other points raised by the employer.

The order of dismissal is affirmed.

SHENK, TRAYNOR, SPENCE and McCOMB, JJ., concur.

CARTER, Justice.

I dissent.

The majority opinion applies technical rules of pleading to a situation where such rules are clearly inapplicable, and fails to consider the liberal application required to be given the workmen's compensation laws.

Petitioner filed a timely application for a compensable injury suffered by him. In addition to the facts justifying compensation he stated that his employer was grossly negligent in the maintenance of the punch press which resulted in his injury. He later offered an amendment in which he charged serious and wilful misconduct in detail; the amendment was filed after the twelve months' period from the date of injury mentioned in section 4553 of the Labor Code. In my opinion the amendment was not necessary to raise the issue of wilful misconduct as such issue was implicit in the language contained in the original application. The only purpose the amendment served was to clarify and particularize the misconduct. Hence the time of offering the amendment is unimportant.

The majority holds that the statement in the original application was not sufficient to raise the wilful misconduct issue and that thus the amendment stated a new cause of action which was barred by section 4553.

Section 5500 of the Labor Code provides that: "The application shall be in writing and shall state the general nature of any controversy concerning compensation or any right or liability arising out of or incidental thereto and over which jurisdiction is vested by law in the commission." The rules of the commission state that a charge of wilful misconduct should be charged with some particularity but the only sanction for the failure to so state the case is that it is grounds for continuance. Calif.Admin. Code, tit. 8, § 10700. The workmen's compensation laws must be liberally construed with the purpose of extending the benefits for the protection of persons injured in the course of their employment. Labor Code, § 3202. The pleadings in workmen's compensation proceedings are to be liberally construed and need not adhere to rules of pleading required in ordinary court procedure. De Martini v. Industrial Accident Comm., 90 Cal.App.2d 139, 148, 202 P.2d 828.

Here we have the allegation that the press was grossly negligently maintained. That was sufficient to advise the employer and his carrier that more than ordinary compensation was sought. Ordinary compensation is recoverable regardless of fault of the employer or employee. Cal.Const. art. XX, § 21; Labor Code, § 3600. Hence petitioner's allegation has no meaning unless it is charging wilful misconduct on the part of the employer. The mere fact that the words "gross negligence" were used does not indicate that the employer was not apprised of a claim for more than ordinary compensation. While gross negligence and wilful misconduct are different, it is said in Mercer-Fraser Co. v. Industrial Accident Comm., 40 Cal.2d 102, 116, 251 P.2d 955, 962, quoting with approval from Donnelly v. Southern Pac. Co., 18 Cal.2d 863, 869, 118 P.2d 465: "'It is frequently difficult, however, to characterize conduct as willful or negligent.'" An applicant for compensation should not be penalized, therefore, because he characterized the conduct as gross negligence rather than as wilful misconduct.

The decision of the majority is squarely contrary to Wennerholm v. Stanford University School of Medicine, 20 Cal.2d 713, 128 P.2d 522, 141 A.L.R. 1358, where the court held that an amendment which charged intentional fraud was not a new cause of action where the original complaint charged that representations were negligently made; that therefore the statute of limitations had not run although the amended complaint was filed after the limitation period. Here a change from a charge of gross negligence in the maintenance of the press to wilful misconduct in the maintenance of the press does not constitute stating a new cause of action.

The opinion of the District Court of Appeal, Second District, Division Three, prepared by Mr. Justice Ashburn, pro tem., ably disposes of this case and I adopt it as a part of my dissent as follows (see, 288 P.2d 164, 165):

"Petitioner challenges as excess of jurisdiction a refusal of respondent Industrial Accident Commission to consider his claim to increased compensation for an industrial accident based upon an allegation of serious and willful misconduct of the employer. That is the only question in the case. Employer and employee are within the Workmen's Compensation Act, the injury was a compensable one, and the normal compensation due petitioner has been adjusted without prejudice to the claim now before us.

"Petitioner received an injury to his hand on June 10, 1953, filed an application for adjustment of his claim on July 13, 1953, and an amendment thereto on December 17, 1954. The application was made upon a printed form provided by the commission. At the line beginning with 'Explain How Injury Was Received' it says 'Punch press broke so that it punched twice in rapid succession.' And paragraph 11, 'The reason for filing this claim is:' was filled in as follows: 'Partial permanent disability of claimant. Claimant alleges that employer was grossly negligent in maintenance of the press.' The printed prayer reads: 'Wherefore, It is requested that a time and place be fixed for hearing and notice given, and that an order or award be made granting such relief as the party or parties may be entitled to.' Hearing was set for September 21, 1953 and later taken off calendar by stipulation. On December 17, 1954, petitioner filed a document entitled 'Amendment (By Interlineation)' which reads as follows: 'Whereas serious and wilful misconduct has been alleged by claimant in his application for adjustment filed with the above commission, July 9th, 1953, and it is claimant's desire to amend said allegation with regard to serious and wilful misconduct, and in said application it is set forth as follows: "Claimant alleges that employer was grossly negligent in maintenance of the press", that in the place and stead of said allegation claimant alleges as follows: I. That on or about June 10th, 1953, the respondent Bowers Mfg. Company operated and maintained a certain punch press in its place of manufacturing in violation of section 3601(b) Title 8, of the California Administration Code, in that all points of operation guards were not properly set up, adjusted or maintained in safe and efficient working order. II. That as a proximate result of said serious and wilful misconduct of said respondant, the claimant, Cesar Lambreton while working within the course and scope of his employment, suffered personal injuries and damage of a permanant nature, to-wit: Loss of part of middle finger right hand and paralysis of index finger of right hand. Wherefore It Is Prayed that in addition to his award, that respondants be assessed extraordinary damages for serious and wilful misconduct.' As this filing was more than one year after date of injury the commission held that the claim of serious and wilful misconduct of the employer was barred by Labor Code, section 5407 and dismissed the same.

"Section 4553, Labor Code provides: 'The amount of compensation otherwise recoverable shall be increased one-half where the employee is injured by reason of the serious and wilful misconduct of any of the following: (a) The employer, or his managing representative. * * * But such increase of award shall in no event exceed three thousand seven hundred fifty dollars ($3,750).' And section 5407: 'The period within which may be commenced proceedings for the collection of compensation on the

ground of serious and wilful misconduct of the employer, under provisions of section 4553, is as follows: (a) *Twelve months from the date of injury.* This period shall not be extended by payment of compensation, agreement therefor, or the filing of application for compensation benefits under other provisions of this division.'

"The theory of the commission and of the employer, as respondent, is that a charge of gross negligence is the antithesis of serious and wilful misconduct and hence the amendment of December 17, 1954, was the first charge of such misconduct and, being filed more than a year after the accident, came too late. Petitioner's counsel take the position that the said document was but an amendment of a defective but amendable allegation in the original application and that it therefore dates back to the time of original filing on July 13, 1953. Respondents do not challenge the applicability to compensation proceedings of this doctrine of relation; they merely take the position that there was no basis for an amendment and hence no room for application of the relation rule. This case thus reduces itself to a question of whether we deal with a mere variance or a complete departure in pleading.

"There are certain rules relating to court actions which point the way to a correct decision here. And it must be accepted as a mere truism that proceedings before the commission are attended by less, not more, formality than those in a court of law. Sections 5708 and 5709, Labor Code, so declare in substance.

"Respondents rely primarily on Mercer-Fraser Co. v. Industrial Accident Comm., 40 Cal.2d 102, 251 P.2d 955, a case in which an award of increased compensation for serious and willful misconduct was annulled for insufficiency of the evidence, which showed negligence and fell short of proof of such misconduct. In so doing the court discussed the difference between negligence and willful misconduct, saying 40 Cal.2d at page 120, 251 P.2d at page 964: 'Rather, the true rule is that serious and wilful misconduct is basically the antithesis of negligence, and that the two types of behavior are mutually exclusive; an act which is merely negligent and consequently devoid of either an intention to do harm or of knowledge or appreciation of the fact that danger is likely to result therefrom cannot at the same time constitute willful misconduct; conversely an act deliberately done for the express purpose of injuring another, or intentionally performed either with knowledge that serious injury is a probable result or with a positive, active, wanton, reckless and absolute disregard of its possibly damaging consequences, cannot properly be classed as the less culpable conduct which is termed negligence. It follows that a finding of serious and wilful misconduct cannot be sustained upon proof of mere negligence of any degree.' It also quoted from Meek v. Fowler, 3 Cal.2d 420, 425, 45 P.2d 194, 197, as follows: '"While the line between gross negligence and wilful misconduct may not always be easy to draw, a distinction appears * * * in that gross negligence is merely such a lack of care as may be presumed to indicate a passive and indifferent attitude toward results, while wilful misconduct involves a more positive intent actually to harm another or to do an act with a positive, active and absolute disregard of its consequences."' This Mercer-Fraser case involved no problem of amendment and, so far as here applicable, holds only that gross negligence is not the equivalent of serious and willful misconduct. Ours is a different question, whether a charge of gross negligence affords basis for an amendment to allege willful misconduct under the circumstances presented by the record at bar.

"It must be recognized that section 4553, in providing increased compensation for willful misconduct, does not create a separate cause of action or claim. This was determined by E. Clemens Horst Co. v. Industrial Accident Comm., 184 Cal. 180, 193 P. 105, 16 A.L.R. 611. The constitutionality of the Compensation Act was there challenged and it was claimed that the provision for such additional award was unconstitutional because the constitution empowered the legislature to do no more than provide for 'compensation' for injured employees and that the addition of a penalty for willful misconduct was not embraced by that

term. 184 Cal. at page 192, 193 P. at page 110, the court said: 'This language does not authorize the creation of a liability for anything more than *compensation*. If the fifty per cent. to be added in cases where the injury is caused by the wilful misconduct of the employer is given as a penalty for such misconduct, and not as compensation to the employe for his injury, the provision is not within the power given to the Legislature by said section, and if it has no other sanction, it is beyond the legislative power and void.' And 184 Cal. at page 193, 193 P. at page 110: 'It is therefore to be presumed the Legislature found that the actual injury by loss of earnings and other elements of damage, not including expenses for costs of treatment and the like, would be at least fifty per cent. more than the fixed schedule would come to, and that it was deemed just, if the injury was caused by willful misconduct of the employer, he should be made to pay a greater proportion of the burden, and that the allowance in such a case should be increased by adding fifty per cent thereto. Thus considered, the additional allowance is really for additional compensation in the strict sense, and not for exemplary damages. This being the case, the power to enforce it was properly given to the commission under the provisions of section 21, article 20, of the constitution.' So it is not a question at bar of whether a new cause of claim can be introduced by amendment after lapse of the period of limitation, but whether the amount of the claim may be so increased.

"Cases dealing with amendments in court actions furnish the correct answer. Great liberality is indulged in the matter of amendment to the end that lawsuits may be determined upon their merits. Klopstock v. Superior Court, 17 Cal.2d 13, 19, 108 P.2d 906, 135 A.L.R. 318; Frost v. Witter, 132 Cal. 421, 424, 64 P. 705 [84 Am.St.Rep. 53]; Barr v. Carroll, 128 Cal.App.2d 23, 26, 274 P.2d 717; Hanna v. Hirschhorn, 112 Cal. App. 438, 440–442, 296 P. 891. But the solution of every problem of whether a new cause of action has been inserted by amendment after the running of the statute of limitation must be solved by applying to the specific facts a correct conception of what constitutes a cause of action. A cause of action is the right to secure redress for violation of an obligation owing to the claimant. In Klopstock v. Superior Court, supra, 17 Cal.2d 13, at page 20, 108 P.2d 906, at page 910: 'In determining whether a wholly different cause of action is introduced by the amendment technical considerations or ancient formulae are not controlling; nothing more is meant than that the defendant not be required to answer a wholly different legal liability or obligation from that originally stated. As the court says in the Frost case, supra, 132 Cal. at page 426, 64 P. at page 707, for the purpose of determining whether amendment is possible, the "cause of action" referred as to furnishing the test means only the legal obligation which it is sought to enforce against the defendant. Other courts have used almost identical language; the test is not whether under technical rules of pleading a new cause of action is introduced, but rather, the test is whether an attempt is made to state facts which give rise to a wholly distinct and different legal obligation against the defendant. The power to permit amendment is denied only if a change is made in the liability sought to be enforced against the defendant. See Harriss v. Tams, 258 N.Y. 229, 242, 179 N.E. 476.' Day v. Western Loan & Bldg. Co., 42 Cal.App.2d 226, 231, 108 P.2d 702, 704: 'It is well-settled that, where the original complaint has been filed within the statutory period, an amended complaint may be filed after the statute has run as long as it does not state a new or different cause of action from that appearing in the original complaint. Stated another way, if the original complaint defectively states a cause of action, it may be amended after the running of the statute as long as the cause of action stated in the amended pleading can trace its descent from the original pleading.'

"Wennerholm v. Stanford University School of Medicine, 20 Cal.2d 713, 128 P.2d 522, 141 A.L.R. 1358, was an action against manufacturers, distributors, and dispensers of certain drugs for personal injuries caused by use of same. The first four complaints charged negligence; the fifth amended complaint shifted to fraud. Judgment sustaining demurrer thereto without leave to amend was reversed. 20 Cal.2d at page 717, 128

P.2d at page 524: 'The ground of general demurrer principally urged by the defendants is that the cause of action is barred by the statute of limitations. This contention is based on the theory that the fifth amended complaint charging fraud states a new and different cause of action from that for negligence stated in the original complaint. Unless the amended complaint sets forth an entirely different cause of action from the original, however, the amended complaint, for the purposes of the statute of limitations, must be deemed filed as of the date of the original complaint. (Citing cases.) The modern rule, where amendment is sought after the statute of limitations has run, is that the amended complaint will be deemed filed as of the date of the original complaint so long as recovery is sought in each complaint upon the same general set of facts. (Citing cases.) A mere change in legal theory will not subject the amended complaint to the bar of the statute of limitations. (Citing cases.) In the present case the only substantial difference between the factual situation set forth in the original and the fifth amended complaint is that the former charged that the representations were negligently made while the latter charges that they were made with knowledge of their falsity. Despite the change in legal theory from an action for negligence to one for fraud, it cannot be said that an entirely different cause of action is stated. Therefore the latter complaint is not barred by the statute of limitations.'

"Certainly the amendment at bar 'can trace its descent from the original pleading' and be said to involve the 'same general set of facts' as the original application. That document was a printed form supplied by the commission. At the foot of the page in small capital letters it says 'Note—Under the provisions of the Workmen's Compensation Insurance and Safety Laws, the applicant need only state the general nature of the claim in controversy * * *.' This the applicant did when he said 'Punch press broke so that it punched twice in rapid succession.' Of course, no charge of fault or negligence is necessary to or expected in such an application. When claimant's attorney included in the 'reason for filing this claim' a statement that 'Claimant alleges that employer was grossly negligent in maintenance of the press' he served notice that something more than compensation payable regardless of fault would be sought. And the printed prayer 'That an order or award made granting such relief as the party or parties may be entitled to' was broad enough to sustain an award of increased compensation if perchance gross negligence would afford ground for such an award in point of law. Obviously the application was defective but, fairly and liberally construed, it did give notice of a claim for compensation additional to the normal amount payable without fault. It was aimed, as were the later allegations of willful misconduct, at increased compensation which was but an incident to, a part of the basic claim. E. Clemens Horst Co. v. Industrial Accident Comm., supra, 184 Cal. 180, 192–193, 193 P. 105, 16 A.L.R. 611.

"The fact that it was inexpertly phrased does not deprive it of all value as a basis for informed amendment. When the basic facts are the same a shifting from one theory of liability to another is not the substitution of a new cause of action. Oberkotter v. Woolman, 187 Cal. 500, 504, 202 P. 669; Wennerholm v. Stanford University School of Medicine, supra, 20 Cal.2d 713, 718, 128 P.2d 522, 141 A.L.R. 1358; Barr v. Carroll, supra, 128 Cal.App.2d 23, 33–34, 274 P.2d 717. The absence of a vital allegation in an original complaint, resulting in the statement of no cause of action at all, does not preclude an amendment to incorporate that indispensable element of the action. The correct view is well stated in 2 Witkin's California Procedure, § 606, p. 1619: 'If the original complaint *fails to state a cause of action,* because of defective pleading of the elements, it is in a sense true that the amended pleading states a new cause of action. But there is no objection to an amendment of this kind, for this is the typical next step when a general demurrer is sustained with leave to amend. The important point is that the amended complaint merely improves the formerly defective statement of the same cause of action; there is no change in the nature of the case and therefore no surprise or prejudice to the defendant. (See Rauer's

Law, etc., Co. v. Leffingwell (1909), 11 Cal. App. 494, 495, 105 P. 427; Ruiz v. Santa Barbara Gas, etc., Co. (1912), 164 Cal. 188, 194, 128 P. 330; Woods v. Cook (1936), 14 Cal.App.2d 560, 562, 58 P.2d 965, infra, § 613.)' Both original application and amendment count upon an accident of June 10, 1953 occurring at the premises of the employer Bowers Manufacturing Company, and resulting in loss of part of middle finger of applicant's right hand and paralysis of index finger of right hand. The gross negligence was alleged to relate to 'maintenance of the press,' and the willful misconduct to the same thing, but more elaborately 'That on or about June 10th, 1953, the respondent Bowers Mfg. Company operated and maintained a certain punch press in its place of manufacturing in violation of section 3601 (b) Title 8, of the California Adminisgration Code, in thay all points of operation guards were not properly set up, adjusted or maintained in safe and efficient working order.'

"Eatwell v. Beck, 41 Cal.2d 128, 135–136, 257 P.2d 643, affords a persuasive analogy. That was an action for deceit. Of course, fraud without damage is not actionable at law and such an averment is essential to a good complaint. Munson v. Fishburn, 183 Cal. 206, 220, 190 P. 808; Maynes v. Angeles Mesa Land Co., 10 Cal.2d 587, 590, 76 P.2d 109; 12 Cal.Jur., § 69, p. 813. The exclusive measure of Eatwell's recovery was his out-of-pocket loss under section 3343, Civil Code; he had alleged certain damage which was not recoverable; confronted by motion for nonsuit he sought leave to reopen and to amend his complaint to aver the proper damages. This was denied and held to be erroneous. An amendment to incorporate a proper allegation was held to be proper and indeed not to be denied. See also ruling of this court in Smith v. Los Angeles Bookbinders Union [No. 63], 133 Cal.App.2d 486, 284 P.2d 194.

"This procedural liberality was applied to a compensation case in National Automobile & Casualty Ins. Co. v. Industrial Accident Comm., 95 Cal.App.2d 10, 212 P.2d 1, 2. In that instance the application alleged that the employee '"accidentally sustained a laceration of the arm, followed by infection"' and died as a result of same. Without any amendment of the pleading, the commission found that 'deceased was on her feet for long hours at a time while performing her said services and such activities aggravated or precipitated an acute attack of thrombophlebitis, proximately causing her death.' 95 Cal.App.2d at page 12, 212 P.2d at page 2. It was claimed that this was a fatal variance and hence the award was void, concerning which contention the court said: 'But little need be said about the claimed variance. The Commission is not bound by strict rules of procedure. Section 5708, Labor Code. An examination of the record demonstrates that, from the very beginning of the hearing, it was obvious that the petitioner was relying upon aggravation of a pre-existing injury as well as the claimed infection of the arm as the cause of death. It was petitioners' witnesses who demonstrated that death was caused by thrombophlebitis and not by the arm injury, and it was also petitioners' witnesses who proved that such condition was aggravated by overwork. Petitioners were not surprised by this theory. Although it would have been better practice to have moved to amend to conform to proof, the failure to do so was a mere informality which does not invalidate the award. Section 5709, Labor Code.'

"Respondents rely heavily upon Peterson v. Industrial Accident Comm., 81 Cal. App.2d 352, 183 P.2d 927, 929, but we do not consider it opposed in any respect to the views herein expressed. In that case the application gave no intimation of any claim other than normal compensation. At the hearing the referee saw that willful misconduct was apparently being charged, told counsel for claimant he would have to amend in order to make that claim, gave permission so to do and suggested: '"Additional Issue: Was injury proximately caused by serious and willful misconduct of the employer?"' The referee also told counsel it would be necessary to file a supplemental application and was told that that would be done. This was on December 4, 1941; after various continuances and other delays the matter was finally heard on July 19, 1946, more than four

years later. No amended or supplemental application having been filed until April 29, 1946, an order was made deeming this 1946 application to be an amendment to the original; and an increased award was made on the ground of employer's misconduct. In annulling it the court held that there was no claim on file which could form a basis for such increased compensation, that an oral amendment would not suffice to raise the issue and that a written amendment filed more than four years after the accident came too late. The court said, 81 Cal.App.2d at page 357, 183 P.2d at page 930: 'While a claim for both sorts of benefits may well be included in a single application, the language of section 5407 indicates an intention that some definite step, other and different from the filing of a general application, must be taken to raise an issue of willful misconduct, and that an application setting up only the ordinary issues shall not be sufficient for that purpose. The respondents contend that sections 4553 and 5407 contain no provisions as to how such a proceeding for the raising of such an issue shall be commenced, whereas sections 5500 and 5501 provide for the application on the ordinary issue. The latter sections are contained in a chapter devoted to pleading and it is nowhere stated therein that they relate only to applications on the ordinary issues. Section 5500 states that the application shall be in writing and shall state the general nature of the controversy concerning compensation, or any right or liability arising out of or incidental thereto. This would seem to have been intended to apply to both of these kinds of issue. In any event the original application here merely set forth as the cause of the injury that a cave-in resulted because the walls of the excavation were not properly shored up. It also stated the only question presented as being whether or not the applicant had entirely recovered or had suffered permanent disability. That this was the only issue raised, was recognized by the referee at the first hearing and concurred in by all parties. In our opinion, the application as originally filed was not sufficient to raise the willful misconduct issue.' And 81 Cal.App.2d at page 359, 183 P.2d at page 931: 'The hearing leading to the award here in question was then held, based on the new application thus deemed to be an amendment to the original application, on the theory that it related back to the date of filing the original application. While there is, and should be, great liberality in the matter of amendments this amendment in 1946, bringing in a new and different issue which must be separately "commenced", could not relate back and be effective as of a date in 1941, in the face of the clear provisions of section 5407 of the Labor Code. While considerable informality in proceedings before the commission is permitted, and properly so, the meaning and effect of these statutory provisions cannot be entirely set aside, and some attempt must be made to comply with them and to raise issues in the manner and within the time there provided. We conclude that the respondent Commission exceeded its jurisdiction in making the particular award which is here in question.' The case did not deal with our problem and is not opposed to the views above expressed.

"Respondent commission's reliance upon its rule 10700 (Title 8, Cal.Adm.Code, § 10700) is of no avail. It sets forth requirements for a charge of serious and wilful misconduct in an application, concluding as follows: '(c) Failure to state the basis of the claim of serious and wilful misconduct with the particularities herein provided, unless specifically waived by the adverse parties, may be grounds for a continuance.' Continuance of hearing, not dismissal, is the penalty for failure to plead willful misconduct with the particularity required by the rule."

For the foregoing reasons I would annul the order.

Rehearing denied; GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.

COUNTY OF SAN BERNARDINO,
Plaintiff and Respondent,

v.

Howard JOHNSON, Defendant and Appellant.

Civ. 5214.

District Court of Appeal, Fourth District, California.

May 16, 1956.

Rehearing Denied June 12, 1956.

Hearing Denied July 11, 1956.

Action by county, against son of individual to whom county had paid old age security, to recover sums paid. The Superior Court of San Bernardino County, Martin J. Coughlin, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Mussell, J., held that under Welfare and Institutions Code, Legislature intended to cover completely subject of recovery by public agencies from responsible relatives for aid rendered, and Legislature did not intend, by enactment of Civil Code section imposing duties upon members of families to support other members who cannot support themselves to give county right of recoupment for sums so expended.

Judgment reversed.

1. Social Security and Public Welfare ⇐94

Under Welfare and Institutions Code, Legislature intended to cover completely subject of recovery by public agencies from responsible relatives for aid rendered, and Legislature did not intend, by enactment of Civil Code section imposing duties upon members of families to support other members of families who cannot support themselves to give county right of recoupment for sums so expended. Welfare and Institutions Code, §§ 2000 et seq., 2224; West's Ann.Civ.Code, § 206.

2. Appeal and Error ⇐839(1)

Where plaintiff brought action based on two causes, trial court did not pass on first cause which involved constitutionality of statute, and defendant appealed from judgment for plaintiff on second cause, reviewing court which reversed judgment would not decide issues of constitutionality raised in first cause.

Richard Richards and Abe Mutchnik, Los Angeles, for appellant.

Albert E. Weller, County Counsel, San Bernardino County, Margaret J. Morris and J. B. Lawrence, Deputies County Counsel, San Bernardino, for respondent.

MUSSELL, Justice.

Defendant appeals from a judgment recovered against him for the sum of $230 and costs in an action filed by plaintiff to recover sums paid to defendant's father under the provisions of the Old Age Security Law, Welf. & Inst.Code, § 2000 et seq. The complaint contains two causes of action. In the first count recovery is sought under the provisions of section 2224 of the Welfare and Institutions Code and in the second count recovery is sought under the provisions of section 206 of the Civil Code which provides as follows:

> "It is the duty of the father, the mother, and the children of any poor person who is unable to maintain himself by work, to maintain such person to the extent of their ability. The promise of an adult child to pay for necessaries previously furnished to such parent is binding."

Defendant in his answer denied liability and alleged that section 2224 of the Welfare and Institutions Code and section 206 of the Civil Code are unconstitutional as applied to him. The parties entered into a stipulation that the allegations of the complaint are true, except as to those allegations concerning defendant's ability to contribute to the support of his father; that defendant was able to pay and contribute to the support of his father an aggregate sum of $230 and no more, but that he did not consent to a judgment against him in any sum; that all matters of fact stated in defendant's first amended answer are true and that "(t)his case may, and shall now be, submitted to the Court for decision and a judgment, without further appearance by either party hereto, on the

basis of the pleadings and record to this point, including this stipulation."

The trial court filed a written opinion herein in which it stated that it was not necessary to determine the question of the constitutionality of section 2224 of the Welfare and Institutions Code because the allegations of the second cause of action, which were stipulated to be true, establish that the defendant was able to pay $5 a month to his father who was "a poor person and unable to maintain himself by work"; that the county involuntarily assumed this obligation and became subrogated to the claims of the father under the provisions of section 206 of the Civil Code. The court further stated that if section 2224 of the Welfare and Institutions Code is unconstitutional, the plaintiff is entitled to recover under section 206 of the Civil Code; that the legislature intended to charge all children with the obligation created by section 206 of said code and that in so doing, no constitutional guarantees were violated; and that, therefore, judgment would be for plaintiff in the sum of $230.

It is apparent that the trial court based its decision and the right of plaintiff to recover on the provisions of section 206 of the Civil Code.

[1] In County of San Bernardino v. Simmons, 46 Cal.2d 394, 296 P.2d 329, the Supreme Court held that the Welfare and Institutions Code sets out what appears on the face of that code to be a complete procedure for recovery by the county, when it pays aid to a needy aged person, from a spouse or adult child who is able to support the aged person, and that the legislature intended, by the Welfare and Institutions Code, to cover completely the subject of recovery by public agencies from responsible relatives, and that it did not intend to create, and there is no proper basis for the courts to innovate, a right of recoupment derived from section 206 of the Civil Code. It clearly appears that under the law thus established plaintiff cannot recover a judgment against the defendant herein, based upon the provisions of section 206 of the Civil Code.

[2] Since the issues presented in the first cause of action have not been passed upon by the trial court and no judgment has been rendered thereon, we do not here decide such issues.

The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.



141 Cal.App.2d 538

Sheril Le MURPHY and Janice Kae Murphy, appearing by way of their guardian ad litem, Virgil Murphy and Virgil Murphy, appearing for himself alone, Plaintiffs and Respondents,

v.

Corwin B. WILSON, Defendant and Appellant.

Civ. 21405.

District Court of Appeal, Second District, Division 1, California.

May 15, 1956.

Action for injuries sustained by father and two daughters in automobile collision. The jury returned nine to three verdict for all plaintiffs, but only awarded father nominal damages, and daughters none, and verdict for father was less than proved special damages. The Superior Court of Los Angeles County, Fred Miller, J., awarded plaintiffs a new trial limited to issue of damages, and defendant appealed. The District Court of Appeal, Fourt, J., held that award of new trial limited to damage issue was abuse of discretion, in view of circumstances, including fact that closeness of question of liability indicated that verdict was compromised on issue of liability.

Order reversed and cause remanded for new trial on all issues.

1. New Trial ⇐9

The granting of a new trial limited to the issue of damages appropriately rests in discretion of trial court.

2. New Trial ⇐9

An abuse of discretion, in granting new trial limited to issue of damages, is shown when record discloses that issue of liability is close, that damages are inadequate, and that there are other circumstances indicating that verdict was probably result of compromise of liability issue.

3. New Trial ⇐9

In action for injuries sustained by father and two daughters in automobile collision, wherein jury returned nine to three verdict for all plaintiffs, but only awarded father nominal damages, and daughters none, and verdict for father was less than proved special damages, award of new trial on issue of damages alone was abuse of discretion in view of circumstances, including fact that closeness of question of liability indicated that verdict was compromised on issue of liability.

Ball, Hunt & Hart, by Clark Heggeness, Long Beach, for appellant.

J. V. Malouf and Glen D. Lucas, Long Beach, for respondents.

FOURT, Justice.

This is an appeal from an order granting respondents a new trial upon the issues of damages only.

Virgil Murphy and his two minor children, Sheril Le and Janice Kae, brought an action against Corwin B. Wilson for personal injuries and property damage arising out of an automobile accident. The plaintiffs claimed general damages as follows: Sheril Le, $7,500; Janice Kae, $5,000; Virgil, $55,000. Virgil Murphy claimed special damages substantially as follows: $50 for repair of his car; $90 for loss of use of his car; $10 for medical services for the children; $392 for medical services; $1,000 for future medical services; $1,500 for loss of earnings and $4,800 for loss of future earnings.

Defendant denied that any negligence on his part caused the accident and affirmatively alleged that plaintiff Virgil Murphy was guilty of contributory negligence. The action was tried before a jury and Virgil Murphy proved undisputed special damages of $423.20 in medical expenses and $50 auto damages. Virgil Murphy was awarded damages in the sum of $142.50. No damages were awarded to either of the children.

Plaintiffs filed a notice of intention to move for a new trial wherein it was set forth that the motion would be made upon substantially all of the statutory grounds and upon the grounds of the inadequacy of the damages. The motion was made and argued and the court granted the motion on the issue of damages only as to all plaintiffs on the grounds of the insufficiency of the evidence.

Appellant's sole contention is that the trial court abused its discretion in ordering a new trial upon the single issue of damages.

[1, 2] The rule is that the granting of a new trial limited to the issue of damages appropriately rests in the discretion of the trial court, but an abuse of that discretion is shown when the record discloses that the issue of liability is close, the damages are inadequate and there are other circumstances that indicate that the verdict was probably the result of a compromise of the liability issue. Clifford v. Ruocco, 39 Cal.2d 327, 246 P.2d 651; Leipert v. Honold, 39 Cal.2d 462, 247 P.2d 324, 29 A.L.R.2d 1185; Rose v. Melody Lane, 39 Cal.2d 481, 247 P.2d 335; Cary v. Wentzel, 39 Cal.2d 491, 247 P.2d 341; Hamasaki v. Flotho, 39 Cal.2d 602, 248 P.2d 910.

The facts of this case, as disclosed by the testimony, are substantially as follows. Virgil Murphy testified in substance that on October 1, 1953, about 8 o'clock p. m. he was driving his automobile westerly on Carson Street in Long Beach. His two minor daughters were with him. Carson Street is marked for two lane traffic in each direction and runs generally east and west. Gundry Avenue runs generally north and south and intersects Carson Street at right angles. Murphy approached that intersection traveling about 25 miles per hour in the inside, westbound lane. He first saw defendant's car when it was west of the intersection and moving on Carson toward the intersection in the inside, eastbound lane about three-quarters of a block away. There was a car about a block ahead of

Murphy in the outside westbound lane. There were no other cars in the inside westbound or eastbound lanes. He saw Wilson either come to a stop or slow down to a speed of less than two or three miles per hour at the west edge of the intersection. Murphy continued on and when he was about a quarter of a block from Wilson's automobile he concluded that Wilson was going to make a lefthand turn at the intersection to go north on Gundry Avenue. Wilson momentarily stopped and Murphy continued on, and when Murphy was about 25 feet from the intersection he saw Wilson commence a left turn. Murphy applied his brakes but was unable to stop and the front of the Murphy car struck the middle of the right side of the Wilson car. The collision occurred near the east edge of, but within the intersection. Wilson was knocked out of the driver's seat and his automobile went out of control. Murphy concluded after the accident that Wilson was intoxicated. Murphy did not seek medical attention immediately after the accident and continued working as a painter. He first saw the doctor on October 12, 1953. The doctor treated him for fourteen months and he wore a back brace for five months. His uncontradicted medical expenses were $335 for the doctor, $57.50 for X-rays, and $30.70 for a back brace, or a total of $423.20. He claimed that the back injury was sustained in the accident and that he was unable to work for five weeks during the summer of 1954. He claimed loss of earnings of $1,500, but part of the time he was in Iowa with his family. His work record showed that he worked continuously after the accident for at least 50 hours per week and earned almost $1,000 per month. He denied any back trouble before the accident. His back was worse at the time of the trial. He further testified that his daughters suffered bruises in the accident and that he paid a dentist $5 for a routine examination of Sheril Le in November of 1954.

Defendant Corwin Wilson testified that at the time of the accident he was on his way home from his work. Before dinner he had two bottles of beer and earlier a cocktail, but he was not intoxicated. He was driving easterly on Carson, and when one block west of the intersection in question he stopped for a traffic light. He then proceeded easterly in the inside lane at a speed of about 20 miles per hour. He gave a left turn signal as he approached the intersection and came to a near stop near the west edge of the intersection to permit a westbound car to pass. His speed was reduced as he entered the intersection so that he was barely moving. He shifted into second gear and started to make his left turn. At that time he saw the Murphy car which was about 150 feet from him in the inside westbound lane. After he completed the turn and began to travel north he looked ahead and just before the collision heard the sound of skidding tires. The front of the Murphy car struck the right side of his car. He was knocked out of the driver's seat and lost control of the car, which came to rest off the street, north of the intersection. He was shaken up and became extremely nervous.

Police Officer Alvin Hyatt testified that he arrived about 8:10 p. m. and investigated for the Long Beach Police Department. He observed 20 to 30 feet of skid marks from the Murphy car leading up to the collision and brush marks from the point of collision to where the Murphy car came to rest. In his opinion the point of impact was three feet west of the east edge of the intersection and near the white line dividing the two lanes of westbound traffic. He concluded that the Wilson car was going north and the Murphy car was going west at the time of the impact. He believed Wilson was intoxicated.

Charles Murdock testified that he was driving eastbound on Carson in the outside lane. Before the accident he saw the Wilson car in front of him in the inside eastbound lane as it approached the intersection, and as he approached the intersection he saw the Wilson car slow down just west of the intersection and concluded that Wilson was going to make a lefthand turn at the intersection. He saw Wilson enter the intersection, slow down and then start to make a lefthand turn at the middle of the intersection. At the time of the impact he had passed the intersection and had to look back over his shoulder to see it.

Dr. Thorstenberg, M.D., testified that he first saw Murphy on October 12, 1953, at which time Murphy gave him a history of an automobile accident on October 1, 1953. The X-rays showed Murphy had congenital defects in his back before the accident. Murphy told him he was rejected from military service in World War II by reason of back deformity, but that he had no trouble with his back before the accident. The doctor concluded that Murphy had suffered a contusion of his chin, a whiplash injury to his neck, a low back sprain superimposed upon a pre-existing spondylolisthesis and scoliosis of the back, and a possible scalenus anticus syndrome. He treated Murphy fourteen months and believed that the accident had aggravated the pre-existing condition of Murphy's back and that an operation was necessary to fuse the back. His fee for the operation would be $500 and the hospital expenses would be at least $500 and Murphy would be disabled for at least six months after the operation.

Dr. Herbert Carlson, M.D., testified that he examined Murphy for the Industrial Accident Commission on December 29, 1950, for an industrial accident occurring in 1947. Murphy told him, during the examination, that he had suffered and was suffering low back pain radiating into his lower left leg. He made an examination and took X-rays and concluded that Murphy had a pre-existing scoliosis, spondylolisthesis and a pedicle defect in his low back. He further concluded, at the time of his examination, that Murphy was suffering permanent disability as a result of these conditions and the 1947 accident. He did not examine Murphy after October 1, 1953.

Dr. Eyer, D.D.S., was the family dentist and he testified that he first saw Sheril Le after the accident on November 23, 1954, for a routine examination. He was told that she suffered a bruised lip in an accident about a year before. He took X-rays and found retarded root development which he believed was caused by a blow to her mouth. He admitted that this condition was caused by a blow after Sheril Le's permanent teeth had erupted. An examination three months later disclosed that this condition had disappeared. It was stipulated that at the time of the accident the child had her baby teeth.

William Murphy testified that he was a painting contractor and Virgil Murphy's employer. He substantiated Murphy's work and earnings record and stated that Murphy took five weeks off from work in August and September, 1954.

Neither Sheril Le nor Janice Kae testified and respondents called no doctor to testify as to their injuries.

From the record of this case it is readily determined that the issue of liability was close. Wilson stated that Murphy was 150 feet away when he started to make the left-hand turn in the intersection. The physical facts indicate that Murphy's car left 25 feet of skid marks and was still traveling fast enough at the time of the impact with Wilson's car to knock Wilson out of the driver's seat. The officer stated that the Wilson car was going north at the time of the collision. There was substantial evidence that Wilson had completed the turn to the left and that Murphy was not an immediate hazard when Wilson began the turn and that Murphy was guilty of contributory negligence. The making or not making of a hand signal is not particularly important here for the reason that Murphy admitted that he knew that Wilson was going to turn to the left.

Both respondents and appellant contend that the verdict was grossly inadequate. The doctor testified that he treated Murphy for fourteen months. There was no dispute that his reasonable charges were $335, in addition to $57.50 for X-rays. Murphy bought a brace for $30.70 and suffered $50 property damage. The award of $142.50 gave no general damages and is less than the admitted specials.

In Rose v. Melody Lane, supra, 39 Cal.2d 481, at page 489, 247 P.2d 335, at page 340, it was said:

> "When the jury fails to compensate plaintiff for the special damages indicated by the evidence, and despite the fact that his injuries have been painful, makes no award or allows only a trifling sum for his general damages, the only reasonable conclusion is that the jurors

compromised the issue of liability, and a new trial limited to the damages issue is improper. See Hughes v. Schwartz, 51 Cal.App.2d 362, 367–368, 124 P.2d 886; McNear v. Pacific Greyhound Lines, 63 Cal.App.2d 11, 16, 146 P.2d 34; Adams v. Hildebrand, 51 Cal.App. 2d 117, 118–119, 124 P.2d 80. A contrary conclusion is justified only when the evidence of defendant's negligence is 'overwhelming.' [Citing cases.]"

As stated in Clifford v. Ruocco, supra, 39 Cal.2d 327, at page 330, 246 P.2d 651, at page 653:

"A failure to allow for undisputed special damages and loss of earnings is one circumstance which the courts have considered as being some indication of a compromise verdict. See Bencich v. Market St. Ry. Co., 20 Cal.App.2d 518, 529–530, 67 P.2d 398; see also, Woods v. Eitze, 94 Cal.App.2d 910, 915, 212 P.2d 12; Hughes v. Schwartz, 51 Cal. App.2d 362, 368–370, 124 P.2d 886."

Also, as the court said in Hamasaki **v.** Flotho, supra, 39 Cal.2d 602, at pages 606–607, 248 P.2d 910, at page 912: "A refusal to allow for undisputed special damages is usually convincing evidence that the jury failed to make a decision of the liability issue, and that circumstance has therefore been stressed in a number of appellate opinions. See Wallace v. Miller, 26 Cal.App.2d 55, 56, 78 P.2d 745; Donnatin v. Union Hardware & Metal Co., 38 Cal.App. 8, 11, 175 P. 26, 177 P. 845. In a particular case, however, gross inadequacy of unliquidated general damages may be just as convincing. Thus, in Simmons v. Fish, 210 Mass. 563, 571, 97 N.E. 102 [Ann.Cas.1912D, 588], it was held that a verdict of $200 for the loss of an eye was a conclusive indication that the jury had compromised the issues of liability and damages. See, also, Schuerholz v. Roach, 4 Cir., 58 F.2d 32, 34 ($625 for loss of eye); Keogh v. Maulding, 52 Cal. App.2d 17, 21, 125 P.2d 858 (verdict for $291.23 more than undisputed damages). As a general rule, it is only when the verdict allows a substantial, even though inadequate, amount for general damages that it can reasonably be concluded that the jury's error related solely to the damages issue. [Citing cases.]"

There are present in this case other circumstances which indicate that the verdicts were a compromise and that the issue of liability was never actually determined by the jury. The jury deliberated for about five hours, from 3:42 o'clock p. m. to 8:11 o'clock p. m., and returned with a 9 to 3 verdict. The fact that the jury found in favor of each of the children and yet did not even award nominal damages indicates a compromise verdict.

During a colloquy between the court and the foreman of the jury at the time the verdicts were returned, the court attempted to ascertain if the verdicts were as the jury really intended. Among other things, the following was said:

"The Court: You have done that but you find that the plaintiff, in effect, that the plaintiff, Virgil Murphy, for instance, has sustained his case and in effect you say that means that you find that the defendant was negligent, that the plaintiff was not contributorily negligent but that he suffered no damages whatever as a result of the defendant's negligence.

"The Foreman: It is our decision.

"The Court: Is that your intent?

"The Foreman: Our decision does not constitute anything other than what is in our minds. It was merely a question of which verdict to sign to indicate our decision.

"The Court: Obviously I can only go so far in determining that. It is up to you.

"The Foreman: Yes, sir.

"The Court: But there are certain forms that you must follow. How can you say on the evidence that you find for the plaintiff, which you have done, you found that the plaintiff has sustained in the case of Virgil Murphy, the father of the children, you said in effect he sustained his case. That means that you find that he was not contributorily negligent, that the defendant was negligent, but that he suffered no damage

whatever as a result. That there was no damage the proximate result of the defendant's negligence and that the plaintiff was not contributorily negligent as a proximate cause.

"The Foreman: That is only true in the case of * * *

"The Court: I am not talking about the case of the one girl.

"The Foreman: That is what I am talking about, sir.

"The Court: To all of you, have I made myself clear, or are you still confused?

"A Juror: Still as confused as ever."

In this case the verdict unmistakably indicates that the jury had doubts either as to defendant's negligence in the premises, or doubts as to whether the present condition of Murphy was not due to some prior condition disassociated from the accident.

It was appropriately said in Reay v. Beasley, 49 Ariz. 362, 66 P.2d 1043, at page 1044: "It is not enough that the issues of liability and damages may be separable. It should be quite clear that it will not give the one seeking the new trial of the issue of damages only an unjust and unfair advantage over his adversary. It would seem that when a verdict is for nominal damages when the admitted facts show that damages should be substantial if there is any liability, and when such verdict is by nine of the twelve jurors, three refusing to join in it, justice and fairness would require the retrial to be of the whole case. * * * Just why the nine jurors joined in such a verdict we do not know. * * * The jurors must have entertained very serious doubts as to how the case should be decided, and this doubt presumably extended to both liability and the amount of damages."

Murphy was entitled to a substantial award of damages or none at all. If the jury had done as they were instructed, namely, determine the matter of liability first, and then consider damages, the award to Murphy would obviously have been in excess of his special damages.

[3] The order granting a new trial on the issue of damages only is reversed and the cause is remanded to the trial court with directions to vacate the judgment and order a new trial on all issues.

WHITE, P. J., and DORAN, J., concur.



141 Cal.App.2d 382

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

J. W. INCE and Howard John William Gray, Defendants,

John Howard William Gray, alias Howard John William Gray, Appellant.

Cr. 5458.

District Court of Appeal, Second District, Division 1, California.

May 9, 1956.

Defendant was convicted of second degree burglary. The Superior Court, Los Angeles County, Joseph M. Maltby, J., entered judgment and denied motion for new trial, and defendant appealed. The District Court of Appeal, Fourt, J., held that evidence was sufficient to sustain conviction.

Judgment and order affirmed.

Burglary ⇐41(1)

Evidence was sufficient to sustain conviction for second degree burglary.

Forno & Umann, by Harry M. Umann, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Arthur L. Martin, Deputy Atty. Gen., for respondent.

FOURT, Justice.

The appellant was convicted of burglary in the second degree and after denial of his application for probation, and denial of his motion for a new trial, was sentenced to

the state prison. He appeals from the judgment rendered and from the denial of the motion for a new trial.

In an information filed in the Superior Court in Los Angeles County, J. W. Ince and Howard John William Gray were charged with burglary in violation of section 459 of the Penal Code. It was alleged that on February 4, 1954, in Los Angeles county, that defendants entered a storage shed and building owned and occupied by RCS Engineering Company with the intent to commit theft. It was also alleged that there had been two prior felony convictions of defendant Gray in the state of Texas. After arraignment each defendant pled not guilty and appellant denied the prior convictions. Trial by jury was waived and the cause was submitted on the transcript of the preliminary hearing and other and additional evidence by both parties. The court found appellant guilty as charged and found both prior convictions to be true.

A fair résumé of the evidence is as follows: Bruce A. Barnes testified that he is the general manager of RCS Engineering Company in Glendora; that connected with their business is a storage yard on Cherry Street, in Paramount, and up until about February 4, 1954, the company had a quantity of valves stored in the yard; about February 9, 1954, Barnes noticed that the four inch valves which had been stored in the yard at Paramount were missing; he noted that a number of boards had been knocked off the back of the building; he then called the owner of the building and the sheriff's office; there was a day-time watchman at the yard, but none at night; the next time he saw the valves was when he saw twelve of them at the Long Beach Pipe and Supply Company in Long Beach; the valves were first stored at the yard on January 17, 1954, at which time the building was in good repair with reference to any missing boards; the valves in question were a special type, brass mounted, expensive and infrequently used in this country; the manufacturer's name of the valves is "Crane Valve, 4-inch, brass mounted screw valve"; the operators of a ranch at Los Alamitos, known as the Vessels Ranch, had specially ordered a number of these valves from the manufacturer, Chicago Crane Company, to be used in an installation at the ranch; however, it was afterwards determined to install a different sprinkler system and aluminum valves; the ranch operators bought the sprinkler system and aluminum valves from the RCS Engineering Company, and that company took the Crane valves in trade; there were fifty-three of the valves taken in trade, and forty-one of them were at the Paramount yard, each being worth about $42 on the wholesale market; the valve which was in evidence in court was identified as being the same as the ones in storage, excepting that the manufacturer's identification tag had been removed. The valves were not usually sold in a group. The brass-mounted screw is a distinguishing feature of the valve and no one else has them in Southern California. Barnes did not know either of the defendants.

Harry M. Levin testified that he is with the Long Beach Steel and Pipe Company and that he knows Gray and has had many transactions with him; that on February 9, 1954, he bought twelve valves from Gray for $121, and at the time of this sale, Gray told him that he got the valves in a trade for an engine; that he made a sales ticket and junk dealer's report (including the license number of the seller's car) to the police. He identified the sales ticket and the police report as the ones which Gray had signed at the time of the sale.

Edward W. Klinglesmith, a deputy sheriff of the county of Los Angeles, testified that he spoke to Gray about the valves; that he asked Gray if he had been in Long Beach on February 9, 1954, and Gray replied that he had not; Gray further stated that his Chevrolet automobile had not been in the area either, and that he had not sold any valves to Levin on February 9, 1954; Gray denied signing the "buy form" and stated that "he did not know what Levin was trying to pull"; Gray further stated that he had not seen any valves of that particular type. Klinglesmith took a handwriting exemplar from Gray.

John Norris, a deputy sheriff of Los Angeles county, testified that he spoke to Gray on February 18, 1954, and Gray stated to

him that the grey colored 1939 Chevrolet automobile behind the house was his car and that he was a junk dealer; that he had not sold any four-inch valves in Long Beach; that he had not even been in Long Beach within the last month, and had not sold anything to the Long Beach Steel and Pipe Company and he further denied that the signature on the "buy slip" was his. Norris investigated at the scene of the theft and noticed the missing boards and trampled grass outside the building and stated that it appeared to him as if heavy objects had been drawn through the grass.

It was stipulated that if Frank McCoy were to be called that he would testify that Gray had tried to sell him four-inch valves such as the ones Gray had sold to Levin for $14 per valve, and that the valves that Gray had tried to sell to him appeared to have grass stains on them. It was also then stipulated that the handwriting on the ticket and the "buy forms" is that of Gray.

Frank R. Perry testified that he is the assistant manager of the Los Angeles Branch of the Crane Company; that he is familiar with valves such as the ones Gray sold to Levin. That such valves are used in the petroleum business and that they had not sold as many as twelve such valves out of stock in the last six months.

John L. Harris qualified as a questioned documents examiner and stated that in his opinion the endorsement on the check which Gray received from Levin in payment of the valves was written by Gray.

John W. Cays, the chief clerk of the local branch of the Crane Company, testified that he was familiar with the stock of the company and that the valve in court had the customary factory paint job on it.

Fred H. Fowler, the Division Merchandising Supervisor with the National Supply Company, testified that he has the agency for the sale of Crane valves in the Torrance district; that the paint on the valves sold by Gray to Levin appeared to be a regular factory finish and that if the valve had been used the "loose gland" would have to be tightened to prevent leakage.

Edmund L. Moore, a salesman of Grinnell Company, which sells pipe valves, testified that he sold fifty-four four-inch Crane valves to the operators of the Vessel Ranch and that the valve in court had a factory paint job.

H. Blaine Weaver was called by the defendant and testified that he had sold scrap and junk valves to the defendant; that he was not sure that there were any Crane valves in what he sold; that the valves he did sell were junk, otherwise he would not have sold them.

Raymond E. Pickering was also called by the defendant and testified in substance that his company gathers salvage and that he had known of four-inch Crane valves in the junk which he had disposed of.

Gray testified in his own behalf and admitted the signature on the "buy slip" which Levin had made out in connection with the sale. He stated that he was in the junk business and that the valves he sold to Levin had been secured at the Pomona Laundry and that they had been reconditioned and polished and he had sold them as new valves. He then admitted the two prior felony convictions in Texas. He further stated that he had sandblasted the valves sold to Levin.

Ralph Simonds, a laboratory technician of the Long Beach Police Department, testified on rebuttal that he was familiar with machinery operations and that the valve in court appeared to be new and that he found no evidence of sandblasting thereon.

Appellant contends that the trial court's judgment of guilty was contrary to the weight of the evidence. It was appropriately stated in People v. Newland, 15 Cal.2d 678, at page 681, 104 P.2d 778, at page 779: "* * * The court on appeal 'will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. For it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground' of insufficiency of the evidence, 'it must be made clearly

to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below.' "

We are of the opinion that the facts and circumstances of this case are clearly sufficient to support the trial court's conclusions.

The judgment and the order denying the motion for a new trial are, and each of them is affirmed.

WHITE, P. J., and DORAN, J., concur.



140 Cal.App.2d 399

Maxine B. DOW, as Administratrix With the Will Annexed of Edgar Laurence Dow, Deceased, and Maxine B. Dow, Individually, Petitioner,

v.

SUPERIOR COURT OF the State of CALIFORNIA, In and for the CITY AND COUNTY OF SAN FRANCISCO, Respondent.

No. 16939.

District Court of Appeal, First District, Division 1, California.

April 2, 1956.

As Modified on Denial of Rehearing May 2, 1956.

Hearing Denied May 29, 1956.

Prohibition proceeding by administratrix to restrain the Superior Court from bringing contempt proceedings against administratrix to enforce its order of distribution of testator's estate. The District Court of Appeal, Fred B. Wood, J., held that where administratrix's daughter appealed from certain portions of an order directing administratrix to distribute certain assets of testator's estate, the appeal stayed the portion of the order to which it applied, and the Probate Court was without jurisdiction to proceed by contempt proceedings to enforce the provisions of its order thus stayed.

Alternative writ discharged; a peremptory writ of prohibition issued to restrain enforcement of certain provisions of order described and limited in opinion.

1. Appeal and Error ⇐805

Rule which provides that on appeal from the superior court at any time before filing of the record in reviewing court appellant may file in the office of the clerk of the superior court a written abandonment of the appeal authorizes abandonment in whole or in part of an appeal, if in the case of abandonment of the appeal in part the resultant delimited appeal is from severable portions of the judgment. West's Ann. Rules on Appeal, rule 19.

2. Executors and Administrators ⇐314(12)

Where administratrix' daughter filed a notice of appeal from the whole of a decree of distribution, and later filed a notice withdrawing and abandoning her appeal from portions directing payment of the administratrix and her attorneys, payment of certain costs by administratrix personally and a distribution to administratrix' daughter, leaving subject to appeal, portions settling a third and fourth account filed by administratrix and direction to file a supplemental account, her delimited appeal was proper. West's Ann.Rules on Appeal, rule 19.

3. Executors and Administrators ⇐314(12)

Where superior court entered a decree of distribution, and an appeal was taken from certain portions of such decree, superior court had jurisdiction to take such steps and proceedings as might be appropriate to the enforcement and carrying out of the unappealed portions of the decree.

4. Executors and Administrators ⇐314(12)

Where administratrix' daughter appealed from a decree of distribution but subsequently abandoned appeal from certain portions including portion directing distribution to her of one-half of residue of estate and then petitioned probate court for an order directing administratrix to distribute certain stock in the estate to her, court, upon making findings that estate was in a condition for distribution of such stock

had jurisdiction to make an order directing administratrix to make distribution thereof.

5. Executors and Administrators ⇐314(12)

Where superior court entered an order directing administratrix to make a partial distribution and to pay certain amounts awarded in a decree of distribution, such order was appealable as an order not merely clarifying or repetitive of decree of distribution, but as an order directing or allowing the payment of a debt, claim, legacy or attorney's fee. West's Ann.Prob. Code, § 1240.

6. Executors and Administrators ⇐314(12)

Where superior court entered an order directing administratrix to make certain payments in accordance with a final decree of distribution, and such order was filed on September 8, and administratrix filed a notice of appeal from the order on September 13, and an order to show cause why the administratrix should not be adjudged in contempt of court for failing to carry out the order of September 7 was not made until September 20, order of September 7 was not merely an initial step in a contempt proceeding and therefore was an appealable order. West's Ann.Code Civ. Proc. § 1222; West's Ann.Prob.Code, § 1240.

7. Executors and Administrators ⇐314(12)

Where administratrix' daughter appealed from certain portions of an order directing administratrix to distribute certain assets of testator's estate, the appeal stayed the portion of the order to which it applied, and the probate court was without jurisdiction to proceed by contempt proceedings to enforce the provisions of its order thus stayed. West's Ann.Prob.Code, § 1240; West's Ann.Code Civ.Proc. § 946.

William A. White, Hutchinson & Quattrin, San Francisco, for Maxine Patricia Hutchinson.

Erskine, Erskine & Tulley, San Francisco, for petitioner, Maxine B. Dow, individually.

J. Oscar Goldstein, P. M. Barceloux, Burton J. Goldstein, San Francisco, for petitioner, Maxine B. Dow, as administratrix.

FRED B. WOOD, Justice.

In this proceeding brought by Maxine B. Dow, individually and as administratrix, to restrain the superior court from taking certain steps and proceedings in the administration of the estate, it seems desirable to narrate certain events in chronological order before stating and discussing the issues.

September 18, 1953, the other division of this court rendered its decision directing the superior court to enter its order (1) terminating the widow's family allowance retroactively as of the date upon which a motion therefor had been made, (2) directing the administratrix to sell sufficient of the assets of the estate to pay all claims and costs of administration within a period of six months from the date of the remittitur, and (3) that, in default thereof, the administratrix be removed from office and another administrator be appointed to close the estate. Estate of Dow, 120 Cal.App.2d 296, 300, 260 P.2d 970.

Three months after the filing of the remittitur, the administratrix filed her fourth and final account and petition for distribution. Maxine Patricia Hutchinson, daughter of the testator, filed objections to the account and alleged that her mother, Maxine B. Dow (widow and administratrix) was entitled to no share in the estate.

A decree was filed February 2, 1955, which among other things settled the accounts and ordered distribution of the assets. On the same day, the daughter filed notice of appeal from the whole of the decree.

March 8, 1955, the daughter filed a notice entitled "amendment and supplementation of notice of appeal and limitation, withdrawal and abandonment of designations of appeal heretofore taken * * *" Our examination of this document convinces us that it may and properly should be viewed as an abandonment of the appeal as to certain designated portions of the decree, thus limiting the appeal to the remaining portions of the decree. This the appellant had a right to do. Rule 19 of the Rules on Appeal from the superior court declares that at "any time before the filing of the record in the reviewing court, the appellant may file in the office of the clerk of the

superior court a written abandonment of the appeal * * *."[1] The record had not yet been filed in the reviewing court.

[1] We interpret the quoted portion of the rule as authorizing abandonment in whole or in part, if in the latter case the resultant delimited appeal is from severable portions of the judgment. Such an intendment is in harmony with the spirit and purpose of the rules and in furtherance of justice and the efficient administration of justice. It seems right and proper to encourage an appellant, when he finds that his original notice is broader in scope than need be, to relinquish suitable portions thereof and thus at an early stage of the proceeding narrow the issues which the respondent must prepare to meet and the reviewing court to consider. In many such cases it should be possible thereby greatly to reduce the bulk and cost of the record upon appeal. Then, too, there is the precedent, by analogy, of partial abandonment (expressly or by conduct) after the record reaches the viewing court. We refer to such cases as Estate of Hinde, 200 Cal. 710, 715–716, 254 P. 561, 564, in which an appeal from one of the orders involved was deemed abandoned by the appellants in view of a statement in their brief that they were "not here urging reversible error" in respect to that order; Bellon v. Silver Gate Theatres, Inc., 4 Cal.2d 1, 17, 47 P.2d 462, in which appellant's failure in his briefs to discuss the issues as to three of the four respondents was deemed an abandonment as to those three; and Heaton v. Justice's Court, etc., 19 Cal.App.2d 118, 123, 64 P.2d 1004, in which the notice of appeal specified the judgment and certain orders made after judgment, and the court held that the appellant abandoned his appeal from the orders by discussing in his brief solely the issues involved in his appeal from the judgment.

We are prompted to add that the very existence of this principle and this practice of recognizing partial as well as total abandonment of an appeal after it reaches the reviewing court (long antedating § 954a of the code and Rule 19 of the rules) is further persuasive of the view that the word "abandonment" was used in Rule 19 as including abandonment of any severable part of an appeal.

The instrument by which the partial abandonment was effected in this case is somewhat complex in its wording but no more so, apparently, than was required to designate with reasonable precision those portions of the judgment in respect to which the appeal was being abandoned. We find that the instrument makes the intended designations with reasonable certainty; particularly in view of that provision of Rule 1 of the Rules on Appeal which declares that a "notice of appeal shall be liberally construed in favor of its sufficiency", a principle developed and applied prior to the adoption of Rule No. 1. Estate of Smead, 215 Cal. 439, 10 P.2d 462. This principle was similarly applied quite recently by this court in Verdier v. Verdier, 118 Cal.App.2d 279, 283, 257 P.2d 723.

It is observable, too, that the filing of the modifying document within the time limited for the filing of an original notice of appeal might serve as a basis for viewing the modifications as permissible amendments of the scope of the appeal as originally noticed.

In ascertaining whether the appeal as thus delimited is from severable portions of the decree, we are guided by the test furnished by our Supreme Court in American Enterprise, Inc., v. Van Winkle, 39 Cal.2d 210, 217, 246 P.2d 935, 938: "The test of whether a portion of a judgment appealed from is so interwoven with its other provisions as to preclude an independent examination of the part challenged by the appellant is whether the matters or issues embraced therein are the same as, or inter-dependent upon, the matters or issues which have not been attacked. * * * '(I)n order to be severable, and therefore appealable, any determination of the issues

1. This provision closely follows a like provision of section 954a which was added to the Code of Civil Procedure in 1935 and repealed in 1945.

No judicial decision discussing the question whether "abandonment," as used in the code section or in the rule, includes abandonment in part, has come to our attention.

so settled by the judgment * * * must not affect the determination of the remaining issues whether such judgment on appeal is reversed or affirmed * * *. Perhaps another way of saying it would be that the judgment is severable when the original determination of those issues by the trial court and reflected in the judgment or any determination which could be made as the result of an appeal cannot affect the determination of the remaining issues of the suit * * *.' Attorney General v. Pomeroy, 93 Utah 426, 73 P.2d 1277, 1294, 114 A.L.R. 726."

Applying this test in Gudelj v. Gudelj, 41 Cal.2d 202, at page 215, 259 P.2d 656, at page 664, the Supreme Court concluded that, under the circumstances of the case, a portion of the judgment which provided for the division of the furniture of the parties was severable from the portion which disposed of the real property, the court saying in part, "it does not appear that any question concerning the furniture was 'the same as, or interdependent upon' the order fixing the interests of the parties in the home."

[2] Similarly in the instant case, we find that the delimited appeal is from portions of the decree that do not involve any question that is "the same as, or interdependent upon" any question involved in other portions of the decree and, therefore, are severable.

The portions as to which the appeal was abandoned are these: (1) Orders fixing and directing payment of compensation of various persons for services severally rendered to the estate (leaving, subject to the appeal, orders fixing and directing payment of compensation of the administratrix and certain of her attorneys); (2) Orders directing Maxine Dow personally, not as administratrix, to pay Maxine Hutchinson's costs of appeal in Estate of Dow, 120 Cal. App.2d 296, 260 P.2d 970, and to refund $262.55 to the estate as directed in 120 Cal. App.2d 296, 260 P.2d 970 (leaving, subject to the appeal, orders fixing the amount due upon and authorizing payment of a judgment Maxine Dow had recovered against the estate, and fixing the amount and directing payment of a claim of Maxine Dow as reimbursement for moneys expended on behalf of the estate); (3) Orders declaring that Gerald H. Dow and Edgar L. Dow, Jr., are not entitled to inherit; (4) Order awarding and distributing to Maxine Hutchinson one-half of the residue of the estate after payment of all obligations, costs, and attorney's fees (leaving, subject to the appeal, an award and distribution to Maxine Dow of a like one-half interest in the residue, and an order determining the amount of principal of and the rate of accruing interest upon a bequest to Maxine Dow and authorizing its payment); (5) Order directing the administratrix to withhold $100 for closing expenses, and moneys for taxes that might accrue, one-half of the unexpended balance thereof to go to Maxine Hutchinson (leaving, subject to the appeal, a direction that the other half of the unexpended balance go to Maxine Dow). This left, also subject to the appeal, the remaining features of the orders settling the third and fourth accounts, and an order directing the administratrix to file a supplemental account.

We entertain no doubt on the question of severability. For example, the amount of fees earned by and awarded to one attorney has no bearing upon those earned by and awarded to another attorney in this particular case; the bequest to Maxine Dow stands or falls by itself; her judgment against the estate is a debt that is quite separate and distinct from all other claims; and her commissions and the amount thereof stand upon their own footing. This is subject, of course, to the financial condition of the estate. The decree valued the estate at $225,106.07, several times the aggregate amount of all obligations, costs and fees, including the bequest, and directed distribution only of the residue remaining after the payment of all obligations, costs and fees.

[3] It is apparent that the respondent court has *jurisdiction* to take such steps and proceedings as may be appropriate to the enforcement and carrying out of the unappealed portions of the decree.

This brings us to the order of September 7, 1955, which petitioner herein claims was made without jurisdiction or in excess of jurisdiction. Upon petition of Maxine Hutchinson and after a hearing the re-

spondent court made certain findings and ordered Maxine Dow, forthwith and in all events on or before September 17, 1955: (1) as administratrix, (a) to pay to the persons named in the order the amounts set opposite their names [compensation for professional services rendered to the estate; each in the amount of the award, except that as to one person the amount was increased by $350 by way of compromise and dismissal of his appeal and as to another a reduction in the amount of $750 in response to his wish for prompt payment], aggregating $10,300; (b) to convey to Maxine Hutchinson, as devisee, her undivided one-half interest in the estate's undivided interest in certain real property known as the Mayflower Mine; (c) to deliver to Maxine Hutchinson 2,200 shares of the stock of River Farms Company, from the 4,758.5 shares held by the estate [partial distribution of the distributee's one-half interest in all the shares awarded by the decree]; and (2) personally, not as administratrix, (a) to pay Maxine Hutchinson's costs on appeal in Estate of Dow, 120 Cal.App.2d 296, 260 P.2d 970, and (b) to refund to the estate the money which she had paid out of estate funds in the appeal in 120 Cal.App.2d 296, 260 P.2d 970. Each of these directions to pay, convey or deliver pertained to an order or award which was no longer subject to appeal and had become final.

The court also, in this order of September 7th, deferred, at the request of the administratrix, the settlement of her supplemental account, and reserved jurisdiction and rulings in respect to all other issues and questions presented by the pleadings and the evidence, without prejudice for future determination.

As facts, the court in this order found all of the allegations of Maxine Hutchinson's petition true [2] except as to the amount of the estate's cash on hand and in bank, which, as of the date of the order, the court found was $20,805.03.

By this reference to the allegations of the petition, the court found the following significant facts among others: The shares of stock of River Farms Company bear dividends of $3 per share per year and are readily saleable at not less than $45 per share; the sale of 350 shares will produce a net sales price of $15,750 (the court in effect held in reserve for such a contingency 358.5 shares by distributing only 2,200 to the daughter); all taxes accruing since the decree have been paid; there are no other accrued or accruing claims or demands against the estate by way of tax liability or otherwise; and the estate is in a condition to distribute to Maxine Hutchinson said 2,200 shares of stock and one-half of the remaining assets, other than cash, all actual and possible contingencies notwithstanding.

[4] We must accept these findings at face value. We observe nothing in the record that challenges their soundness. This is not an appeal and the record herein does not include the evidence upon which the findings were based.* It follows that

2. In view of the reservation of jurisdiction and rulings in respect to "other issues," this finding should perhaps be interpreted as limited to all allegations that were relevant to the things which the court in its order of September directed to be done. The reservation of "rulings" on other issues well may have been intended by the court to include rulings in the form of findings of fact as well as conclusions of law and orders based thereon that might later be made.

It is of interest to note that in her reply to the return made by the real parties in interest, the petitioner states that on October 19, 1955, the estate had cash in hand in the sum of $23,463.52, a marked increase over the $20,805.03 it had on September 7, 1955.

* There is appended to petitioner Dow's Reply to Real Party in Interest Hutchinson's Return (as Exhibit B) a purported transcript of the hearing which culminated in the order of September 7, 1955.

Even if that be a complete and accurate transcript it does not furnish us the evidence except in fragmentary fashion. Each party called upon the probate judge to take judicial notice of various and sundry proceedings theretofore had in the Estate of Dow, including evidence adduced, documents filed and orders made therein. We have, in the instant proceeding, no such knowledge or record of those matters (judicially noticed by the trial judge) as would enable us to undertake to determine whether they furnish substantial support for the findings of fact upon which the order of September 7, 1955, is based.

the court had jurisdiction to make the order it did make on September 7, 1955.

Next in sequence is an order of September 20, 1955, to show cause why the petitioner herein should not be adjudged in contempt of court for failing to carry out the order of September 7th. Petitioner, who has appealed from the latter, claims the appeal is effective, operates as a stay, and therefore for the time being deprives the respondent court of jurisdiction to enforce the order appealed from; wherefore, she asks this court by writ of prohibition to restrain the respondent court from taking any further steps in the contempt proceeding, during the pending of her appeal. We are persuaded that those provisions of the order of September 7, 1955, which direct the payment of money or distribute property or rights in property are appealable under those clauses of section 1240 of the Probate Code which respectively authorize an appeal from an order "directing an executor or administrator", "directing or allowing the payment of a debt, claim, legacy or attorney's fee," or "distributing property." The real party in interest claims the order of September 7th was not appealable upon the theory that it merely implemented the decree and, therefore, had no such independent force of its own as to qualify as an "order" within the meaning of that term as used in section 1240.

Without passing upon the conclusion which she would have us draw from that premise, we observe that the September 7 order was not merely clarifying or repetitive. A serious question concerning the appealability of any portion of the decree of February 2, 1955, had been presented by the manner in which the real party in interest had taken her appeal therefrom. Her appeal from the whole of the decree, followed by partial abandonment of certain portions of the appeal presented to the administratrix, the legatees and other distributees and the trial court a legal question of first impression in this state. In its essence, therefore, the order of September 7 was an order "instructing" and "directing" the administratrix concerning her present right and duty to make the payments and distribute the property as declared and prescribed in the order of September 7. It should not matter greatly that the petition which initiated the proceeding that culminated in this order was signed by a legatee and devisee rather than by the administratrix as provided in section 588 of the Probate Code.

It is true that our Supreme Court recently said that "it is clear that the change in section 1240 [making appealable an order "instructing or directing an executor or an administrator"] was enacted to accommodate orders made pursuant to section 588." In re Estate of Schechtman, 45 Cal.2d 50, 55, 286 P.2d 345, 348. That statement, we think, should be read in the light of the type of nonappealable order which the court was then considering, an order made pursuant to the discovery provisions of sections 613–615 of the Probate Code. We do not think the court by the statement quoted intended to hold unappealable an instructional or directional order of the type under consideration in the instant case.

We say this because of the rulings made in the following cases: An order directing an administrator to withhold the distributive shares of nonresident heirs (issued after the rendition of the decree of distribution) was deemed appealable as an order "instructing or directing an executor or administrator", in Howaldt v. Superior Court, 18 Cal.2d 114, 116, 114 P.2d 333, 334. (The reported decision does not show that the order resulted from a section 588 proceeding.) The Howaldt case was followed in Re Estate of Mitchell, 20 Cal.2d 48, 50, 123 P.2d 503, 504, which held appealable (as "an order instructing or directing an executor or administrator") a direction that the executors pay a certain sum to a realtor by way of commission, a direction contained in an order confirming the sale of the property involved. Similarly, in Re Estate of Hart, 119 Cal.App.2d 310, 312–313, 319, 259 P.2d 703, 704 (hearing by Supreme Court denied), an order was deemed appealable (as "an order refusing to direct an executor") which was made in a contest of will proceeding and in the form of a denial of contestant's motion for an order that his costs be paid out of the estate (hence, not a § 588 proceed-

ing). In Re Estate of Lucas, 23 Cal.2d 454, at page 463, 144 P.2d 340, at page 345, it was said that an order to approve a compromise made pursuant to section 718.5, Probate Code, was "appealable either as an order 'instructing or directing an executor or administrator' or as one 'directing or allowing the payment of a debt' or claim"; cited and followed in Re Estate of Stevens, 27 Cal.2d 108, 113, 162 P.2d 918, also in Strudthoff v. Yates, 28 Cal.2d 602, 609, 614, 170 P.2d 873, and in Re Estate of Green, 138 Cal.App.2d 211, 292 P.2d 651, each in relation to a proceeding instituted by a petition filed under section 718.5.

In addition, the order of September 7 differed in the following respects from the decree of distribution: (1) the amount of one attorney's fee was increased by way of compromise for the dismissal of his appeal and the amount of another attorney's fee was reduced in response to his desire for prompter payment; and (2) distribution to the real party in interest was ordered in a quantity less than as awarded by the decree and without waiting for payment of all obligations, costs and fees and the filing and approval of the supplemental account required by the decree. These portions of the order certainly qualified as appealable orders "directing or allowing the payment of a debt, claim, legacy or attorney's fee" and an order "distributing property," respectively § 1240.

[5] Furthermore, even as to the fees and commissions which the order of September 7 directed the administratrix to pay in the precise amounts awarded by the decree of distribution, In re Smith's Estate, 117 Cal. 505, 49 P. 456, indicates that the direction therefor is appealable as a direction for the "payment of a debt, claim, legacy or attorney's fee." In that case an adjudication was made December 24, 1895, that the claim of one Thorne was a preferred claim and that it be paid in due course of administration. From that order no appeal was taken. Later, on April 24, 1896, an order was made directing the administrator to pay the Thorne claim. An appeal was taken from the April order which recited that the administrator had money on hand sufficient to pay the claim, that the estate was insolvent, and directed that the claim be paid by the administrator "forthwith." The administrator appealed from the April order and Thorne moved to dismiss it as an appeal from a nonappealable order. In denying the motion to dismiss, the court said "The order, being for the payment of a debt or claim, is expressly made appealable by subdivision 3 of section 963 of the Code of Civil Procedure. Whether or not the order of December 24, 1895, could or should have been appealed from, is a question not before us." 117 Cal. at page 507, 49 P. at page 457.

Under the circumstances, the rationale of In re Guardianship of Morro, 36 Cal.App. 2d 623, 98 P.2d 552, does not apply. It held that a subsequent order which in effect "merely clarified the previous order by supplying the name to be placed in the deed as grantee and directing its proper delivery", 36 Cal.App.2d at page 628, 98 P.2d at page 555, was not appealable. Ours is a directing order, not a mere clarification of a directing order.

[6] The real party in interest further claims that the order of September 7, 1955, is nonappealable for the additional reason that it is, assertedly, the initial step in a contempt proceeding and as such should be treated as a mere intermediate order; added, is the fact that under section 1222, Code of Civil Procedure, a contempt order is "final and conclusive", hence nonappealable. One of the cases upon which the real party in interest principally relies is Gue v. Dennis, 28 Cal.2d 616, 170 P.2d 887. The appellant had been served with subpoenas pursuant to the provisions of sections 92 and 93 of the Labor Code, but refused to respond thereto. The Labor Commissioner brought the refusal to the attention of the superior court and requested an order directing the appellant "to appear and show cause why he should not be punished for contempt in failing to comply with" the subpoenas, 28 Cal.2d at page 617, 170 P.2d at page 887. Based upon the Labor Commissioner's affidavit, "the superior court made an order directing appellant to show cause why he should not be required to comply with the subpoenas. Following a hearing, appellant was ordered to obey

the subpoenas duces tecum within a prescribed period of time 'or be adjudged in contempt' ", 28 Cal.2d at page 617, 170 P.2d at page 887, from which order he appealed. The Labor Commissioner moved to dismiss the appeal as having been taken from a nonappealable order. In granting the motion the court said: "Section 93 of the Labor Code has as its objective an adjudication in contempt if noncompliance persists. This being so, an order directing compliance, which expressly contemplates a further order, is intermediate in character, and any review thereof should await a subsequent adjudication in contempt. * * * In the event appellant is adjudged in contempt, review may be had either by certiorari or habeas corpus, whichever is appropriate." 28 Cal.2d at pages 617–618, 170 P.2d at page 887. No such situation obtained in the instant case. The petition which initiated the proceeding which culminated in the order of September 7, 1955, neither expressly nor by necessary implication indicates that a contempt proceeding is in progress. Insofar as the subject matter of the order of September 7 is concerned it was a petition which in considerable detail summarized the significant features of the decree of final distribution, alleged that the petitioner had appealed from certain portions of the decree, averred that those portions were separable and had become final, stated facts tending to show that distribution could be made to the petitioner and that certain fees and commissions could be paid to the attorneys and others without prejudice to ultimate payment and satisfaction of all other obligations of the estate in case the petitioner should lose all phases of her appeal, and prayed that the court direct the administratrix to forthwith make the payments and convey the property interests which the trial court in its order of September 7 did direct. The order dated September 7 was filed September 8 and on September 13, 1955, the administratrix filed a notice of appeal from the order. It was not until September 20 that the proceeding under discussion took on the aspect of a contempt proceeding. It was on September 20 that the real party in interest filed a "supplementation of" the petition which she had originally filed. In response to this supplemental petition and on September 20 an order to show cause why the administratrix should not be adjudged in contempt of court for failing to carry out the order of September 7 was made.

We conclude, therefore, that the order of September 7 was appealable.

[7] This appeal stays the portions of the order of September 7th to which it applies. See Code of Civil Procedure, § 946; Estate of Waters, 181 Cal. 584, 585, 185 P. 951; Lerner v. Superior Court, 38 Cal.2d 676, 680, 242 P.2d 321.

The probate court is without jurisdiction to proceed with the enforcement of those provisions of the order of September 7th which are thus stayed. See Sacks v. Superior Court, 31 Cal.2d 537, 540, 190 P.2d 602, and cases cited.

The writ will not restrain the respondent court from considering and acting upon other matters mentioned or referred to in the order of September 7th, such as "other issues and questions presented by the pleadings * * * and the evidence received thereon," jurisdiction and rulings concerning which the court reserved "without prejudice, for further determination," such, for example, as an application for removal of the administratrix and the appointment of a new administrator. See Estate of Buchman, 132 Cal.App.2d 81, 106, 281 P.2d 608, and cases collected in 3 Cal. Jur. 677–679, § 190.

Accordingly, a peremptory writ of prohibition should issue restraining the respondent court from taking steps and proceedings (embraced within the order of September 20th) for the enforcement of those provisions only of the order of September 7th which have been stayed by the appeal.

The real party in interest has, in this proceeding, requested various writs and orders for affirmative relief in matters extraneous to the issues involved herein. Those requests are denied without prejudice to their renewal in appropriate form, independently of this proceeding, should the requester be so advised.

The alternative writ is discharged. Let a peremptory writ of prohibition issue to restrain the enforcement of certain of the provisions of the order of September 7, 1955, as herein described and limited.

PETERS, P. J., and BRAY, J., concur.



140 Cal.App.2d 957

ESTATE of Edgar Laurence DOW, Deceased.

Maxine Patricia HUTCHINSON, Petitioner and Respondent,

v.

Maxine B. DOW, Individually and as Administratrix with the Will Annexed of the Estate of Edgar Laurence Dow, Deceased, Respondents and Appellants.

No. 17057.

District Court of Appeal, First District, Division 1, California.

April 2, 1956.

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Goldstein, Barceloux & Goldstein, San Francisco, for appellant as administratrix.

Erskine, Erskine & Tulley, Morse Erskine, II, San Francisco, for appellant individually.

William A. White, Hutchinson & Quattrin, San Francisco, for respondent.

FRED B. WOOD, Justice.

The appeal herein is from an order of September 7, 1955, which is described in our opinion in Dow v. Superior Court, Cal. App., 297 P.2d 30.

Respondent herein has moved to dismiss the appeal upon the asserted ground that the order in question is nonappealable. We hold that those provisions of the order which direct the payment of money or the distribution of property are appealable for the reasons stated in our opinion in No. 16939.

The motion to dismiss the appeal is denied.

PETERS, P. J., and BRAY, J., concur.



141 Cal.App.2d 561

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Virgil Nelson WEIGHT, Defendant and Appellant.

Cr. 5574.

District Court of Appeal, Second District, Division 1, California.

May 15, 1956.

Defendant was convicted of violating Penal Code Section 288, by sexually molesting his two minor daughters. From a judgment of the Superior Court of Los Angeles County, Aubrey N. Irwin, J., denying defendant probation and sentencing him to state prison after his return to court from state hospital to which he had been committed as a sexual psychopath, he appealed. The District Court of Appeal, Doran, J., held that the Superior Court did not abuse its discretion in denying probation and imposing sentence on ground that offenses were so serious as to require some penalty.

Judgment affirmed.

Criminal Law ⇐982

The Superior Court did not abuse its discretion in denying probation to one convicted of sexually molesting his two minor daughters and sentencing him to state prison, on ground that offenses were so serious as to require some penalty, after his return to court from state hospital to which he had been committed as a sexual

psychopath. West's Ann.Pen.Code, § 288; Welfare and Institutions Code, § 5512.

Grossman & Rosen, Joseph M. Rosen, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., for respondent.

DORAN, Justice.

This is an appeal from the judgment.

As recited in appellant's brief, "Defendant was charged in an information with the violation of Section 288 of the Penal Code in two counts. And after a trial by jury was convicted of both counts.

"Thereafter, the matter was referred to the Probation Department for a report and two psychiatrists were appointed to examine the defendant pursuant to the sexual psycopathy provisions of the Welfare and Institutions Code; that on December 4, 1953, defendant was committed to the Metropolitan State Hospital for the 90 day observation period as a probable sexual psycopath.

"Thereafter, and on February 23, 1954, the defendant was returned to the Superior Court for further proceedings under Section 5512 of the Welfare and Institutions Code and upon the recommendation and report of the Director of the Metropolitan State Hospital the court found the defendant to be a sexual psychopath within the meaning of the Welfare and Institutions Code and ordered him committed to the Metropolitan State Hospital for an indeterminate period.

"Thereafter, and on September 27, 1955, the defendant was returned to court from the State Hospital for further proceedings, and on October 25, 1955, the court ruled that probation was denied and sentenced the defendant to the State Prison for the term prescribed by law."

The victims of the offense were defendant's two daughters, ages 7 and 8 years, respectively.

Quoting from appellant's brief, "This appeal is concerned with an abuse of discretion by the trial court in denying probation to the defendant. Appellant does not contend that the evidence was insufficient to sustain the verdict, nor that there were any errors in the trial of the within cause. For that reason, and for the sake of brevity, appellant does not feel that it is necessary to set forth all of the details as adduced by the evidence contained in the Reporter's Transcript as to the acts constituting the violations with which defendant was charged, but in substance the record discloses that the defendant did sexually molest his two minor daughters, ages 9 and 8."

As recited in respondent's brief, the record reveals that, "On October 25, 1955, a hearing was held on the defendant's application for probation. The court pointed out that it had received and read the clinical report, the original probation report and the supplemental probation report, and stated 'none of which is favorable, it being recommended that probation be denied.' The court further pointed out as reasons for denying probation: 'The charges involved in this proceeding, there being two, were serious, involving children of the ages of 8 and 7. It is the opinion of this court that a period of treatment in the State Hospital for Sexual Psychopaths does not constitute penalty or a complete solution to the problem. As the law provides, and as the staff at Atascadero State Hospital state, probation is recommended only providing the circumstances surrounding the commission of the offense justify such consideration.

" 'It is the opinion of this Court that the offenses for which he was convicted are of such a serious nature that some penalty is required. * * *' ".

In the light of the record it does not appear that the court abused its discretion.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

141 Cal.App.2d 684

William A. ZOELLER, Plaintiff and Appellant,

v.

Steve SCHNEIDER, Defendant and Respondent.

Civ. 21330.

District Court of Appeal, Second District, Division 3, California.

May 21, 1956.

Action for money paid and services allegedly rendered pursuant to written contract between plaintiff and defendant. The Superior Court of Los Angeles County, Ralph K. Pierson, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Vallée, J., held that evidence sustained findings that money represented stock plaintiff purchased in corporation which parties had organized and that services were performed for corporation and not for defendant personally.

Affirmed.

1. Estoppel ⇐52

"Waiver" is intentional relinquishment of known right, or such conduct as warrants inference of relinquishment of such right, and may result from express agreement or be inferred from circumstances indicating intent to waive.

See publication Words and Phrases, for other judicial constructions and definitions of "Waiver".

2. Contracts ⇐278(1)

Where corporation, which was formed by parties pursuant to contract subject to condition that loan from Reconstruction Finance Corporation be obtained, was subsequently unable to obtain loan, and corporation was failure, party had good reason to elect to terminate contract, and his conduct in terminating contract was not breach of contract and did not preclude him from relying on failure to obtain loan as defense to action on contract.

3. Contracts ⇐350(1)

In action for money paid and services allegedly rendered pursuant to written contract between plaintiff and defendant, evidence sustained findings that money represented stock plaintiff purchased in corporation which parties had organized and that services were performed for corporation and not for defendant personally.

Donald Armstrong, Torrance, for appellant.

Clifton A. Hix, San Pedro, and Elizabeth Cochran, Long Beach, for respondent.

VALLÉE, Justice.

Appeal by plaintiff from an adverse judgment in an action for money paid and services allegedly rendered pursuant to a written contract between plaintiff and defendant. Plaintiff contends the findings are not supported by the evidence.

On October 13, 1950 the parties entered into a written contract whereby they agreed to organize a corporation with an authorized capital of $252,500 to be divided 2,500 shares of preferred and 2,500 shares of common stock. Defendant agreed to transfer his plant and equipment to the corporation. Plaintiff agreed to buy 50 shares of preferred for $5,000. It was agreed that the corporation would enter into an employment contract with plaintiff at a salary of $1,000 a month.[1] The corporation was organized and began to function with defendant's plant and equipment; plaintiff paid the corporation the $5,000, and he was

1. Pertinent parts of the contract are: "That Whereas, First Party [defendant] owns and is now operating under the firm name and style Wilmington Forge Works at No. 224 N. Marine Avenue, Wilmington, California, a forge works, and in addition owns two forgeing [sic] hammers in storage at the Belyea Trucking Company yard at 200th Street, and Avalon Boulevard and owns two acres of vacant land on East Road between Figueroa and Main Streets, in the County of Los Angeles, and

"Whereas, First Party is desirous of organizing a California corporation to acquire the assets above described, and to interest said Second Parties in assisting him in conducting said business after it has been acquired by the corporation to be formed, and such Second Parties are interested in being associated in

elected president. Plaintiff performed services which he alleged were performed at the request of defendant and were of the value of $3,500. The suit is to recover from defendant the $5,000 paid to the corporation and $3,500 alleged to be the value of the services.

The court found: 1) on October 13, 1950 the parties entered into the contract; 2) Torrance Forge and Steel, Inc., a corporation, was formed; 3) plaintiff advanced $5,000 to the corporation for his own use and benefit; 4) the $5,000 was used by the corporation and it was not expended or used for the benefit of defendant; 5) plaintiff did not render any services at defendant's request of the value of $3,500 or in any other sum; 6) defendant rescinded the contract, gave notice thereof, and was justified in so doing. Judgment for defendant followed, from which plaintiff appeals.

There was evidence of the following facts: The corporation was organized and began to function. A resolution was adopted by the board of directors for issuance of stock in accord with the contract. A permit was then obtained to issue the stock to plaintiff. He paid the $5,000 to the corporation for the stock. No stock was issued. The money was deposited in the bank account of the corporation. Defendant paid some $4,500 of the expenses of the corporation. Plaintiff performed services for the corporation. There is no evidence that he performed any services for defendant. He received about $1,000 from the corporation for his services. Defendant also performed services for the corporation and received from it about $1,000 for those services. About 2 months after the corporation was organized it was insolvent and plaintiff withdrew $2,529.27 from its bank account, leaving a balance of $4.47. He used the money to pay various obligations of the corporation. Application to the Reconstruction Finance Corporation for a loan had been denied. Defendant then gave plaintiff written notice that he considered himself discharged from all "duties and liabilities" under the contract. The findings are supported by the evidence.

Plaintiff argues that defendant waived the condition that a loan be obtained from the Reconstruction Finance Corporation which was a condition of the contract, because: he participated in the organization of the corporation; while acting as chairman of the meeting of the board of directors he offered to perform his part of the agreement to transfer his assets without making the transfer conditioned upon the obtaining of a loan; and he allowed the new corporation to take over his business. The theory seems to be that defendant breached the contract and that he cannot rely on the failure to obtain a loan as a defense.

[1, 2] Waiver is " 'the intentional relinquishment of a known right or such conduct as warrants an inference of the relinquishment of such right and may result from an express agreement or be inferred from circumstances indicating an intent to waive.' " Panno v. Russo, 82 Cal.App.2d 408, 412, 186 P.2d 452, 454. There was no waiver on the

the management of the business of the corporation when it is organized:—

"2. First Party agrees to transfer and assign to the corporation to be organized, all of the property and assets hereinabove described, in exchange for eight hundred (800) shares of said preferred capital stock and seven hundred fifty-nine (759) shares of said common stock.

"5. Second Parties each agree to purchase from the corporation fifty (50) shares of said preferred stock at follows: Zoeller one of the Second Parties shall pay the sum of $5,000.00 cash in exchange for fifty (50) shares of said preferred stock and McCoy the other Second Party shall give his promissory note in the principal sum of Five Thousand and no/100 Dollars ($5,000.00) for his fifty (50) shares of said preferred stock.

"6. First Party agrees that any corporation organized pursuant to the terms hereof shall enter into an employment contract with Second Parties employing them for a term of One year at salaries of One Thousand Dollars ($1,000.00) per month each. * * *

"9. None of the provisions hereof relative to the issuance of the preferred and common stock of the corporation to be organized shall be operative or binding until a permit of the Corporation Commissioner of the State of California shall first have been obtained. This Agreement is to be subject to obtaining such loan from the Reconstruction Finance Corporation which will be of sufficient amount for the proposed objects of said corporation as set out in this Agreement."

facts. More than 2 months after the corporation began doing business plaintiff withdrew from its bank account the $2,529.67 because he feared the account might be seized. The balance was $4.47 and according to plaintiff's testimony there were bills totaling $6,501.79 that had to be paid. A reasonable time had passed in which defendant could see the venture was unsuccessful. See Kersch v. Taber, 67 Cal.App.2d 499, 154 P.2d 934; 12 Cal.Jur.2d 377, § 160. When defendant knew the corporation would not be able to obtain the loan and that the operation was a failure, he elected to terminate the contract. He had good reason to so act.

[3] The court's findings that the $5,000 was not expended for the use or benefit of defendant and that plaintiff did not render any services for defendant are amply supported. Indeed it is difficult to see how the court could have reached any other conclusion. The $5,000 was paid for stock, not to or for the use or benefit of defendant; and plaintiff's services were performed for the corporation, not for defendant. Plaintiff lost $5,000 and his time; defendant lost at least $6,500 and his time.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.



141 Cal.App.2d 557

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

James William WILKINS and Joseph Grant, Defendants and Appellants.

Cr. 5538.

District Court of Appeal, Second District, Division 1, California.

May 15, 1956.

Rehearing Denied May 28, 1956.

Hearing Denied June 12, 1956.

Prosecution for conspiracy to commit burglary and attempted burglary. The Superior Court, Los Angeles County, Kurtz Kauffman, J., granted plaintiff's motion for new trial on charge of criminal conspiracy to commit burglary and entered judgment of conviction for offense of attempted burglary and defendant appealed from judgment of conviction. The District Court of Appeal, Doran, J., held that the evidence was not sufficient to sustain the conviction.

Reversed.

1. Burglary ⇐41(10)

Evidence was not sufficient to sustain conviction for attempted burglary.

2. Criminal Law ⇐560

Probably ground for suspicion is not sufficient, under doctrine of reasonable doubt, to sustain conviction.

Harold J. Ackerman, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., Joan D. Gross, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Appellant, together with James Wilkins, were charged with criminal conspiracy to commit burglary and also the offense of attempted burglary. A jury found defendants guilty on both counts. A motion for a new trial on Count I, Conspiracy, was granted. Motion for a new trial on Count II, Attempted Burglary, was denied. The appeal is from the judgment on Count II, Attempted Burglary.

The appeal of defendant Wilkins was dismissed under Rule 17(a).

Both defendants were charged with prior convictions of burglary. The priors were admitted.

It is contended on appeal that the evidence is insufficient to support the verdict.

The offense is alleged to have occurred in Altadena, the attempted burglary of a drug store.

As recited in respondent's brief, "Keith L. Morse, employed as a pharmacist by the McIntyre Mariposa Pharmacy, closed the store Friday, April 15, 1955, at about 9:30 p. m. and locked all doors and windows and set the burglar alarm. On returning

the next morning shortly past 8:00 a. m., he noticed that the screen door latch had been pulled completely out the screen door and the hook was missing.

"Alexander R. McIntyre, operator of the McIntyre Pharmacy, left about 8:00 p. m. on April 15. He lived right across the street. At 1:00 a. m. the following morning he returned because he heard about four shots, commotion, and automobiles going up and down the street. He went over to the alley behind the pharmacy and 'saw a sheriff's car going around with flashlights'. The deputy sheriffs called his attention to the screen door that had been pulled out. He noted fresh splinters hanging on the threads of the eye of the latch. He saw the hook itself."

John Davis, a deputy sheriff, testified, as recited in respondent's brief, that "When he first saw Wilkins on the night of the 15th, the latter was driving a car south on Lake Street within a block of the pharmacy with at least 3 persons in it including Wilkins. Davis and his partner, Sgt. Peterson, were parked on Lake Street in Davis' own car. They observed the car approach them from the rear on Lake Street going south, turn east, at which time they started and followed it as it turned north two blocks later. At this time Davis and Peterson turned around and went back up the street, and made a circle of the town and parked on Mariposa, between Lake and El Molino Streets. Shortly thereafter the same 1950 Cadillac, which he had observed Wilkins driving, pulled away from the intersection of Lake and Mariposa. A man walked around the corner and up to the front door of the McIntyre Pharmacy, cupped his eyes in his hands, and peered through the glass into the store. Then he walked down the face of the store to the other door, stopped, hesitated, and kept on walking past them. As he approached the intersection, the same Cadillac pulled up beside him and he got in. Davis couldn't identify this individual and he was referred to as 'John Doe'.

"They started following the Cadillac again, when it parked. Shortly thereafter it moved and they lost it, but saw it again in the same area. They parked their car and took their equipment, including a walkie-talkie radio, and lights, and went through the backyards of a couple of buildings in the block which is north of the location where the pharmacy is located, and came out in the alley behind the McIntyre Drug Store. There was a slight hill across the alley from the pharmacy and a large incinerator nearby. Davis walked down the alley and, on checking both of the back doors of the pharmacy, including the screen door, found them locked and secure. There was some activity in a bakery down the alley.

"He and his partner were seated on the hill across from the pharmacy after they had explored the surrounding locality when Davis saw the same Cadillac. Davis and his partner parked in the area above the alley. They heard two car doors open and two close, an engine stop, and what sounded like a trunk lid open and close, then some mumbling and scuffling of feet leaving the car, heading toward the rear of the pharmacy. From where they were, they could not observe anyone in the alley. Later Davis heard what he believed to be a door 'pop', as though someone had jerked it, and a door close.

"A minute or so later, he heard sounds coming across the alley and two persons climbing the embankment. They crawled right toward him. When they were 5 feet from him, one suddenly exclaimed, 'Gees, look who's here!', and immediately turned and scrambled down off the hill. He recognized them both at this time.

"They shouted for them to stop, and Wilkins stopped at one of the rear doors of the pharmacy. Grant was still running toward the car. The car started up and drove out of the alley without lights. As soon as the car started, Grant stopped. There were shots fired at the car.

"Both Wilkins and Grant were then placed under arrest. Lying in the alley near one of the rear doors of the pharmacy was a bag of tools containing keyhole type saws, a crow bar, two sledge hammers, a couple of chisels, a couple of drift punches, two pairs of canvas gloves, and a brace and bit. These tools were identified as burglar tools by Davis who had worked burglaries

for three years and investigated many. He hadn't seen the bag in the alley before Wilkins and Grant arrived. At this time the screen door that Davis had found secure shortly before was slightly ajar."

"The hill across from the pharmacy", above referred to, was about ten feet high.

The defendants denied any attempt to burglarize the drug store and testified that they went into the alley to urinate.

[1, 2] There was no evidence whatever of guilt. Of course there was probably grounds for suspicion but that, as a matter of law is not sufficient. The doctrine of reasonable doubt is still in effect. In People v. Draper, 69 Cal.App.2d 781, at page 786, 160 P.2d 80, at page 83, on that subject is the following:

"The foregoing evidence points the finger of suspicion at Draper, shows that he had an opportunity to participate in the commission of the crimes and proves that he was not a truthful witness. This is not sufficient to sustain the burden resting on the People of proving him guilty beyond a reasonable doubt for it is the rule here that evidence that merely raises suspicion, no matter how strong, of the guilt of a person charged with a crime is not sufficient to sustain a verdict and judgment against him. (Cases cited.)"

Quoted in People v. Rascon, 128 Cal. App.2d 118, at page 122, 274 P.2d 899.

See People v. Smith, 128 Cal.App.2d 706, 709, 275 P.2d 919.

Cf: People v. Norris, 125 Cal.App.2d 855, 271 P.2d 59; People v. Colletta, 100 Cal.App.2d 1, 222 P.2d 922; People v. Platnick, 71 Cal.App.2d 767, 770, 163 P.2d 766.

Appellant's explanation of the verdict is supported by the record and is correct as a matter of fact and of law. It follows: "Appellant respectfully submits that an analysis of the evidence herein leads to the conclusion that there is evidence that an entry of the pharmacy by the rear door was attempted, but that there is no evidence that appellant was the one who attempted such entry. The best that can be said for the People's case is that there is a suspicion of the same, nothing more. In the light of the failure of the People to prove their case to the extent that the law requires in order to sustain a conviction of guilty, even when examining only the evidence most favorable to the respondent, it may be concluded that the verdict of the jury was based upon an improper consideration of the evidence. Appellant respectfully submits that the prior offense of the defendant in 1948 having been for burglary, the jury gave undue and improper consideration to such factor in a case involving a similar charge."

The judgment is reversed.

WHITE, P. J., and FOURT, J., concur.

Hearing denied; SHENK and SPENCE, JJ., dissenting.



141 Cal.App.2d 612

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Calvin Hudson CAGLE, Defendant and Appellant.

Cr. 5597.

District Court of Appeal, Second District, Division 2, California.

May 16, 1956.

Defendant was convicted of attempted burglary. From a judgment of conviction in the Superior Court, Los Angeles County, Herbert V. Walker, J., the defendant appealed. The District Court of Appeal, Fox, J., held that evidence was sufficient to support conviction.

Judgment affirmed.

1. Criminal Law ⇐1159(2)

Before a conviction may be reversed on ground of insufficiency of evidence, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in court below.

2. Criminal Law ⇐1144(13)

The District Court of Appeal must assume in support of the judgment the existence of every fact which the trial court could have reasonably deduced from the evidence, and then determine whether the facts justified the inference of guilt.

3. Burglary ⇐41(6)

In prosecution for attempted burglary, wherein defendant was identified by witness as individual who cut screen on bedroom of home, and witness identified defendant's dress, in some detail evidence was sufficient to support conviction.

4. Criminal Law ⇐260(11)

Reviewing court is not at liberty to draw inferences from evidence contrary to those drawn by the trial judge.

Harrison M. Dunham, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

FOX, Justice.

Defendant was convicted of attempted burglary. He appeals from the judgment on the sole ground that the evidence is insufficient to sustain his conviction.

While the home of Louis Perrotti, at 4247 Eleventh Avenue, Los Angeles, was unattended on the evening of August 27, 1955, his next door neighbor, Mrs. Betty Gregory, heard a disturbing noise "like a lock being moved or a window * * *" She called out "Louie" thinking Mr. Perrotti had returned home. She did not, however, receive any response. Upon a recurrence of this noise Mrs. Gregory raised the Venetian blind and observed a man about six feet from the Perrotti home. He was about ten feet from her house. He was cutting across the driveway. She watched him all the way out. It was dark, being shortly after 8:00 o'clock. All the lights in the Gregory house were on. Mrs. Gregory did not see his face. He was wearing a sport shirt—"a light shirt with figures in it"—that hung out, and light trousers. Mrs. Gregory called to her sister, Mrs. Koch, who was in the front room. They both followed the man. Mrs. Gregory observed a police car. She told the officers what she had seen. Mrs. Koch continued to follow the man. The police inquired of her, "Which way did he go?" She pointed him out; "he was in the center of the street, in the light." The police brought him back to the Perrotti driveway. Mrs. Gregory identified the man as the person she saw leaving the Perrotti home. Not "more than 10 minutes" elapsed between the time she saw him leaving the Perrotti premises and his return by the police.

A small knife was taken from defendant by the police upon his arrest. Microscopic examination of the blade revealed a series of uniform and parallel scratches similar to those made by screen wire. Some debris was removed from the cutting edge of the blade. That was compared with material taken from the Perrotti screen that had been cut. The materials were similar. A chemical test was also made of the debris to determine whether it had rust in it; the test showed that it had, similar to the debris removed from the screen.

When defendant was apprehended the officers observed that his forearms, his pants, and the tip of one of his shoes had on them what appeared to be white oxide paint. The Perrotti house was painted white with a green trim.

When arrested, defendant told the officer he was supposed to meet his girl friend "down here on West Washington some place." When the officer pointed out that he was quite a distance from Washington Boulevard defendant refused to tell anything more.

Four days after his arrest, Officer Wright questioned defendant. He explained his presence in the neighborhood by relating that he had been drinking with a man he knew at 43d Street and Central Avenue, in Los Angeles; that the friend was too drunk to drive, so defendant started to drive the friend's car back to the latter's home. The friend got mad at the way defendant was driving the car, so defendant got out of the car and left him. Defendant admitted going "between a couple of houses over around 11th Avenue" but insisted he

just went back there to urinate. He said a lady spoke to him while he was there. The officer then asked him, "Well, did you cut a screen back there?" Defendant replied, "You know I can't say that."

Defendant does not question that someone attempted to break into the Perrotti house. His position is that the evidence is insufficient to prove that he is the person who attempted such entry.

[1, 2] It is elementary that before a conviction may be reversed on the ground of the insufficiency of the evidence "it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. [Citation.] We must assume in support of the judgment the existence of every fact which the trial court could have reasonably deduced from the evidence, and then determine whether the facts 'justify the inference of guilt.' [Citation.]" People v. Frankfort, 114 Cal. App.2d 680, 689, 251 P.2d 401, 407.

[3] Applying these principles, the trial court could reasonably find from the evidence that defendant was the person Mrs. Gregory saw on the particular evening only a few feet from the cut screen of the bedroom window of the Perrotti home; that she and her sister, Mrs. Koch, followed him down the street; that Mrs. Gregory informed the police what she had seen; that Mrs. Koch kept defendant in view and pointed him out to the police, resulting in his arrest. Defendant was returned to the Perrotti driveway by the officer where Mrs. Gregory identified him. This all occurred in the space of ten minutes. True, neither of these witnesses saw defendant's face; hence they were not able to describe his features, but Mrs. Gregory described his dress in some detail. Such a description was worthy of credence, particularly in view of the short interval between Mrs. Gregory's disturbance by a noise at the Perrotti house, causing her to observe a stranger in the act of leaving, her pursuit of the defendant, and his immediate apprehension and return to the scene. The debris on the blade of defendant's knife, the scratches on the blade, and the paint on defendant's person and clothing corroborate Mrs. Gregory's identification.

Defendant failed to give a satisfactory explanation of his presence in the neighborhood. He also gave an evasive answer indicating a consciousness of guilt when asked whether he cut the screen.

Considering the evidence in its entirety, and the inferences that reasonably may be drawn therefrom, it cannot be said as a matter of law that the judgment of conviction is lacking in sufficient evidentiary support. See People v. Machen, 3 Cal.App.2d 499, 39 P.2d 893.

[4] Defendant would have us draw inferences contrary to those drawn by the trial judge. A reviewing court is not at liberty to do this. People v. Gould, 111 Cal. App.2d 1, 8, 243 P.2d 809.

The judgment is affirmed.

MOORE, P. J., and ASHBURN, J., concur.



HAYWARD LUMBER & INVESTMENT COMPANY, a corporation, Plaintiff and Appellant,

v.

E. W. BISCAILUZ, American Bonding Company of Baltimore, a corporation, C. G. Traughber, J. D. Brady, John Doe, Richard Roe and Lumbermen's Mutual Casualty Company, a corporation, Defendants,

E. W. Biscailuz, J. D. Brady, American Bonding Company of Baltimore and Lumbermen's Mutual Casualty Company, a corporation, Respondents.*

Civ. 21390.

District Court of Appeal, Second District, Division 1, California.

May 9, 1956.

Hearing Granted July 5, 1956.

Action to recover damages from sheriff, his deputies and their sureties for serv-

* Opinion vacated 306 P.2d 6.

ing notice of release of attachment on garnishee bank. The Superior Court, Los Angeles County, Louis H. Burke, J., rendered judgment for defendants. Plaintiff appealed. The District Court of Appeal, Nourse, J. pro tem, held that notice of release of attachment by sheriff, to garnishee bank, did not release garnishment.

Judgment affirmed.

1. Sheriffs and Constables ⇐87, 118

Where garnishee, after writ of attachment has been served by sheriff, does not pay amount of debt to sheriff, sheriff has no further duty to perform other than to make his return in accordance with provisions of applicable Civil Procedure Code section, and it is not a part of his duties or within his power to release garnishment or to issue any orders to garnishee. West's Ann.Code Civ.Proc. §§ 542, subd. 6, 542b, 553, 554, 555, 558, 559.

2. Sheriffs and Constables ⇐118

Where plaintiff brought action against construction company to recover money judgment for breach of contract and caused writ of attachment to issue against garnishee bank, issuance of notice by sheriff and his deputy to bank of release of attachment pursuant to court order, prior to entry of judgment in favor of plaintiff and after undertaking was filed pending appeal from that order, did not effect a release of the garnishment against the bank, as serving of notice of release of attachment was an intentional act beyond powers of sheriff and consequently such action of sheriff and his deputy did not cause plaintiff any legal injury. West's Ann.Code Civ.Proc. §§ 542, 543, 544, 946.

3. Execution ⇐362
Garnishment ⇐110

Where plaintiff caused writ of attachment to issue against bank after initiation of action to recover damages for breach of contract against corporation to which bank owed money but notice of release of writ of attachment was improperly served on bank prior to entry of judgment for plaintiff in the action, plaintiff could, upon securing judgment against construction corporation and writ of execution upon that judgment, have enforced liability of bank by proceedings supplemental to execution or, if garnishee bank then denied debt, by an action against bank. West's Ann. Code Civ.Proc. §§ 542, 543, 544, 719, 720.

4. Estoppel ⇐97

Where plaintiff caused writ of attachment to issue against bank, which was debtor of defendant corporation against which plaintiff had brought suit for breach of contract, and sheriff served notice of release of writ of attachment pursuant to court order prior to entry of judgment for plaintiff in the action and after undertaking was filed by plaintiff pending appeal from that order to continue attachment in force, plaintiff, in subsequent suit against sheriff and deputies for damages for injury allegedly suffered as result of release of attachment, could not claim an estoppel against sheriff who allegedly admitted he had released garnishment, in view of fact plaintiff was not in privity with garnishee bank and did not itself act in reliance upon notice of release of attachment or change its position because of it. West's Ann.Code Civ.Proc. §§ 542, subd. 6, 543, 544, 946.

Philip T. Lyons, Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondents E. W. Biscailuz and J. D. Brady.

Crider, Tilson, & Ruppe, Donald E. Ruppe, Los Angeles, for respondent American Bonding Co.

Sims & Wallbert, Los Angeles, for respondent Lumbermen's Mutual Cas. Co.

NOURSE, Justice pro tem.

By its complaint in this action plaintiff seeks to recover from the defendant Biscailuz, the Sheriff of the County of Los Angeles, and the defendants Traughber and Brady, as his deputies, and from the sureties upon their respective bonds, an amount which it claims it lost by reason of an alleged breach of duty by the defendant officers acting in their official capacity.

Plaintiff appeals from a judgment in favor of all of the defendants.

There is no dispute as to the facts, which are:

Plaintiff brought an action against Construction Products Corporation to recover a money judgment on account of the breach of a contract by that Corporation. In that action plaintiff caused a writ of attachment to issue; this writ was served by the sheriff upon the Bank of America in accordance with paragraph 6 of section 542 of the Code of Civil Procedure. Upon this garnishment the Bank answered showing that it was indebted to Construction Products Corporation in the sum of $6,858.14.

On June 1, 1951, upon motion made by the defendant Construction Products Corporation, the court ordered that the attachment be released as to all property attached except $2,000 "in bank account with Bank of America * * *" This order was entered in the minutes of the court on June 8, 1951, and on June 11 the plaintiff filed its notice of appeal from that order and also an undertaking on appeal to continue the attachment in force pursuant to the provisions of section 946 of the Code of Civil Procedure.

On June 12 the county clerk issued a certificate in which he stated that the order releasing the attachment had been made on June 1, that notice of the order had been served upon the attorneys for the plaintiff, and that no bond continuing the attachment had been filed. On the same day the defendant Biscailuz, acting through his deputy the defendant Brady, issued an order addressed to the Bank of America purporting to release all moneys held by it and attached by virtue of the writ theretofore served, over and above the sum of $2,000. This order was on a printed form which, by its heading, showed that it issued from the Office of the Sheriff, County of Los Angeles, State of California, Civil Division, and was entitled in the cause and denominated "Order to Release." It did not refer to any order of court releasing the garnishment or directing any action by the sheriff, but stated that the sheriff had released the property in question from the attachment.

Upon the receipt of this notice the Bank of America permitted Construction Products Corporation to withdraw from its account in the bank the sum of $4,858.14, that being all of the money which it had on deposit in excess of the sum of $2,000.

Plaintiff was successful in its appeal from the order discharging the attachment, and that order was, by the judgment of the appellate court, reversed. Thereafter plaintiff prosecuted its action against Construction Products Corporation and secured a judgment against it in the sum of $5,411.86. Upon this judgment it caused a writ of execution to issue, and directed the sheriff to levy this execution upon the Bank of America. This the sheriff did, collecting from the Bank of America the sum of $2,000, from which amount the sheriff deducted his fees and remitted to the plaintiff the sum of $1,982.30. Plaintiff then demanded that the sheriff collect the balance of the judgment from the bank, but was advised by the sheriff that he had, on June 12, 1951, released all funds in excess of those collected upon the execution from the attachment.

Between June 12, 1951, and the entry of the judgment in favor of the plaintiff and against Construction Products Corporation on November 23, 1952, the defendant Construction Products Corporation had been declared a bankrupt and no dividends were paid to its general creditors.

The court made findings of fact substantially in accordance with the facts as we have stated them, and further found that the garnishment had not been released and that the plaintiff had not suffered any damage or injury by reason of any breach of duty by defendant Biscailuz or defendant Brady.

We have come to the conclusion that the act of said defendants in issuing the notice of release of attachment did not effect a release of the garnishment effected by the service of the writ of attachment on the bank, and that therefore the court's findings that the plaintiff was not damaged by that act must be sustained.

The attachment of a debt is effected by serving upon the debtor of the defendant a copy of the writ of attachment; and if

the principal demanded in the writ does not exceed $300, a copy of the complaint in the action from which the writ is issued and, in every case, a notice that the debts owing by him to the defendant are attached in pursuance of the writ. Code Civ.Proc., secs. 542, 543.

Upon being served, the garnishee may either pay to the sheriff the amount of the debt owing by him to the defendant, or, failing so to do, becomes liable to the plaintiff for the amount of that debt until the attachment be discharged or a judgment recovered by the plaintiff be satisfied. Code Civ.Proc., sec. 544.

If the debt is paid by the garnishee to the sheriff, then it becomes the duty of the sheriff to hold the money so paid until the attachment is discharged by lapse of time, Code Civ.Proc., sec. 542b, by order of court, Code Civ.Proc., secs. 554, 555, 558, or by final judgment in favor of the defendant. Code Civ.Proc., sec. 553.

[1] If, however, the garnishee does not pay the amount of the debt to the sheriff, the sheriff has no further duty to perform other than to make his return in accordance with the provisions of section 559, Code of Civil Procedure; it is not a part of his duties or within his power to release a garnishment or to issue any orders to the garnishee, Johnston v. Jones, 78 Cal.App. 84, 248 P. 286; Sunset Realty Co. v. Dadmun, 34 Cal.App.2d Supp. 733, 736, 88 P.2d 947.

[2, 3] The act of the sheriff in issuing the notice to the bank was not an act of misfeasance, nor careless or negligent performance of duty, but an intentional act beyond his powers, and therefore constituted malfeasance. The act being beyond his power, it could not operate to release the attachment, and the bank remained liable to the plaintiff under the provisions of section 544, Code of Civil Procedure. The plaintiff, therefore, upon securing its judgment against Construction Products Corporation and its writ of execution upon that judgment, could have enforced that liability by proceedings supplemental to execution or, if the bank then denied the debt, by an action against the bank. Code Civ.Proc., secs. 719, 720.

Appellant has not cited us any authority contrary to what we have stated as to acts of the sheriff and his deputy not causing him legal injury. It asserts, however, that the defendants by their answers admitted that they did release the attachment, and that therefore the trial court's finding to the contrary cannot be upheld.

Examination of the pleadings shows that each of the answers of the defendants did put in issue, by proper denials of the allegations of the complaint, the fact as to whether the defendants released the garnishment, although they did admit the giving of the notice; they further put in issue the allegations of the complaint that the plaintiff had been damaged. Further than this, a reading of the transcript of the oral proceedings discloses that the case was tried in the lower court upon the theory that this fact was in issue.

[4] Appellant has not directly argued the question of estoppel, but has only intimated that question by its brief, although it did raise the question in the trial court. We have given careful consideration to the matter of estoppel, but have come to the conclusion that plaintiff is not in a position to assert an equitable estoppel. If the bank had been forced to pay the plaintiff the amount that it, acting upon the notice given by the sheriff, had released to Construction Products Corporation, and was here suing the defendants, there might be merit in a claim, by it, that it did not lie within the mouth of the sheriff to deny his power to release the garnishment. The plaintiff is not in privity with the bank, and did not itself act in reliance upon that notice or change its position because of it. It therefore cannot claim an estoppel.

The court in its conclusions of law found that the action was barred by the statute of limitations and barred by the failure of the plaintiff to serve a notice pursuant to the provisions of sections 1981 and 1982 of the Government Code, and that the defendant Biscailuz was not liable because of the provisions of section 1953.6 of the Gov-

ernment Code, which was not enacted until many months after the wrongful act in question here.

While appellant's attacks on these conclusions all seem meritorious, it would serve no purpose for us to discuss and decide them here, inasmuch as we have been forced to the conclusion that the sheriff's wrongful act did not cause damage to the plaintiff.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.



141 Cal.App.2d 604

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Mike Avalos GONZALES, Defendant and Appellant.

Cr. 5513.

District Court of Appeal, Second District, Division 2, California.

May 16, 1956.

Prosecution for illegal possession of narcotics, with prior conviction. Defendant was convicted in the Superior Court, County of Los Angeles, Allen T. Lynch, J., and appealed. The District Court of Appeal, Moore, P. J., held, inter alia, that where testimony that police informant advised officers that accused had heroin in his house was admitted as bearing on the legality of the arrest and search and seizure, and where knowledge as to name of the informant could not have proved accused innocent, and where disclosure of identity of informant might have affected public welfare adversely, trial court properly refused cross-examination of officers as to name of their informant.

Affirmed.

1. Arrest ⇐63(4), 71
Criminal Law ⇐394

Where officers relied upon their informer because they knew and trusted him, their arrest of accused on information that accused was using heroin and actually had the narcotics in his home was lawful, and search was lawful, and evidence obtained in search was admissible in narcotics prosecution. West's Ann.Pen.Code, § 836, subd. 3; West's Ann.Health and Safety Code, § 11500.

2. Arrest ⇐63(4)

Reasonable grounds for justifying an arrest may consist of information obtained from others, and such information is not necessarily such as would be admissible at trial of arrested person on question of his guilt. West's Ann.Pen.Code, § 836, subd. 3.

3. Arrest ⇐63(4)

Weight to be accorded information upon which officer acts in making an arrest for a felony is to be determined by trial court in exercise of a sound discretion. West's Ann.Pen.Code, § 836, subd. 3.

4. Arrest ⇐63(4)

Where officers have lawfully entered a house and find reasonable cause for believing that occupant has committed a felony, they may arrest him without a warrant. West's Ann.Pen.Code, § 836, subd. 3.

5. Witnesses ⇐216

Where evidence that police informant advised officers that accused had heroin in his house was admitted in narcotics prosecution, as bearing on the legality of the arrest and search and seizure, and where knowledge as to name of informant could not have proved accused innocent, and where disclosure of identity of informant might have affected public welfare adversely, trial court properly refused cross-examination of officers as to name of their informant. West's Ann.Code Civ.Proc. § 1881, subd. 5.

6. Arrest ⇐63(4)

To justify an arrest by officer, officer's information must come from reliable source, and officer must act in good faith testifying that he received his information

from a reliable person, and such good faith must pass scrutiny of trial judge. West's Ann.Code Civ.Proc. § 1881, subd. 5; West's Ann.Pen.Code, § 836, subd. 3.

Forno & Umann, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Having been convicted of illegal possession of heroin and marihuana and of having been previously convicted of a violation of section 11500, Health and Safety Code, defendant now seeks a reversal of the judgment on the grounds that (1) his home was illegally searched at the time of his arrest; (2) he was arrested without probable cause and (3) appellant was prejudiced by the court's refusal to require the arresting officer to divulge the identity of the informant whose report was the basis for defendant's arrest.

About seven p. m. of March 9, 1955, the Narcotics Division of the Los Angeles Police Department received a telephone call to the effect that Mike Gonzales was using heroin and actually had the narcotic in his home. The informant had given information on prior occasions to the police and they had confidence in his integrity and reliability. Officer Broadhurst who had received the message accompanied by Officer Lucarelli called on appellant, knocked on the latter's door and asked to see him. When he appeared and identified himself as Gonzales, Broadhurst searched him and removed from his left shirt pocket a green capsule box containing gelatine capsules which were filled with white powder. Appellant freely stated that he had paid $65 for 60 "caps" of heroin and they were for his own use; that no one else in the home knew anything about them; that the outfit in his pocket was his own, as well as the marihuana cigarette in his brother-in-law's gray suit; that he had purchased three of them a short time ago and had forgotten all about that one; that he used about a gram of heroin daily. Four people were present when appellant was searched, but the cigarette was taken from the suit in a different room by Officer Lucarelli alone.

The informant was an operator for the police department; he had wisely advised the officers on previous occasions in narcotic arrests. They had found him reliable. Officer Broadhurst declined to reveal his name, as contrary to public interest.

The evidence adopted by the court is that when the officers, acting upon credible information, knocked at appellant's door, he asked them in. They arrested him, found one vial of heroin on his person. Then they searched the house and found additional narcotics and some instruments.

Since the court believed the officer's testimony that he had received information of appellant's possession of heroin and that he had narcotics in his home, a felony, and that his informant was a responsible person, it held the arrest was legal and the search following was lawful and not violative of the Cahan rule. People v. Cahan, 44 Cal.2d 434, 282 P.2d 905.

[1, 2] The foregoing statement of appellant's arrest and the search of his home readily answer his criticism of the receipt of the evidence obtained by the officers. They relied upon their informer because they knew and trusted him. Hence, the arrest was lawful. Penal Code, sec. 836, subd. 3. Reasonable grounds for justifying an arrest may consist of information obtained from others and such information is not necessarily such as would be admissible at the trial of the arrestee on the question of his guilt. People v. Boyles, 45 Cal.2d 652, 290 P.2d 535.

[3, 4] The weight to be accorded the information upon which the officer acts in making an arrest for a felony is to be determined by the trial court in the exercise of a sound discretion. United States v. Li Fat Tong, 2 Cir., 152 F.2d 650, 652. Where officers have lawfully entered a house and find reasonable cause for believing the occupant has committed a felony, they may arrest him without a warrant. In re Dixon, 41 Cal.2d 756, 761, 264 P.2d 513.

[5, 6] Appellant complains that the trial court prejudiced his cause by refusing to al-

low him to cross-examine the officers as to the name of their informant. There was no error in such ruling. Knowledge of the name of the "operator" who had evidently gained accurate information with reference to appellant's possession of narcotics could not have proved the latter guiltless. The disclosures by the arrest show that the information was correct. Not only would such knowledge have been of no service in an attempt to establish appellant's innocence, but it would have affected the public welfare adversely. If the unnamed "operator" is successful in ferreting out violators of the narcotics laws, he should have the gratitude of the State. If his name is carried on the tongue of every "dope peddler" in the county, he would have only the scorn of the sinful. But the court in refusing appellant the right of such cross-examination was obedient to the statute that a public officer cannot be examined as to official communications made to him in confidence if the public interest would suffer. Code Civ. Proc., sec. 1881, subd. 5. See Fricke's Crim. Evidence, 3rd Edition, p. 314; People v. Hernandez, 115 Cal.App.2d 435, 439, 252 P.2d 75; People v. Gonzales, 136 Cal.App. 2d 437, 288 P.2d 588. In announcing the foregoing rule, we do so with the reservation that the court is now concerned only with a case involving search and seizure. It is not here held that the right of free cross-examination should be denied in any criminal cause in which knowledge of the officer's informant would probably prove the innocence of the accused. See Scher v. United States, 305 U.S. 251, 254, 59 S.Ct. 174, 83 L.Ed. 151; Annotated at 83 L.Ed. page 155; also, annotation to United States v. Ragen, 95 L.Ed. at 431; VIII Wigmore on Evidence (3rd Ed.) sec. 2374, page 751. Suppressing the identity of an undercover operator or of a "friend to the law" who has ventured to assist the prosecution by disclosing information as to where crime has been, or is about to be committed is a benefit to the State. But such benefit must not be extended to such a degree as to multiply injustices. It is not just any "tip" upon which an officer may act. See People v. Thymiakas, 140 Cal.App.2d 940, 296 P. 2d 4. The officer's information must have come from a *reliable* source and the officer must act in good faith in testifying that he had received his information from a reliable person, and such good faith must pass the scrutiny of the trial judge. No abuse of discretion having been shown, the court's ruling was correct.

Judgment affirmed.

FOX and ASHBURN, JJ., concur.



141 Cal.App.2d 585

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Albert HOOD, Defendant and Appellant.

Cr. 5581.

District Court of Appeal, Second District, Division 1, California.

May 16, 1956.

Defendant was convicted of second degree burglary. The Superior Court of Los Angeles County, Edwin L. Jefferson, J., entered judgment and defendant appealed. The District Court of Appeal, White, P. J., held that evidence warranted conviction.

Affirmed.

1. Criminal Law ⇐641

In burglary prosecution, record disclosed no neglect of Public Defender assigned to defendant, in respect to waiver of jury, permitting prosecution to submit its case on evidence adduced at preliminary examination, producing defense testimony by defendant or other witnesses, failing to appeal from judgment of conviction, arguing new trial motion or preparing for trial. West's Ann.Gov.Code, § 27706(a); West's Ann.Pen.Code, §§ 987, 1181; West's Ann. Const. art. 1, § 13.

2. Criminal Law ⇐1159(2, 4)

Appellate courts do not reweigh evidence or pass upon credibility of witnesses.

3. Criminal Law ⇐1035(3)

The rule which imputes acts of counsel to defendants in absence of complaint to trial court does not require that complaint be made of specific acts on part of counsel but affords defendant opportunity to complain when, at any time during trial, his counsel does not adequately represent him, thereby affording trial court an opportunity to correct the situation.

4. Criminal Law ⇐1035(3)

Defendant who did not avail himself at trial of privilege of complaining of inadequate representation by his counsel could not, after adverse judgment, make such complaint to reviewing court.

5. Burglary ⇐41(6)

Evidence warranted second degree burglary conviction in that defendant was identified as perpetrator of crime.

6. Criminal Law ⇐741(2)

Identification of defendant as perpetrator of crime is question for trier of fact.

7. Criminal Law ⇐1159(5)

Reviewing court will not disturb finding as to identity of defendant as perpetrator of crime if such finding is warranted by substantial evidence.

8. Judges ⇐49(1)

In burglary prosecution, record disclosed no such preoccupation with prior convictions as to show judicial misconduct. West's Ann.Code Civ.Proc. § 1963, subd. 15.

Robert M. Maslow, Hollywood, under appointment by the District Court of Appeal, for appellant.

Edmund G. Brown, Atty. Gen., Arthur L. Martin, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was charged in two counts with the crime of burglary. He was also charged with two prior felony convictions. Not guilty pleas were entered as to both counts of the information, and the prior convictions were denied. Trial by jury was waived and the People's case was by stipulation submitted on the testimony adduced at the preliminary examination with both the prosecution and defense reserving the right to offer additional evidence if desired. Defendant offered no testimony in his behalf. Defendant was acquitted on Count I, and found guilty on Count II. The burglary therein charged was fixed as second degree. The allegations as to both alleged prior convictions were found to be true. Defendant's motion for a new trial was denied. Defendant in propria persona, filed notice of appeal from the "verdick" (sic), which we shall consider as an appeal from the judgment of conviction.

As to the factual background surrounding this prosecution, the record reflects that Clentren Quiller testified that his home is located at 4127 Woodlawn, in the City of Los Angeles. At 10:30 a. m. on July 20, 1955, he locked the doors to his house and departed. Returning at 2 p. m. the same day he discovered that a 21" Admiral television set, a radio, and some curtains, clothes and a quart of milk were missing. He noticed that the screen on his rear-outer door was cut and a glass window in the inner door was broken. Quiller had not given the defendant nor anyone else permission to enter his home or to take anything out of it.

Luther Bass testified that he lives at 1283 West 36th Place and that he works at Felds Expect. In the middle of July, 1955, he saw the defendant, Albert Hood, coming out the back gate of the court behind Feld Expect carrying a table model television set with a blanket over the top of the set. The time of day was close to noon. That defendant walked over to a waiting yellow cab that was parked on the edge of the Feld Expect parking lot. He tried to get the television set in the left side of the automobile but it wouldn't fit. Then he brought the set to the righthand side and put it in through the front door next to the driver.

Bass' attention was attracted because the driver would not help Hood put the set in the car. Noting this and anticipating questions he took the number of the cab. At the

trial he stated that he remembered the number which was 9040. After Hood got the set inside he drove off in the cab. The next time Bass saw Hood was at the police station where he identified him in a "line-up".

Otto Leisy, a taxi cab driver, testified that on July 20, 1955, he picked up a male passenger whom he identified at the trial as the defendant. He picked up the defendant near 41st and Main Streets. At this time the defendant was carrying an eight to ten inch bundle of clothes. The defendant directed Leisy to drive in the alley behind Woodlawn and Main Streets and park behind a court in a vacant lot. Leisy waited outside while the defendant went in to "get some more articles". The defendant returned with a table model television set. The set wouldn't fit in the back seat so the defendant set it in the front seat of the cab. Leisy noticed that one of the defendant's hands had evidently been "scuffed" on his way into the house. His finger was bleeding quite a bit and he had a handkerchief wrapped around it.

Leisy took the defendant to an apartment house in the vicinity of the eleven hundred block which was situated across the street from 1106 West Eleventh Street.

[1] As a first ground for reversal appellant urges that he was denied his constitutional guarantee of counsel to advise and defend him at his trial, Constitution of California, Article I, § 13; Penal Code, § 987. In support of this claim appellant states in his brief, "Appellant at the outset admits that counsel was physically present with him at all stages of the proceedings, assigned to him by the court after first having had an opportunity to procure counsel of his own choice * * *. Appellant does not allege nor imply the incompetence of the Public Defender assigned. Indeed, his appointment to that office signifies his requisite ability. A perusal of the record, however, demonstrates gross neglect and callous indifference and this, it is submitted, vitiates the right to counsel." We are in accord with appellant's statement that the best criterion of the competency, care and alertness of the Public Defender who represented appellant is the record in the case. We have carefully scrutinized the record herein and have no hesitancy in saying that it does not disclose "gross neglect and callous indifference" on the part of appellant's counsel.

Appellant asserts that it was not an exercise of sound discretion for his trial attorney to waive a jury and permit the prosecution to submit its case on the evidence adduced at the preliminary examination. Aside from the fact that such procedure is common practice, the record here reflects that appellant was represented at the preliminary examination by counsel who carefully and painstakingly cross-examined each witness who testified thereat.

It is urged that no testimony was produced at the trial in appellant's behalf, and that "not even the defendant himself was permitted to deny his guilt". However, it is not claimed that appellant was desirous of becoming a witness in his own behalf or could have denied his guilt without committing perjury, and unless we resort to suppositions we would be unfair were we to criticize the discretion of possibly wise choice made by trial counsel in this regard.

Present counsel is also critical of the fact that no defense testimony was produced. Again he indulges in the assumption that such testimony was available and that it would have proven beneficial to the cause of the accused. We are persuaded that trial counsel was the best judge of what testimony could or should have been offered.

[2] Appellant's contention that the Public Defender was derelict in not taking an appeal from the judgment herein is totally without merit. Undoubtedly, the Public Defender was aware of the long recognized rule that appellate courts do not reweigh evidence or pass upon the credibility of witnesses, People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, and confronted as he was with a situation which involved a conviction devoid of any questions of law, it cannot justly be said that he violated the provisions of section 27706(a) of the Government Code which provides in part as the duty of the Public Defender to "prosecute all appeals to a higher court or courts of any person who has been convicted, where, *in his opinion*, the appeal will or might reasonably be expected to result in the reversal or modifica-

tion of the judgment of conviction." (Emphasis added.) Appellant tacitly admits the wisdom of the Public Defender in not appealing from the judgment of conviction when in that part of his brief attacking the sufficiency of the evidence to sustain the conviction, he states, "this brief should more properly be directed to the trial court".

The next criticism directed by counsel against the conduct of the trial by the former counsel is that "even the motion for a new trial was made with a minimum of exertion using the stereotyped phraseology of 'on all the grounds set forth in 1181 of the Penal Code.'" The record refutes this claim for it shows that at the time the motion was made the Public Defender stated, "* * * I didn't get the transcript back from the probation office until this morning. I'm not prepared to argue it. I would request the matter go over a week for the purpose of argument on motion for new trial." The matter of argument on the motion was then continued for a week at which time the record reflects that the motion was argued, thus negativing the charge that trial counsel relied on "stereotyped phrasecology" in presenting his motion, but on the contrary, requested and was granted a week within which to formulate and prepare his argument for a new trial, and which argument he presented. In this state of the record we perceive no "gross neglect and callous indifference", as charged by present counsel.

In answer to the contention of present counsel that the Public Defender was unprepared for the trial of appellant's case we deem it unnecessary to here set forth the mathematical computation of time to which present counsel resorts as a premise for such a conclusion. We are satisfied to rely upon and concur in the statement made by our Supreme Court in the case of People v. Adamson, 34 Cal.2d 320, 333, 210 P.2d 13, 19, as follows: "that it would be difficult to find in California any lawyers more experienced or better qualified in defending criminal cases than the public defender of Los Angeles County and his staff." See also People v. Simeone, 132 Cal.App.2d 593, 597, 282 P.2d 971; People v. Collins, 117 Cal.App.2d 175, 182, 255 P.2d 59.

It is also urged by present counsel that testimony for the defense should have been offered because at the close of the preliminary examination the committing magistrate said, "It's a close matter. For the purpose of the preliminary, the Court holds the defendant to answer on both counts". Reference to the record immediately preceding the foregoing statement by the magistrate, however, shows that it was Count I that was under discussion and it was to that count the court was referring when the foregoing statement was made. The Public Defender at the trial secured an acquittal on Count I.

[3, 4] In his brief appellant states that while "Fully cognizant of the rule which imputes the acts of counsel to him in the absence of complaint to the trial court (People v. Youders, 96 Cal.App.2d 562, 569, 215 P.2d 743), appellant contends that no complaint was possible in that few, if any, acts of counsel were committed in his behalf". However, the rule announced in the Youders case, supra, does not require that complaint be made of specific acts on the part of counsel, but affords him the opportunity to complain when, at any time during the trial his counsel did not adequately represent him, thereby affording the trial court an opportunity to correct the situation. Not having availed himself of this pivilege, appellant cannot now, after an adverse judgment, for the first time complain, People v. Wilkerson, 130 Cal. App.2d 330, 333, 279 P.2d 56. Certainly, the record before us does not disclose "That the defense made in his (appellant's) behalf was a sham and a violation of his constitutional right to counsel". If anything favorable to appellant was overlooked by his trial attorney, it is not apparent in the record.

[5] Finally, appellant insists that the evidence as a matter of law was insufficient to sustain his conviction of burglary as is charged in Count II of the information. He concedes that the *corpus delicti*

of the crime charged was proven, and "* * * relies solely on the method and manner in which he was identified as the perpetrator of this crime and the weight given to his two prior convictions in establishing the insufficiency of the evidence to sustain the judgment and conviction."

We have heretofore narrated the evidence offered at the trial and it need not now be repeated. Suffice it to say that appellant attacks the credibility of the witness Bass, asserting that he was "semi-literate" because he could not recall his employer's telephone number. The claim that this witness is a "semi-literate" is refuted by a mere reading of his testimony. Appellant disparages the testimony of the witness Leisy with the charge that he was "not too sure" of his identification of appellant and that 28 days had elapsed between the burglary and the date his testimony was given.

Addressing itself to the problem presented by a challenge on appeal, to the sufficiency of identification evidence, our Supreme Court, in the case of People v. Farrington, 213 Cal. 459, 463, 2 P.2d 814, 815, said: "The strength or weakness of the identification, the incompatibility of and discrepancies in the testimony, if there were any, and the uncertainties of witnesses in giving their testimony were matters solely for the observation and consideration of the jurors in the first instance, and for the consideration of the trial court on motion for a new trial. It has approved the finding of the jury, and on appeal this court may not disturb such finding and the action of the trial court unless we can say, as a matter of law, that there was no evidence to support the conviction." See also People v. Erno, 195 Cal. 272, 283, 232 P. 710; People v. Newland, supra, 15 Cal.2d at page 681, 104 P.2d 778; People v. Connelly, 195 Cal. 584, 593, 234 P. 374.

[6, 7] In the case at bar we cannot say, as a matter of law, that there was no substantial evidence to support the conviction of appellant. The question of whether the identification was sufficient was one of fact for the duly constituted arbiter of the facts, and where, as here, the finding of guilt is warranted by substantial evidence, it will not be disturbed. People v. Newman, 102 Cal.App.2d 302, 305, 227 P.2d 470.

[8] Appellant's contention that the trial court "arrived at its judgment through an undue preoccupation with defendant's prior convictions * * *" is totally devoid of merit. Appellant's claim is predicated upon a colloquy that occurred between the Public Defender and the court, after the adjudication of guilt, at the time appellant was arraigned for judgment and when the court was considering the sentence to be imposed. It is as follows:

> "Mr. Buckley (Deputy Public Defender) * * * I might mention that your Honor does have jurisdiction to impose a county jail sentence on a second degree burglary, despite the ineligibility for probation.
>
> "The Court: I think he has already been through San Quentin on burglary. That was in 1950, second degree, two counts. Paroled on 4/28/53. Discharged 4/28/54. And he did a stretch in Oklahoma for burglary. No, I can't quite do that, Mr. Buckley."

The foregoing is totally inadequate to support the veiled charge made that during the trial the court was guilty of prejudicial misconduct. Judicial tribunals, proceeding within their proper jurisdiction, are deemed to have acted rightly, impartially, and honestly, 1 Freeman on Judgments, 383 pp. 820–821; 387 pp. 830–832. There is also a rebuttable presumption "That official duty has been regularly performed", Code Civ. Proc. § 1963, subd. 15, which in this case was not controverted by other evidence.

For the foregoing reasons, the judgment is affirmed.

DORAN and FOURT, JJ., concur.

Betty DE ARMOND and G. J. DeArmond, Plaintiffs and Respondents,

v.

Ann TURNER, Richard Turner et al., Defendants and Appellants.

Civ. 5334.

District Court of Appeal, Fourth District, California.

May 15, 1956.

Rehearing Denied June 12, 1956.

Hearing Denied July 11, 1956.

Action for injuries sustained by a guest in defendant's automobile driven by his codefendant wife off highway into a tree. From a judgment of the Superior Court of Kern County, Warren Stockton, J., on a jury's verdict for plaintiffs, defendants appealed. The District Court of Appeal, Mussell, J., held that evidence supported jury's implied findings that defendant wife was intoxicated at time of accident, that her intoxication was proximate cause of accident, and that she was acting as her husband's agent in driving automobile at such time.

Judgment affirmed.

1. Appeal and Error ⇐1001(1)
Automobiles ⇐245(24, 54)

In action for injuries to guest in automobile driven by owner's wife, whether she was drunk or under influence of intoxicating liquor at time of accident causing injuries and, if so, whether such fact was proximate cause of accident, were questions for jury, and where reasonable men might differ, District Court of Appeal, on appeal from judgment on jury's verdict for plaintiff, must determine whether there is sufficient evidence in record to support jury's findings on such questions.

2. Automobiles ⇐181(1)

Any degree of intoxication proximately causing motorist's negligent doing of or failure to do an act is sufficient to come within meaning of word "intoxication" in automobile guest statute. West's Ann. Vehicle Code, § 403.

3. Automobiles ⇐181(1)

A person is "intoxicated" or in state of "intoxication" within meaning of automobile guest statute, if intoxicating liquor has so far affected his nervous system, brain or muscles as to impair appreciably his ability to operate automobile as an ordinarily prudent and cautious man, in full possession of his faculties and using reasonable care, would operate or drive similar vehicle under like conditions. West's Ann.Vehicle Code, § 403.

See publication Words and Phrases, for other judicial constructions and definitions of "Intoxication".

4. Automobiles ⇐244(20, 36)

In action for injuries to guest in automobile driven off highway into tree, evidence substantially supported jury's findings, implied from verdict for plaintiffs, that defendant driver was intoxicated at time of accident and that her intoxication was proximate cause of accident.

5. Automobiles ⇐244(23)

In action against husband and wife for injuries to guest in husband's automobile driven by wife off highway into tree, evidence substantially supported jury's finding, implied from verdict for plaintiffs, that wife was acting as husband's agent in driving automobile at time of accident.

6. Automobiles ⇐244(23)

Proof that automobile involved in accident was owned by husband and being operated by his wife with his express consent and permission at time of accident creates prima facie case authorizing inference by court or jury that wife was using automobile as husband's agent, in absence of substantial proof to contrary.

7. Trial ⇐296(3)

In action against husband and wife for injuries to guest in automobile driven by wife off highway into tree, instruction to jury that it having been established that automobile was owned by husband and being used with his permission by wife at time of accident, both of them were liable, if one was liable, was not error prejudicial to defendants, in view of other instructions that verdict must be for husband, if jury found that wife was not acting as husband's agent or within scope of her authority at time of accident, and that husband's

responsibility would be limited to $5,000, if jury found that wife was not husband's agent.

8. Appeal and Error ⇐1004(1)
Damages ⇐96

The amount of verdict awarding damages for personal injuries is largely within jury's sound discretion, which may not be interfered with by appellate court, unless record shows that verdict was result of jurors' passion or prejudice.

9. Damages ⇐130(1)

A jury's verdict awarding a woman $20,000 damages for a broken and dislocated ankle, broken femur above knee, broken left arm above and below elbow, broken breast bone, and fracture over left eye, necessitating her confinement in hospital for 52 days, complete body cast for ten months, two operations, and use of wheel chair for six months, was not excessive, in absence of showing that it was result of jurors' passion or prejudice.

Baker, Palmer, Wall & Raymond, Bakersfield, for appellants.

Dorris, Fleharty, Phillips & Underhill, Bakersfield, for respondents.

MUSSELL, Justice.

This action arose out of an accident in which plaintiff, Betty DeArmond, was injured when an automobile in which she was riding as a guest was driven by the defendant, Ann Turner, off of Highway 99 north of Bakersfield, and into a tree.

It is alleged in the complaint that defendant, Ann Turner, at the time of the accident, was intoxicated and under the influence of intoxicating liquor and that as a direct and proximate result of said intoxication of said defendant, she drove and operated a Hudson automobile in such a careless and negligent fashion as to cause the same to leave the highway and strike a fixed object adjacent thereto. A jury returned a verdict in favor of plaintiffs and against defendants, Ann Turner and her husband, for $20,000, and defendants appeal from the judgment thereupon entered.

On August 3, 1953, at about noon, defendant, Ann Turner, hereinafter referred to as "defendant", stopped at Trout's Restaurant in Bakersfield and asked plaintiff, Betty DeArmond, hereinafter referred to as "plaintiff", to accompany her to Wasco. Plaintiff, who was employed in the cafe, agreed to go with the defendant later in the afternoon and at about 4:30 p. m. defendant returned to the cafe and was observed by plaintiff sitting on a stool at the bar with a bottle of beer and a glass before her. A few minutes later the plaintiff and defendant left for Wasco in a Hudson automobile registered in the name of Dick's Car Lot, the fictitious firm name of a used car business operated by defendant, Richard Turner. Defendant told plaintiff she wanted to go to Wasco to find her husband and "get a power of attorney to the car, because she said she wanted to sell it or trade it off on another car." Defendant testified at the trial, in this connection, that she "had a prospect" for the car and that the purpose of the trip was to tell her husband about the prospect; that the "prospect" was to get in touch with her on the following day and she felt that her husband would like to sell the car if she could find him to "sign off" the pink slip.

Mrs. Turner was unable to locate her husband in Wasco after visiting several used car lots and she and plaintiff then started back to Bakersfield. Plaintiff testified that when they left Wasco defendant was driving between 65–70 miles per hour; that she said she was in a hurry; that she started crying after they left Wasco and kept talking about her husband; that when they turned toward Bakersfield and were traveling south on Highway 99 at a speed of 65–70 miles per hour, plaintiff said, "Please, for the love of God, slow down or you will kill us both"; that defendant replied, "It would probably be a good idea if I did"; that a light green car, traveling south at a terrific rate of speed, passed the Hudson; that as this car passed, defendant said, "It is going to hit us"; that the green car was more than three car lengths ahead when it cut in ahead of defendant's car; that as the green car passed, defendant pulled to the right and the Hud-

son went off the highway and struck a tree or "ditch or big rock, or something" and a tire blew out; that plaintiff was thrown under the dashboard of the car and lost consciousness. Plaintiffs' injuries were a broken and dislocated left ankle, a broken femur above the knee, a broken left arm above and below the elbow, a broken breast bone, and a fracture over the left eye. She was confined in the hospital 52 days and was in a complete body cast. She was operated on twice and was still in the cast 10 months after the accident. Thereafter she was in a wheelchair for six months.

A traffic officer arrived at the scene of the accident about 8:30 p. m. on August 3, 1953, which was about 15 minutes after he had received the first call concerning it. He testified that the marks left by the Hudson indicated that the brakes on it had not been applied; that the car traveled 129 feet from the shoulder of the highway before striking a small tree, and traveled an additional 144 feet before striking a second tree. He further testified that about an hour and a half after receiving his first call about the accident, he visited the defendant in a hospital in Oildale; that there was a moderate odor of alcohol on her breath but he did not know whether it was from beer, wine or whiskey; that "her speech wasn't very good, it was slightly incoherent and, oh, mushed up, you might say"; that he asked her what she had been drinking and she stated she had had a "few beers".

Geneva E. Brown, a witness who knew the defendant, testified that at about 4:00 o'clock on the afternoon of August 3, 1953, she saw the defendant at the bar in Trout's Cafe; that she was drinking a cocktail; that defendant had a second drink there within a few moments; that she (Mrs. Brown) then went across the street to the "Twin Peppers" and there saw the bartender serve at least two drinks to the defendant; that the defendant was talking in a loud tone of voice and that she did not walk "very steady".

Defendant testified that she did not have more than one beer on the day of the accident; that she was not in the Twin Peppers that day; that the purpose of the trip to Wasco was to locate her husband and tell him about the prospective buyer she had for the car and to sell it. When asked to relate how the accident happened, she stated the right front tire of the Hudson blew out; that there was a car passing at the time and that she jerked her car to the right and it hit the soft dirt.

[1] Appellant first argues that there was no evidence of defendant's intoxication or that the proximate cause of the accident was due to her use of intoxicating liquor. The questions of whether defendant was drunk or under the influence of intoxicating liquor at the time of the accident and whether, if drunk, or under the influence of intoxicating liquor, that this was the proximate cause of the accident, were questions for the determination of the jury, and where, as here, the minds of reasonable men might differ, it is our problem to find whether or not there is sufficient evidence in the record to support the findings of the jury. Lindemann v. San Joaquin Cotton Oil Co., 5 Cal.2d 480, 489–490, 55 P.2d 870; Tomlinson v. Kiramidjian, 133 Cal.App. 418, 422, 24 P.2d 559.

In Johnson v. Marquis, 93 Cal.App.2d 341, 351, 209 P.2d 63, 69, judgment for plaintiffs was affirmed on appeal in an action by a guest under the provisions of section 403 of the Vehicle Code for personal injuries arising out of an automobile accident where intoxication of the defendant driver was charged, and it appeared that the defendant driver admitted drinking a 7-Up bourbon highball shortly before the accident. It was there said:

> "We are persuaded there is substantial evidence to support the implied findings that Mrs. Marquis was operating her machine while she was under the influence of intoxicating liquor, and that she was guilty of wilful misconduct which resulted in the accident from which the plaintiffs suffered the injuries complained of. Even though reasonable minds may differ in that regard, this court is not warranted on that account in reversing the findings of the jury and the judgment of the

court in denying appellant's motion for judgment notwithstanding the verdict. Foerster v. Direito, 75 Cal.App. 2d 323, 330, 170 P.2d 986."

[2] In Noble v. Key System, Ltd., 10 Cal.App.2d 132, 136, 51 P.2d 887, 889, the court defined intoxicating as used in section 141¾ of the Vehicle Code as follows:

"Any degree of intoxication which, under all the circumstances of the case, proximately causes the doing or refraining from doing any act which is classified as a negligent act is a sufficient degree of intoxication to come within the statute. Knickrihm v. Hazel, 3 Cal.App.2d 721, 40 P.2d 305."

[3] In Smith v. Baker, 14 Cal.App.2d 10, 12–13, 57 P.2d 960, 961, the court said:

"The word 'intoxication,' as used in our guest statute * * *, has been held in Tomlinson v. Kiramidjian, 133 Cal.App. 418, 24 P.2d 559, to have a meaning similar to 'under the influence of intoxicating liquor' as that term is defined in People v. Ekstromer, 71 Cal. App. 239, 235 P. 69, 71. A person may therefore be said to be intoxicated or in a state of intoxication within the meaning of the guest statute, if intoxicating liquor has so far affected his nervous system, brain, or muscles 'as to impair, to an appreciable degree, his ability to operate his car in the manner that an ordinarily prudent and cautious man, in the full possession of his faculties, using reasonable care, would operate or drive a similar vehicle under like conditions.' If there was any substantial evidence to show that appellant Beverly Baker was in such condition at the time that the accident happened, then such evidence was sufficient to sustain the finding of intoxication."

[4] In the instant case there was evidence that defendant had a beer and two cocktails at Trout's Cafe bar; that a few moments later, while in the Twin Peppers across the street, a witness saw the bartender serve her with at least two drinks; that defendant was talking in a loud tone of voice and it seemed to the witness that she did not walk "very steady"; that defendant was crying and talking about her husband while she was driving from Wasco; that she was driving at a speed of 70 miles per hour just prior to the accident; that plaintiff urged the defendant to slow down or she would kill them both and defendant replied, "It would probably be a good idea if I did"; that when the defendant was interviewed by the traffic officer at the hospital after the accident her speech was slightly incoherent and there was an odor of alcohol on her breath; that she told the officer she had a "few beers" to drink. While the defendant testified that a tire blew out and she jerked the car over to the shoulder of the highway, the testimony of plaintiff and the traffic officer was to the effect that the tire blew out, if at all, after hitting the first tree. Plaintiff's testimony was that the green car which passed the Hudson did not turn back into defendant's lane of traffic until it was more than three car lengths ahead and from this testimony the jury could reasonably infer that the green car did not force defendant off the highway. We believe that the foregoing evidence substantially supports the implied finding of the jury that the defendant was intoxicated at the time of the accident and that her intoxication was the proximate cause thereof. We cannot hold otherwise as a matter of law.

[5] There was substantial evidence to support the implied finding of the jury that the defendant was acting as agent of her husband in driving the Hudson automobile at the time of the accident. She testified that she drove the car "off and on" and that her husband drove it whenever he wanted to; that he let her use and drive any of the cars on his used car lot; that the purpose of the trip to Wasco was to tell her husband about a prospect she had who was interested in buying the car and to see if he wanted to sell it.

[6] As was said in Perry v. McLaughlin, 212 Cal. 1, 14, 297 P. 554, 560:

"Where proof is made that the car in question was owned by the husband, and was being operated by the wife

at the time of the accident, with his express consent and permission, there is created a *prima facie* case authorizing an inference by a court or jury, in the absence of substantial proof to the contrary, that the wife was using the car as the agent of the husband." (Citations.)

[7] Defendant argues that the court erred in giving the following instruction:

"Instruction No. 27. It has been established in this case that at the time of the accident in question, the vehicle then being used by the defendant Ann Turner was owned by the defendant Richard Turner, and that it was being used with the permission of the owner. It follows, therefore, under the law, that if one is liable, both are liable."

However, in the following instruction, number 28, the court instructed the jury that it must determine whether at the time of the accident Mrs. Turner was acting as agent for her husband and within the scope of her authority and that if it found she was not acting as such agent or within the scope of her authority, the verdict must then be in favor of the defendant, Richard Turner. Before reaching a verdict, the jury returned into court for further instructions as to limiting the liability of defendant, Richard Turner, to the sum of $5,000. The court then instructed the jury that if it found that the defendant, Ann Turner, was not the agent of her husband, his responsibility would be limited to $5,000. Counsel for both plaintiffs and defendants then agreed that the statement of the court was correct. Under these circumstances, we find no prejudicial error in the giving of the questioned instruction.

[8, 9] Defendant further complains that the damages awarded were excessive. This contention is without merit. In Miller v. Pacific Constructors, Inc., 68 Cal.App.2d 529, 549, 157 P.2d 57, 67, it is held:

"The rule is well established that the amount of a verdict for damages for personal injuries is largely within the sound discretion of the jury, and that it may not be interfered with unless it appears from the record that it is the result of the passion or prejudice of the jurors." (Citations.)

In the instant case, plaintiffs injuries were quite severe and there is no indication in the record that the verdict was not the result of the honest convictions of the jurors. It does not appear that the verdict was the result of passion or prejudice on the part of the jury and it follows that we may not hold that the amount of the verdict was excessive.

The judgment is affirmed.

BARNARD, P. J., and CONLEY, J. pro tem., concur.



141 Cal.App.2d 651

NATIONAL DISTILLERS PRODUCTS CORPORATION, a corporation, Plaintiff and Respondent,

v.

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation, Defendant and Appellant.

Civ. 16538.

District Court of Appeal, First District, Division 2, California.

May 21, 1956.

Hearing Denied July 18, 1956.

Action by taxpayer against city and county to obtain refund of personal property taxes paid under protest on taxpayer's liquor. The Superior Court, City and County of San Francisco, Albert C. Wollenberg, J., entered judgment for taxpayer, and city and county appealed. The District Court of Appeal, Dooling, J., held that liquor, which had been subject of interstate shipment to San Francisco prior to tax day, which was in San Francisco in taxpayer's possession on tax day, and which, after tax day, was to be shipped in foreign commerce, was immune from local personal property taxation under the commerce clause by reason of fact that federal gov-

ernment had regulated manufacture, transportation, storage, and exportation in furtherance of commerce of such liquor and that local taxation would constitute an interference with such regulation.

Judgment affirmed.

1. Commerce ⇐41(1)

Liquor, which had been imported by taxpayer from foreign countries and held by it in San Francisco as original importer and in original package on tax day, was improperly subjected to state personal property taxes. U.S.C.A.Const. art. 1, § 8, cl. 3; § 10, cl. 2.

2. Commerce ⇐41(4)

Liquor, which had been subject of interstate shipment to San Francisco prior to tax day, which was in San Francisco in taxpayer's possession of tax day in original packages, and which, after tax day, was to be shipped in foreign commerce, was immune from local personal property taxation under the commerce clause by reason of facts that federal government had regulated manufacture, transportation, storage, and exportation in furtherance of commerce of such liquor and that local taxation would constitute an interference with such regulation. U.S.C.A.Const. art. 1, § 8, cl. 3; § 10, cl. 2; Tariff Act of 1930, §§ 1 et seq., 309, 311, 313 as amended 19 U.S.C.A. §§ 1001 et seq., 1309, 1311, 1313.

Dion R. Holm, City Atty., City and County of San Francisco, Lawrence S. Mana, Deputy City Atty., San Francisco, for appellant.

Brobeck, Phleger & Harrison, San Francisco, for respondent.

DOOLING, Justice.

This is an appeal by defendant City and County of San Francisco from a judgment of the superior court ordering it to refund certain personal property taxes paid under protest by plaintiff National Distillers Products Corporation.

Respondent is a Virginia corporation qualified and entitled to do business in the State of California. It is engaged in business as an importer, exporter, manufacturer and distributor of wines, liquors, and other alcoholic beverages. In the course of this business it manufactures, and purchases from and sells to manufacturers, wholesalers, dealers and distributors located in various states of the United States and in various countries of the world, the merchandise required for and involved in the conduct of its business. On the first Monday of March, 1952, tax day, it owned and possessed in warehouses in San Francisco certain quantities of liquor upon which appellant levied and collected an ad valorem personal property tax. Respondent paid the portion of the tax assessed against the liquor here in question under protest, and then instituted this action to recover that tax, claiming that this liquor was exempt from state taxation.

[1] Respondent had judgment against appellant for $9,831.45 plus interest from the date that the disputed tax in this amount was paid. $4,708.92 of this sum represented a tax assessment against 5,281 cases of liquor which had been imported by respondent from foreign countries and held by it in San Francisco as the original importer and in the original package on the tax day. As to this liquor it is conceded that the tax was properly recovered under the authority of Parrott & Co. v. City and County of San Francisco, 131 Cal.App.2d 332, 280 P.2d 881.

The remainder of the disputed tax in the amount of $5,122.53 was assessed with respect to 9,195 cases of liquor owned and possessed by respondent in warehouses in San Francisco on assessment day. This liquor had been delivered to the San Francisco warehouses on various dates, starting with June 28, 1948. As to this liquor the trial court found: "Two thousand seven hundred six (2,706) cases of said spirits had been rectified, reduced in proof, and bottled in a United States customs bonded warehouse, Class 6, in Baltimore, Maryland; stamped, packaged, and labeled for export; immediately thereafter transported by bonded common carrier to San Francisco; and there held under United States

customs bond in a Class 3 customs bonded warehouse. One thousand two hundred eight (1,208) cases of said spirits had been bottled in Baltimore, Maryland, under internal revenue bond; stamped, packaged, and labeled for export; immediately thereafter transported by bonded common carrier to San Francisco; and there held under internal revenue bond in a public warehouse. Five thousand two hundred eighty-one (5,281) cases of said spirits had been bottled, stamped, packaged, and labeled especially for export in Baltimore, Maryland; immediately thereafter transported by bonded common carrier to San Francisco; and there held in the export storage room of a public warehouse, subject to a drawback or refund of previously paid internal revenue taxes upon proof of export in accordance with appropriate federal regulations. All of said spirits were produced, bottled, packaged, labeled, stamped, and transported to California, and thence abroad ship for transportation to destinations in foreign countries or use as supplies of vessels in accordance with applicable federal laws and regulations and under the supervision and control of appropriate federal government agencies."

As of September 1, 1953, 614 cases of this liquor were still in San Francisco warehouses. "At various times after March 3, 1952, 43 cases of said 9,195 cases of distilled spirits in United States customs bond were, while in bond, sold and placed aboard vessels, and used as supplies of vessels of the United States actually engaged in foreign trade or trade between the Atlantic and Pacific ports of the United States or between the United States and its possessions, and two cases of spirits in United States customs bond, while in bond, were sold and placed aboard vessels, and used as supplies of vessels of the United States employed in the fisheries on the high seas; of said 45 cases of spirits aforesaid, 20 cases were sold directly to the owners of and delivered to said vessels, and 25 cases were sold to a concern in San Francisco doing business as a ship chandler—which concern thereafter sold said 25 cases for delivery to the owners and to said vessels. At various times after March 3, 1952, the remainder of said 9,195 cases of distilled spirits were sold and placed aboard vessels and transported to customers and destinations in foreign countries."

There was testimony that under the federal regulations it was not possible to sell any of this liquor domestically. Mr. Carl P. Greely, Assistant General Traffic Manager of respondent having control and supervision over all imports, exports and domestic shipments for respondent and its subsidiaries and affiliated companies, testified that he knew of no case in which respondent had sold liquor of the type here in question domestically. He stated that the reason for this was that first it would be necessary to secure permission from the Commissioner of Internal Revenue in Washington and prove a hardship case in order to do so. Further, he testified that it would not be financially feasible to do such a thing as it would require new packaging, bottling, labeling, and would also result in the payment of an internal revenue tax on 14 percent of the contents which would be water rather than liquor because of the difference in proof between the liquor sold domestically and that designed for export.

The court found that "the production, transportation to San Francisco, detention in a public warehouse, and movement aboard vessels under bond for delivery to customers and destinations in foreign countries or consumption on the high seas constituted integrated steps in a movement of goods in interstate and foreign commerce in the process of shipment either to foreign destinations or for consumption aboard vessels on the high seas, in accordance with plaintiff's plan and intent."

The court concluded that this liquor "constituted items in foreign commerce over which the federal government has exercised its power of regulation and control to the end that such distilled spirits may be sold or otherwise disposed of for transportation to destinations in foreign countries or sold for use as supplies for specified vessels of the United States free of the burden of domestic taxation. The statutes and

regulations applicable to these spirits taken together operate as regulations of foreign commerce; and read in the light of their purpose they are tantamount to a declaration that in order to accomplish constitutionally permissible ends the merchandise shall not become a part of the common mass of taxable property within the state, pending its disposition in the manner above specified, and shall not become subject to the state taxing power. The purposes of the Congressional regulation applicable to this phase of foreign commerce would fail if the state were free at any stage of the transaction to impose a tax which would lessen the competitive advantage conferred by Congress upon the said spirits or infringe on the Congressional regulation of this class of foreign commerce." Thus it further concluded that the personal property taxes were illegally and unconstitutionally assessed and collected by appellant from respondent.

At the trial respondent contended, as it does on appeal also, that the tax imposed on the liquor to be exported or sold as ships' stores was unlawful under both Article I, § 8, Clause 3 of the United States Constitution (commerce clause) and Article I, § 10, Clause 2 of that Constitution (import-export clause). The trial court agreed with respondent as to its first contention and therefore did not decide on the merits of its second argument.

Appellant first argues that the levy of the personal property tax here sought to be imposed was not an interference with the federal regulation of foreign commerce. The trial court based its decision to the contrary on McGoldrick v. Gulf Oil Corp., 309 U.S. 414, 60 S.Ct. 664, 669, 84 L.Ed. 840. In that case the City of New York sought to impose a sales tax on fuel oil manufactured in New York City from crude petroleum which had been imported from a foreign country to New York and there sold to vessels engaged in foreign commerce. Gulf Oil Corporation's predecessor imported crude petroleum and made customs entry of it for its own manufacturing warehouse pursuant to its bonds given to the United States under the warehouse laws of the United States and treasury regulations. The bonds were given for the purpose of enabling the importer, under statutes of the United States and treasury regulations, to bring the petroleum into the United States to manufacture it while in bond into fuel oil and then to withdraw it for export or other lawful purpose free of the import duty which would otherwise be payable. The bonds were conditioned upon compliance with laws and regulations relating to the custody and safe-keeping of the imported merchandise and its products held in bond, and to its lawful withdrawal from the warehouse under permit of the collector of the customs. The court reviewed in detail the provisions of the Revenue Act of 1932 laying a tax on the importation of crude petroleum and granting exemptions, the related provisions of the Tariff Act of 1930, and the applicable treasury regulations, and concluded that taken together they operated as regulations of foreign commerce. It then held that the tax sought to be imposed conflicted with the Congressional policy adopted by the Acts of Congress to relieve the importer of the import tax so that he might meet foreign competition in the sale of fuel as ships' stock. The court stated: "It is evident that the purpose of the Congressional regulation of the commerce would fail if the state were free at any stage of the transaction to impose a tax which would lessen the competitive advantage conferred on the importer by Congress, and which might equal or exceed the remitted import duty. * * * [citations] The Congressional regulation, read in the light of its purpose, is tantamount to a declaration that in order to accomplish constitutionally permissible ends, the imported merchandise shall not become a part of the common mass of taxable property within the state, pending its disposition as ships' stores and shall not become subject to the state taxing power. The customs regulation prescribing the exemption from state taxation, when applied to the facts of the present case, states only what is implicit in the Congressional regulation of commerce presently involved. The state tax in the circumstances must fail as an infringement of the Congressional regulation of the commerce."

The instant case seems to present a situation that is clearly within the rationale of the Gulf Oil case. Sections 309, 311 and 313 of the Tariff Act of 1930, as amended, Title 19 U.S.C.A. §§ 1309, 1311 and 1313, provide freedom from internal revenue taxes or for a drawback of taxes paid, when the required procedure is followed for domestic liquors exported, used as ships' stores, or sold to vessels employed in the fisheries. These provisions would seem to constitute regulations of foreign commerce in the instant case just as similar provisions did in the Gulf Oil case. Certainly the purpose of this regulatory scheme is to encourage commerce and give a competitive advantage to these items. If states or their political subdivisions were allowed to impose taxes on these items an interference with this purpose would result.

Appellant seeks to distinguish the Gulf Oil case by pointing out that in that case the items sought to be taxed were manufactured from imported materials while here the liquor was of domestic origin. Its position is that that case was decided exclusively on the ground that the laying of import duties was a regulation of foreign commerce and that the exemption from import duties was similarly a regulation of foreign commerce. It maintains that since the instant case involves intoxicating liquors subject to Internal Revenue Tax levied under the taxing power that the only federal power here exercised is the taxing power. It argues that therefore there can be no exercise of the commerce power in this situation. There seems to be little merit to this contention. The Tariff Act of 1930, as amended, 19 U.S.C.A. § 1001 et seq., provides exemptions for both types of items in particular cases. There is no reason to assume that the exemption in one case would be a regulation of foreign commerce and in the other an exercise of the power to tax. This is especially true since the sections involved do not deal with the imposition of a tax, but rather with a declaration that no tax shall be imposed.

Appellant argues that the purpose of the strict governmental regulations under which the liquor is held is to prevent the diversion of the liquor to the domestic market without the payment of the Internal Revenue Tax. It seems obvious that this is one of the purposes of these regulations. However this does not necessarily mean, as appellant seems to imply, that these regulations constitute an exercise only of the taxing power to the exclusion of the commerce power. The Gulf Oil case indicates that appellant's position on this point is not well taken. The court in that case stated: "Customs regulations to insure the devotion of the imports to the intended use are likewise within the Congressional power since such regulations are not only necessary or appropriate to protect the revenue, but are means to the desired end, the regulation of foreign commerce by insuring that the particular class of exempted imports are used for the purposes for which the exemption is allowed." 309 U.S. at page 428, 60 S.Ct. at page 669.

Likewise pertinent is the language of the Supreme Court in Board of Trustees v. United States, 289 U.S. 48, 58, 53 S.Ct. 509, 510, 77 L.Ed. 1025, that: "the judicial department may not attempt in its own conception of policy to distribute the duties thus fixed by allocating some of them to the exercise of the admitted power to regulate commerce and others to an independent exercise of the taxing power. The purpose to regulate foreign commerce permeates the entire congressional plan." We are satisfied that it is equally true of the congressional legislation before us that the purpose to regulate and encourage commerce "permeates the entire congressional plan."

[2] Appellant argues that the liquor here sought to be taxed was "at rest" in San Francisco on tax day and was then part of the general mass of personal property subject to taxation. It contends that there were two shipments of this liquor: 1) an interstate shipment to San Francisco which was completed, and 2) a subsequent shipment in foreign commerce as to liquor which was exported. It argues that the storage of these goods in San Francisco constituted such a break in their transit as to remove them from the protection of the commerce clause. The cases relied on

by it to support this phase of its argument deal with factual situations in which goods are immune from local taxation by reason of the fact that they are being shipped in interstate commerce. When this shipment is either ended or interrupted at the convenience of and because of the wishes of the shipper then the goods are said to have "come to rest" and are subject to local taxation. State of Minnesota v. Blasius, 290 U.S. 1, 54 S.Ct. 34, 78 L.Ed. 131. However, in the instant case the goods are not immune from local taxation because they had been traveling in interstate commerce. Rather, under the rationale of the Gulf Oil case, they derive their immunity from local taxation under the commerce clause by reason of the fact that the federal government has regulated their manufacture, transportation, storage, and exportation in furtherance of commerce, and that such taxes would constitute an interference with that regulation.

Appellant relies on Gooderham & Worts, Ltd. v. Collins, 50 Cal.App.2d 716, 123 P.2d 922, and Rathjen Bros. v. Collins, 50 Cal. App.2d 774, 123 P.2d 930, for the proposition that "California courts have held liquor to be ships' stores, subject to the state's taxing power." In the Gooderham case [50 Cal.App.2d 716, 123 P.2d 924], the court upheld a sales tax imposed on a distributor of distilled spirits on a sale of liquor to the Matson Navigation Company. No federal tax had been paid on this liquor. The court found that there was a delivery of the liquor free from bond to the Matson Company within the state and held that this constituted a taxable event within the meaning of the statute. The court further said "If as appellant seems to assume the liquor had been consigned for delivery at some designated point outside of the territorial limits of the United States and remained under government control until it was delivered at that point, a different situation would be presented." The instant case would seem to present a "different situation" than that discussed in the Gooderham case. Here the liquor sought to be taxed was still under federal government control when the tax was imposed. There had been no sale of it at that time.

In the Rathjen case [50 Cal.App.2d 774, 123 P.2d 936] the court upheld a sales tax imposed on the sale of distilled liquors to steamship companies. The trial court found that two of these sales had been made while the distilled spirits were in a bonded warehouse and decided that these sales were not subject to tax for this reason. The appellate court disagreed saying: "That factor has no relevancy to the issue. The sale was in California and delivery was made to the purchaser in San Francisco. The respondent had no further control of the merchandise after it was delivered in San Francisco. Respondent in no sense exported these distilled spirits. These points have been fully considered and passed upon in the case of Gooderham * * *. As there held, and for the reasons there stated, this type of sale is subject to the tax." This case does seem to go further than the Gulf Oil case in allowing local taxes to be imposed on items that have been subjected to federal control. However in both the Gooderham and the Rathjen cases the court seems to base its decision on the fact that the federal control had ceased when the state tax was imposed. In the instant case that control was still in force when the personal property tax was imposed.

Furthermore if there is anything in these California cases in conflict with the Gulf Oil case it is obvious that the Gulf Oil case must control.

Judgment affirmed.

NOURSE, P. J., and KAUFMAN, J., concur.

Leon OPPENHEIMER and Josephine Oppenheimer, Plaintiffs and Respondents,

v.

Leroy N. MINKS, also known as L. N. Minks, and Evelyn S. Minks, also known as E. S. Minks, Defendants and Appellants.

No. 16736.

District Court of Appeal, First District, Division 1, California.

May 14, 1956.

As Corrected on Denial of Rehearing June 13, 1956.

Hearing Denied July 11, 1956.

Action by apartment building owners against contractor engaged to construct building, and another, for alleged defects in construction, and on common count for money had and received which had been spent on construction but which was allegedly in excess of fixed sum contemplated by agreement. The Superior Court, County of Alameda, Thomas J. Ledwich, J., entered judgment for plaintiffs and defendants appealed. The District Court of Appeal, Bray, J., held that since issue was whether agreement contemplated fixed fee or cost-plus payment, cause of action was not changed by proof or amendment to conform to proof and there was no improper variance from bill of particulars when court permitted amendment of complaint to conform to proof to reduce sum sought for defects and to increase sum sought in common count.

Judgment affirmed.

1. Pleading ⇐397

Action by building owners against contractor who constructed building, and another, for defects in construction and on common count for money had and received which had been spent on construction, wherein issue was whether agreement contemplated fixed fee or cost-plus payment, was not action for breach of contract, and cause was not changed by proof or amendment to conform thereto and there was no improper variance when court permitted such amendment to reduce award sought for defects and to increase award sought under common count.

2. Trial ⇐295(1)

Instructions are to be considered as a whole.

3. Trial ⇐252(1)

Court properly refused instruction which did not conform to facts of case.

4. Trial ⇐251(2)

In action for moneys had and received, wherein fraud was not made an issue, defendants' proffered instruction thereon was properly refused.

5. Husband and Wife ⇐235(2)

In action by apartment building owners for money had and received which had been deposited in fund for construction of building, against contractor with whom they had entered into agreement to construct building and against his wife, as contractor's alleged partner, evidence on issue of whether defendants were partners in contracting business was for jury, even though husband alone had signed contract.

6. Witnesses ⇐225, 267

Record failed to reveal that trial court had unduly interfered with examination or cross-examination of witnesses.

7. Witnesses ⇐246(2)

Trial court could properly interrogate witnesses in order to make their statements clearer.

8. Evidence ⇐353(13)

In action by apartment building owners against persons who constructed building and collected rents for owners for period, to recover for defects in construction and for money had and received, parties' dissolution agreement which divided various properties but which was entered into while defendants were still collecting rents for owners and which did not mention apartment building was irrelevant and properly excluded.

9. Discovery ⇐90

In action by apartment building owners against persons who constructed building and collected rents for owners for period, to recover for defects in construction and for money had and received, report of accountant employed by owners to go over defendants' books was confidential and court

properly refused defendants' request for its production.

Paul D. Morse, Oakland, for appellants.

Frisbie & Hoogs, Berkeley, for respondents.

BRAY, Justice.

Trial was had upon plaintiffs' fourth amended complaint, containing two counts: (1) for damages in the sum of $3,018.56 for alleged defects in the construction of certain buildings erected by defendant Leroy N. Minks for plaintiffs; (2) a common count for moneys had and received in the sum of $6,983.64. During the trial, the court, over defendants' objection, permitted plaintiffs to amend the first count to conform to the proof by decreasing the amount alleged to be due and prayed for to $2,574 and the second count by increasing the amount alleged to be due and prayed for to $9,923.27. Defendants appeal from a judgment on a jury verdict in the sum total of the amended amounts prayed for in the two causes of action.

Questions Presented.

1. Was the cause of action changed either by proof or amendment to conform to proof, and was there a variance from the bill of particulars?

2. Instructions.

3. Should the issue of defendants' partnership have been submitted to the jury?

4. Alleged misconduct of court.

5. Court's refusal to admit "Dissolution Agreement."

6. Court's refusal to order plaintiffs to produce their own accountant's report.

Facts.

The parties had been close friends over a period of years. Defendant Leroy Minks had made investments, managed property and made collections for plaintiffs during this time. Defendants Leroy and Evelyn were husband and wife. Both were licensed separately as real estate brokers.[1] Over a period of several months plaintiffs and defendants discussed the feasibility of constructing some apartment houses, with parking spaces or garages on real property belonging to plaintiffs. It was originally planned to build eight apartments at a cost of about $40,000. There was a conflict in the evidence as to whether there was an oral contract between the parties, and if so, whether the apartments were to be constructed for a fixed sum or on a cost-plus basis. On March 5, 1951, plaintiffs borrowed $25,000 from a bank and deposited it and approximately $15,000 they had, in a special fund in the bank, called the "Oppenheimer Building Fund" on which checks for building expenses were to be drawn by defendant. A building permit was obtained and the work started. Up to this point all understandings were oral. A few days later the bank requested that defendant supply it with a statement of the transaction. Defendant complied with a statement dated March 26th, in which he agreed to erect eight units shown on accompanying blueprints for $37,500 plus proposed garages to cost $2,500, making a total of $40,000. Plaintiffs were to pay for additional work, if any, and "whatever amount of said forty thousand dollars is left after said building is completed, said sum shall be the property" of plaintiffs. Defendant for his services was to receive $1,500 payable when plaintiffs deemed the money was earned. Some question arose as to whether steel and good building material could be obtained. When it was found that it could, the parties decided to build four stores in the place of the garages. The evidence is conflicting as to what the stores were to cost. Plaintiffs testified defendant told them the stores' total cost would be between $4,000 and $6,000. Defendant testified that he estimated the stores would cost $4,000 to $6,000 per unit. However, he told the Oakland Building Department that all stores would total $6,000. He testified that he said this to keep the cost of the building permit low and to permit lower tax assessment on the proper-

1. Practically all the transactions were between plaintiffs and Leroy. Evelyn was charged with being a partner with Leroy in these transactions. Unless otherwise noted "defendant" herein refers to Leroy.

ty. Because of the construction of the stores, further capital was needed, so plaintiffs borrowed an additional $10,000. Plaintiff Josephine testified that $6,000 of this was for the stores and the remaining $4,000 for remodeling other property of plaintiffs. About $11,000 more which came from plaintiffs' income property plus an additional $1,000 was put in the fund. Plaintiffs testified that defendant was not authorized to spend this money. Certain changes were made in the building plans which added to the original estimated cost of the building. In October or November, when the work was substantially completed, plaintiffs paid defendant his $1,500 fee, and also paid a contractor who was in actual supervision of the work $1,000. Defendant obtained tenants and managed the property until May or June, 1952. Plaintiffs requested and received from defendant (the exact date of receipt is in conflict) a financial statement dated February 13, 1952.

1. Was Cause of Action Changed?

[1] Defendants contend that the action was commenced and partially tried on the theory that plaintiffs were suing in conversion, claiming that defendants embezzled the $6,983.64 shown in the bill of particulars and then during the balance of the trial changed their theory to one of breach of contract, and that the trial court in permitting the amendment of the amount of the complaint recognized and permitted such change of theory. Plaintiffs deny this charge. A thorough study of the transcript fails to support defendants' contention. At the opening of the trial plaintiffs stated that they would prove that defendant in writing agreed to construct an apartment building according to plans and specifications for $37,500 plus an additional $2,500 for certain garages and for his services defendant was to receive $1,500; that shortly after the building was started it was orally agreed between the parties that stores would be built instead of garages and that plaintiffs would pay the cost of the construction of the stores. Plaintiffs then stated that the Oppenheimer Building Fund was created, into which plaintiffs put certain moneys, and in which defendant placed collections made by him for plaintiffs, and that taking into consideration the agreed price of the building, the extra cost for the stores and other items and compensation to defendant, and deducting the total from the entire amount of the building fund, $6,900 plus dollars "disappeared in the process and is no longer available, paid out of this building fund and disappeared into thin air * * *. He had a contract for $40,000 plus legitimate extras which we will show you—plus the stores—the difference between that and the amount of money the man had available to him given to him by my clients is what we will ask you to return to them * * *." Defendants' opening statement claimed that the agreement between the parties was oral and was to the effect that defendant would supervise the construction of the building for a fee of $1,500 and the business of collecting rents from the tenants who might occupy it [2] and that plaintiffs would pay for the cost, that the $6,900 plus collected by defendant went into the Oppenheimer fund and was used to build the building. From the opening statements and as the case proceeded it clearly appeared that the main issue between the parties was whether the agreement between the parties for the construction of the building was for a fixed price of $40,000 or whether it was for cost-plus. The $6,983.64 went into the sum of $62,847.22, the total sum in the fund. The total amount of the fund was expended by defendant in the construction of the building and the stores. This he was entitled to do if the agreement was a cost-plus one. He was not entitled to use all of the fund if the contract was for an agreed price. When the expenditures from the fund to which defendant was only entitled if the agreement were a fixed price one (and the jury so found it to be) were deducted from the total amount of the fund used by defendant from the fund, there was a difference of $9,923.27, some $2,000 more than represented by the collections referred to in the bill of particulars. We see no variance in the cause of action

2. Defendant cross-complained for damages for plaintiffs' breach of this agreement.

between that pleaded in the common count and the theory upon which the case was started, on the one hand, and the theory upon which recovery was had, on the other. Plaintiffs were suing for moneys had and received. Their bill of particulars showed that they set forth moneys received by defendant for plaintiffs for which they claimed he did not account. In attempting to account for it, he showed that the moneys went into the building fund and from it were used in the construction work. But plaintiffs then countered by showing that he had no right to use those moneys for that purpose as he had agreed to build the building for a fixed amount, in other words, that he had used the money without their authority. Thus, plaintiffs were not suing on a breach of contract. They were suing for moneys held by defendant in trust for them and improperly expended. Authorities such as Cincotta v. Catania, 61 Cal.App. 38, 214 P. 451, holding that under a cause of action for money had and received a recovery for breach of contract cannot be had, are not in point. There was no variance from the bill of particulars except as to amount. It appeared from the proof that, in addition to the moneys mentioned in the bill of particulars, defendant had unauthorizedly used other moneys in the trust fund. The court properly permitted plaintiffs to amend their complaint to allege the true amount which the evidence showed defendant had received for plaintiffs' use and benefit.[3] No objection was made to the amendment on the ground of difference between these amounts and those shown in the bill of particulars. The objection was that by changing the amount in the complaint the cause of action was changed.

2. Instructions.

[2] Defendants complain of a number of the instructions given. Generally, it is contended that the criticized instructions are determinations by the court as to what the agreements of the parties and the terms thereof were; as to what the jury should determine other controverted facts to be; that the court instructed the jury to find against defendants' theory that the building agreement was on a cost-plus basis; and that in a particular instruction the court failed to include all elements of the subject. We find no error in the instructions. Throughout, defendants take phrases from an instruction with complete disregard of the context and of the fact that instructions must be considered as a whole, and attempt to read into them a different meaning than they actually bear. Likewise, they completely ignore the fact that elements claimed to be omitted from a particular instruction are either in the instruction or clearly appear elsewhere. Defendants contend that certain instructions change plaintiffs' cause of action from conversion to breach of contract. The instructions actually bear no such construction. The substance of certain instructions offered by defendants and not given, where proper, were given in other instructions.

[3] When the construction work started defendant and one Milarch had a partnership contractor's license. Defendant and Evelyn as individuals and defendant and Evelyn as partners had no license. Before the building was completed the Minks-Milarch license expired. The court refused to give an instruction offered by defendants of the type approved in Comet Theatre Enterprises v. Cartwright, 9 Cir., 195 F.2d 80, 30 A.L.R.2d 1229. However, the instruction is not applicable here. In the Comet case, the plaintiffs had paid an unlicensed contractor the agreed amount for his services and was seeking to recover the payment because the contractor was unlicensed. The court said that the plaintiffs could not recover the amount paid for the services and keep the benefits of them too. In this case, the Oppenheimers are not seeking to recover the amount paid to the Minks for the agreed construction price; they are seeking to recover the amount of their money that he used without authority.

3. The only amendment to the second cause of action was changing the figures $3,983.64 to $9,923.27. The figures in the first cause of action were reduced. Defendants do not complain of this amendment.

[4] Defendants offered an instruction on fraud. As fraud was not an issue the instruction was properly refused.

Defendants complain that there was no evidence of partnership between defendant and Evelyn and hence instructions leaving that issue to the jury were erroneous.

3. Partnership of Defendants.

[5] Defendants also claim on this same ground that the court erred in refusing to direct a verdict in Evelyn's favor. The evidence on this subject follows. The letter signed by defendant agreeing to construct the building was on the letterhead of the business defendant and Evelyn were conducting at that time. Evelyn testified that she and her husband operated and owned the real estate business together under the names Minks Co. and L. N. Minks Co. She testified that she was not a contractor, that her husband was and that his building activities were run out of the same office and with the same office organization as the real estate business. When asked if there was any separation between the businesses she replied "Not too much." Then when asked "Was there any?" she replied, "Well, I suppose there was. *I didn't ever stop to think of it.*" (Emphasis added.) "We used them both * * *. We didn't discriminate between the two." To the court's question "What was it, a partnership or corporation, or what?" she replied, "We just owned the business and we weren't too particular." Defendant testified that Minks Co. was fictitiously registered to do business under his wife's name and that L. N. Minks Co. was registered to do business "as myself," that "in the office we didn't even remember which was which." When asked if other than registration there was any difference between the companies he said, "Well, I wouldn't know." He then testified "our business is conducted mutually together * * *." They used one set of books and operated their business as a unit. Exhibit C, a check to A. R. Peterson & Sons marked "Paid in Full on Oppenheimer Job 10016 MacArthur Blvd." (the apartment building location) bears the printed heading "E. S. Minks—L. N. Minks." Plaintiffs' exhibit 5—defendant's accounting for the receipts and expenditures out of the "Oppenheimer Building Fund"—is on the letterheads of "L. N. Minks Co." The mere fact that the contract with plaintiffs was signed only by defendant, is not conclusive that he was not acting for the partnership.

While there was no direct evidence of an oral or a written agreement of partnership between the defendants in the contracting business, the evidence above set forth was sufficient to raise an inference that such a partnership existed. Therefore the court properly left the determination of that issue to the jury and properly denied the motion for directed verdict.

4. Alleged Misconduct of Court.

[6, 7] Defendants specify 48 instances in which they claim the trial court unduly interfered with their examination and cross-examination of witnesses. Defendants specify 17 instances in which they claim the court by its rulings and comments improperly created an unfavorable opinion of defendant. We have examined each instance and fail to find that they support defendants' contention. They are principally rulings adverse to defendants on the form of questions (asking for the conclusion of the witness, basing a question upon a fact not in evidence, not proper cross-examination, etc.). In most instances the court was right. In the few where the question should have been permitted, changes in the form of the question adduced the information sought. The 17 instances of comment on rulings by the judge were likewise proper. Nor do we find anything wrong in the fact that the court in some of the instances interrogated the witnesses. When done, it obviously was done to make the witness' statements clearer. We cannot read into the instances any desire upon the part of the court to injure defendants. Of course, the answers were unfavorable to defendants, but that fact would not deprive the court of its power to interrogate a witness when deemed necessary to make the situation more clear. The court fully instructed that the jury must not be influenced by any

remarks of the court that might appear to favor one party or the other, and that if some statement made by the court indicated that it had an opinion on the merits of the case, the jury must disregard the remark. While on a limited number of occasions the court seemed a bit petulant, we fail to find any indication of injury to defendants or failure to accord defendants a fair trial.

5. Dissolution Agreement.

[8] After the completion of the building and before this action was commenced, defendants and plaintiffs entered into a "Dissolution Agreement" in which the parties divided various properties they had owned together and which purported to settle all financial affairs between them relating to certain specified properties and transactions. (The apartment building was not mentioned.) There is a clause to the effect that as to any other holdings owned by plaintiffs which defendants are then managing, defendants shall "have no further interest therein or thereto morally, commercially or legally" if "at any time * * * [they] may be taken over by" plaintiffs. The court refused to admit this agreement on the ground that it did not deal with the apartment building. At the time it was executed defendants were still collecting the rents for plaintiffs on that building. It was not until thereafter that plaintiffs discharged defendants as their agent in this respect. Defendants claim that it discredited plaintiffs' present claim. We fail to see that it has any bearing on this case. The court properly rejected it.

6. Accountant's Report.

[9] Plaintiffs employed an accountant to go over defendants' records. Defendants demanded that the accountant's report to plaintiffs be produced in court and that they be permitted to examine it. The court refused to order its production. Defendants have cited no authority requiring it. It was a confidential report between the accountant and plaintiffs and a part of the preparation for trial by plaintiffs and their counsel. We see no error here.

Defendants, using their own version of the evidence in the case, contend that the verdict results in substantial injustice to defendants in unjustly enriching plaintiffs at defendants' expense. The answer to their contention is that the jury on substantial evidence found against their contention.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



141 Cal.App.2d 563

In the Matter of LOS ANGELES COUNTY PIONEER SOCIETY, In Process of Winding Up.

Harry J. LELANDE, Appellant,

v.

PEOPLE of the State of California, Respondent.

Civ. 21159.

District Court of Appeal, Second District, Division 2, California.

May 15, 1956.

Rehearing Denied June 7, 1956.

Hearing Denied July 11, 1956.

Proceeding on a motion for reimbursement of costs incurred in litigation. The Superior Court, Los Angeles County, James H. Pope, J., entered an order denying motion, and the movant appealed. The District Court of Appeal, Ashburn, J., held that transfer of case to Supreme Court on petition of party set case at large for decision of Supreme Court upon entire record, and costs award made by District Court of Appeal was thereby vacated, even though no direct attack thereon was made in Supreme Court.

Affirmed.

Courts ⇐488(1)

Transfer of case to Supreme Court on petition of party set case at large for decision of Supreme Court upon entire record, and costs award made by District

Court of Appeal was thereby vacated, even though no direct attack thereon was made in Supreme Court.

Ray Howard and Alfred P. Peracca, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Edward Sumner, James C. Maupin, Deputy Attys. Gen., for respondent.

ASHBURN, Justice.

This appeal is taken by Harry J. Lelande from an order denying his motion for reimbursement for costs incurred in litigation involving the attempted dissolution of Los Angeles County Pioneer Society. In re Los Angeles County Pioneer Society, 40 Cal.2d 852, 257 P.2d 1.

That case was initially decided by this court, 112 Cal.App.2d 446, 246 P.2d 1029, at page 1034; the opinion concluded as follows: "It is further ordered, however, that with respect to the accounting necessary in connection with the dissolution, the Superior Court is directed to award the Historical Society and Harry J. Lelande court costs incurred by each of them, in both the Superior Court and on appeal, in the protection of said fund against the wrongful use thereof, and such costs may be paid therefrom notwithstanding the commitment of Historical Society to use the fund according to its resolution." Upon petition of the Pioneer Society a hearing in the Supreme Court was granted, the order of the superior court declaring the society to be a charitable corporation and appointing a new trustee was affirmed, and no mention made of any award of costs to Lelande or reimbursement of same to him.

Appellant Lelande claims on this appeal that the order granting a hearing did not vacate the portion of the district court opinion above quoted because it was not attacked by Pioneer and he, Lelande, did not petition for a hearing; that said quoted portion of the district court's ruling remains the law of the case. At first view this appears to be a startling proposition and upon careful analysis proves to be wholly fallacious.

Briefly the background facts are these: Pioneer Society, organized in 1910, devoted its activities for years to collecting and preserving historical data concerning early history of California and especially Los Angeles County; collecting and preserving specimens and materials illustrative of early customs; perpetuating the memory of pioneers and cultivating fraternization among its members. But interest abated and membership dwindled to 58 persons in 1948. The idea was then conceived that the society was not a charity, that it should be dissolved and its assets distributed ratably among the members. To this end a proceeding for voluntary dissolution under the Corporations Code was filed. Several members, including Mr. Lelande, objected. He appeared in the proceeding and actively opposed the dissolution. In due course the attorney general intervened alleging that the society was a charitable trust and praying for the appointment of a new trustee upon the ground that Pioneer had abandoned its trust. The court entered judgment that Pioneer was a charitable corporation, that its assets were dedicated to charitable purposes, that it had abandoned its trust and was threatening to divert its assets to the benefit of its private members and that appointment of a new trustee was necessary. Appropriate reservation of jurisdiction having been made, the court on October 18, 1950, made a further order appointing Historical Society of Southern California as substitute trustee and ordered the assets held by Pioneer turned over to it, to be held and administered upon certain specifically defined trusts. From this order Pioneer took a general appeal. Lelande also appealed from part of it. He had been insisting that there be included in the definition of the trusts upon which Historical should take and administer the property the substance of a resolution which Historical had passed declaring the trusts upon which it would hold the same. The trial judge declined to write that into the order and Lelande appealed from the order "insofar as it fails to define the powers and duties of said trustee, especially in that it does not give effect to a Resolution of said Historical Society a copy of which was

filed by it as a part of its showing on its application for such appointment on September 5, 1950, said Resolution providing that the trust fund should be used for the erection of a building to be managed and used jointly by the Historical Society and by the Native Sons of the Golden West and the Native Daughters of the Golden West."

These appeals were heard and decided together by the district court of appeal, the opinion containing the paragraph concerning costs above quoted. Lelande did not apply for hearing in the Supreme Court but Pioneer did and its application was granted.

Lelande's attorney now argues that the order transferring the cause to the Supreme Court, though general in its terms, operated only to transfer the contentions of Pioneer to the higher tribunal and left the district court opinion in full force and effect so far as Lelande was concerned. It is plain, however, that the matter covered by his appeal was not severable from that involved in Pioneer's attack upon the order; its appeal necessarily included the same matter. It challenged the right to make the order, challenged it as a whole and in all its parts. Lelande complained of one of those parts but it was not a severable portion.

The conduct of Lelande's counsel in the Supreme Court after the hearing was granted is inconsistent with his present contention. He appeared and moved to dismiss the Pioneer appeal and for "Adoption of the District Court's Determination of His Own Appeal." One of his grounds was this: "He has a direct financial interest in the affirmance of said Order and of the portion of the decision of the District Court relating to costs, and the Superior Court will not proceed to allow the same until the remittitur is returned so confirming the same." Counsel also resisted a motion of Pioneer to dismiss the Lelande appeal. And after the Supreme Court had ruled he petitioned on behalf of Lelande for a rehearing, saying in part: "Had it not been for Pioneer's Petition for Hearing being granted, *its contentions having nothing to do with Lelande's*, the above holding of the District Court would have been the law of the case. That entire decision was set aside by this Court's consenting to review *Pioneer's contentions*. Believing that this Court's affirmance should continue in force or revive said *unopposed* portion of the District Court's decision, Lelande made his said separate motion for its adoption as a part of the final decision."

The Supreme Court opinion shows that the entire cause was before it. The first sentence says: "Los Angeles County Pioneer Society and Harry Lelande, a member thereof, appeal separately from an order appointing the Historical Society of Southern California trustee of all property in the possession of Pioneer." 40 Cal. 2d at page 856, 257 P.2d at page 3. At page 857 the opinion again refers to the "present appeals." The merits of the Lelande appeal were considered and disposed of, 40 Cal.2d at pages 866–867, 257 P.2d at page 10, as follows: "Appellant Lelande, although not questioning Historical's fitness to act as trustee, contends that the order appointing Historical trustee should have defined Historical's duties in more detail. The order of the court followed the provisions of Pioneer's articles. Lelande points out that before it it was appointed trustee, Historical adopted a resolution providing that the assets acquired from Pioneer would be used to erect a building to be occupied by Historical and other societies, and contends that the court should have ordered Historical to comply with that resolution. In our opinion, the trial court did not err in limiting its decree to provisions similar to those in Pioneer's articles. This limitation conforms to the wishes of the donors of the assets. In view of our conclusion that Lelande's contentions cannot be sustained, it is unnecessary to discuss the motion of Pioneer to dismiss Lelande's appeal." The order was affirmed, Pioneer's motion to dismiss Lelande's appeal was denied and his motion to dismiss the Pioneer appeal was denied.

In the face of the general appeal taken by Pioneer and the general petition for hearing filed by it, there is no merit in

the contention that the entire cause was not taken over by the Supreme Court or in the claim that any portion of our ruling or opinion was not vacated. Knouse v. Nimocks, 8 Cal.2d 482, 483, 66 P.2d 438: "The opinion and decision of the District Court of Appeal, by our order of transfer, have become a nullity and are of no force or effect, either as a judgment or as an authoritative statement of any principle of law therein discussed. As stated by us in a former action, the opinion may serve as a brief on the legal questions involved therein, and may be adopted by this court as its opinion in the pending action. In re Estate of Kent, 6 Cal.2d 154, 156, 57 P.2d 901. But without some further express act of approval or adoption of said opinion by this court, that opinion and decision are of no more effect, as a judgment or as a precedent to be followed in the decision of legal questions that may hereafter arise, than if they had not been written." To the same effect are In re Estate of Kent, 6 Cal.2d 154, 156, 57 P.2d 901; E. J. Stanton & Sons v. County of Los Angeles, 78 Cal.App.2d 181, 193, 177 P.2d 804. See also, 3 Witkin California Procedure, pp. 2416–17, § 208.

The general rule is firmly established, and Martin v. Howe, 190 Cal. 187, 211 P. 453, 454, disposes of appellant's claim that the granting of the Pioneer petition did not transfer to the Supreme Court those portions of the order concerning which Pioneer and Lelande were not in controversy. In that case a petition for hearing in the Supreme Court had been filed by certain defendants who were not interested in the defense of statute of limitations. After a hearing had been granted and the cause decided by the Supreme Court other defendants who had not joined in the petition for hearing applied for a rehearing by the Supreme Court, asserting that the matter of limitation had not been presented satisfactorily because the case had been transferred upon petition of defendants not interested in that question and the defendants seeking a rehearing "believed that the matter would not be considered by this court, but that the conclusion of the District Court of Appeal on that branch of the case would be adopted without question." The Supreme Court said, 190 Cal. at page 188, 211 P. at page 454: "On the contrary, the transfer of the case here by the court of its own motion or on the petition of any of the parties set the case at large for the decision of this court upon the entire record."

Appellant's reliance upon Heroux v. Atchison T. & S. F. Ry. Co., 14 Cal.2d 285, 93 P.2d 805, is misplaced. A judgment for defendant in a personal injury action had been reversed by the appellate court and remittitur had issued on November 9, 1938. On December 24, 1938, motion to recall the remittitur was filed in the district court of appeal. That court denied the motion and the Supreme Court granted a petition for hearing. Manifestly, there was and could be before the Supreme Court in those circumstances nothing other than the matter of the motion for recall of remittitur. At page 287 of 14 Cal.2d at page 807 of 93 P.2d, the Supreme Court said: "The effect of our order was to transfer the motion to this court. The respondent insists that our order had the effect of transferring the entire cause on the merits of the appeal. Such of course was not the case. The appeal on its merits was disposed of by the judgment of the District Court of Appeal reported in 28 Cal.App.2d 401, 82 P.2d 620, supra, and by the order of this court denying the respondent's petition for a hearing on November 7, 1938. The only matter transferred to this court by its order was the motion to recall the *remittitur*. * * * It is the rule that the order of transfer has the effect of setting aside the judgment of the District Court of Appeal and of lodging the cause in this court and placing it in the same situation as a cause originally commenced here." The case bears no analogy to the situation at bar and affords no support for appellant's contention.

The opinion of the Supreme Court in the Pioneer case, 40 Cal.2d 852, 257 P.2d 1, is silent on the subject of costs to Lelande. In effect that is a denial of same. Counsel for appellant was correct when he said in his petition for rehearing after Supreme Court decision "[t]hat entire decision was

set aside by this Court's consenting to review Pioneer's contentions."

Appellant presents no other points in his attack upon the instant order which require discussion. He made these same arguments in a petition for writ of mandate in the matter of Lelande v. Superior Court, Civil No. 20569, wherein this court denied an alternative writ without opinion. The Supreme Court in the same manner denied a hearing.

The order is affirmed.

MOORE, P. J., and FOX, J., concur.



141 Cal.App.2d 626

Beverly Jean DU BOIS, Plaintiff and Respondent,

v.

John Jay DU BOIS and Jennie V. Starr, Defendants,

Ella M. Shaw, as Administratrix with the will annexed of Jennie V. Starr, Deceased, substituted in the place and stead of Jennie V. Starr, Appellant.

Civ. 8743.

District Court of Appeal, Third District, California.

May 17, 1956.

Rehearing Denied June 13, 1956.

Hearing Denied July 11, 1956.

Divorce action, in which wife joined husband's employer, upon claim that employer had obtained judgment against husband on fictitious notes and had withheld part of his salary, pursuant to plan to deprive wife of her share of community. The Superior Court, Stanislaus County, R. R. Sischo, J., entered judgment against employer, and granted wife interlocutory divorce decree and custody of children, alimony and support. Upon death of the employer, her administratrix appealed. The District Court of Appeal, Van Dyke, P. J., held, in part, that in view of uncontradicted testimony that husband's salary was certain lower figure, finding that employer had withheld certain sums from husband's salary was without support in evidence.

Judgment reversed.

1. Husband and Wife ⇐270(8)

In wife's divorce action, in which husband's employer was joined upon claim that employer had obtained judgment against husband on fictitious notes and had withheld part of his salary, pursuant to plan to deprive wife of her share of community, in view of uncontradicted testimony that husband's salary was certain lower figure, finding that employer had withheld certain sum from husband's salary was without support in evidence.

2. Evidence ⇐588

Disbelief of witnesses by trial court furnishes no foundation for an affirmative finding contrary to that to which they had testified.

3. Judgment ⇐850

Where husband's employer, whose judgment against husband, wife sought to vacate in her divorce action upon claim that it had been obtained to defraud her of her share in community property, had, by reason of advanced age, placed all her property in trust, court in divorce action was not competent to adjudicate invalidity of judgment, in absence of joinder of parties who had succeeded to employer's interest in judgment prior to wife's joinder of employer in divorce action.

Sutter, Elledge & Carter, Modesto, for appellant Du Bois.

Cook & Gleason, Turlock, for appellant Starr.

Philander Brooks Beadle and Morton L. Silvers, San Francisco, for respondent.

VAN DYKE, Presiding Justice.

This action was begun as a divorce action brought by Beverly Jean DuBois, respondent here, against her husband John. The complaint filed charged cruelty as ground for divorce, sought custody of the minor children of the parties, a distribu-

tion of the community property and provisions for alimony and child support. The cause came on for trial on May 28, 1953. During the trial proceedings that day certain matters developed in the testimony concerning alleged claims made by Jennie V. Starr to property of the marital community, and the matter was continued to afford opportunity to join Mrs. Starr as a third party. It appeared that on May 20th, after the cause was at issue but before the first day of trial, an action had been begun by Mrs. Starr against John wherein the complaint sought judgment against him based upon allegations that promissory notes, aggregating in principal sum $31,500, had been executed in favor of, and were held by, Mrs. Starr, and were due and unpaid. The trial court made an order authorizing the joinder of Mrs. Starr in the case, and on July 1st, following, an amended complaint was filed, making her a party. Therein it was alleged that the action she had brought against John had resulted in a default judgment of something over $40,000 and that execution had been issued thereon. It was further alleged, however, that on June 13th Mrs. Starr had assigned the judgment to W. Coburn and Jeremy C. Cook by a "purported assignment." The cause against Mrs. Starr was stated as follows: There were allegations that Beverly and John were possessed of community property, the full extent of which Beverly did not know; that included therein was the family home, a house and lot in Turlock; that John had been employed since March of 1946 by Mrs. Starr as manager of her nursery in Turlock; that between November 1, 1946 and June 1, 1949, he had executed nine unsecured promissory notes to Mrs. Starr aggregating $31,500 in principal amounts; that there was no consideration for any of said nine notes and that the same were not obligations of John. It was alleged that the attorney representing Mrs. Starr in said action she brought against John was W. Coburn Cook and that he was an associate and partner of H. E. Gleason, who was the attorney for John. It was alleged also that the action had been fraudulently and collusively conceived and maintained for the purpose of depriving Beverly of her just share in the community property of the parties. When trial of the divorce action was resumed after Mrs. Starr had answered the pleading against her, testimony was taken concerning the community property of the parties, the claims of Mrs. Starr thereto, the good faith of the suit on the notes, and related matters. A judgment was rendered affecting the interests of Mrs. Starr and deciding the issues raised against her. Also an interlocutory decree of divorce was granted to Beverly, she was given custody of the children and granted alimony and child support; the community property was apportioned. John appealed from the judgment against him, but his appeal has been dismissed for want of prosecution thereof. Mrs. Starr appealed. While the appeal was pending she died and there has been substituted her personal representative.

The theory upon which respondent sought to obtain the order of the court permitting the joinder of Mrs. Starr was this: She contended that the promissory notes executed to Mrs. Starr by John had been executed not at the times they bore date, but after respondent had begun the divorce action; that the execution of the notes, the delivery of the notes to Mrs. Starr, the filing of the action by Mrs. Starr, the entry of the default of John, the obtaining of the judgment and the issuance of the execution thereon were all mere steps taken to carry out a collusive and fraudulent scheme to impress a judgment lien upon the family home and to obtain levy upon whatever personal property the marital community might possess subject to execution, to sell the property so seized, and thus take it out of the reach of the court in the divorce action to the detriment of respondent.

Appellant contends that the joinder of Mrs. Starr was unauthorized; that the complaint making her a party did not state a cause of action against her in that it did not show that she claimed any interest in the community property. We think we need not consider these contentions because an examination of the record discloses, as argued by appellant, that the judgment of

the court, in so far as it affected the interests of Mrs. Starr, must be reversed for want of evidence.

[1, 2] The trial court granted respondent a personal judgment against Mrs. Starr in the sum of $1,275, being one-half of a total sum of $2,550, which the court found was community property in the hands of Mrs. Starr by reason of her having withheld portions of the salary of John. John was given a like judgment against Mrs. Starr, the court having divided between him and Beverly the total amount which Mrs. Starr was found to owe to the community. The finding that Mrs. Starr had withheld sums aggregating $2,550 from John's salary is without support in the evidence. The period during which the withholding was declared to have been made extended from January 1, 1953 to the date of the judgment and was at the rate of $350 per month, the court declaring that, although during the period John was paid $400 a month, his salary was in fact $750 a month. The testimony addressed to this matter was as follows: John testified that beginning January 1, 1953, a salary which had been $750 had been reduced to $400 a month. Jeremy C. Cook, an attorney at law, who was one of the trustees of a trust into which on June 13, 1953 Mrs. Starr had transferred all of her property of whatever kind and who was the manager of that trust, testified that from the time the trust was made and he took over the management of the trust property John's salary had been $400 per month paid to him for operating a nursery formerly owned by Mrs. Starr and placed by her in the trust. This testimony was corroborated by that of the bookkeeper who kept the books for the nursery business. There is nothing in the testimony that is contradictory to the above. The court may have disbelieved the witnesses, but disbelief furnishes no foundation for an affirmative finding to the contrary.

[3] The trial court found and adjudged that the promissory notes sued on by Mrs. Starr had been executed without consideration after the divorce action had been begun and that the execution of the notes, the action upon them, the default and the judgment were all collusively fraudulent acts on the part of John and Mrs. Starr, done for the purpose of defrauding respondent. The court decreed that the judgment obtained by Mrs. Starr was void. The record presents this situation: The complaint, as against Mrs. Starr, contained an allegation that, having fraudulently procured the judgment against John, Mrs. Starr had "purportedly" assigned the same to W. Coburn Cook and Jeremy C. Cook. There was introduced in evidence on behalf of Mrs. Starr the conveyance in trust made by her, which conveyed to W. Coburn Cook and Jeremy C. Cook, as trustees, all of Mrs. Starr's property. Briefly it was shown that she had made this disposition because, by reason of advanced age, she was no longer able or desirous of caring for her property. The trust indenture gave to her a right to receive during her lifetime the net income derived from the trust properties and made other dispositions to take effect upon her death. The conveyance was final, no right of revocation having been reserved. There is nothing in the evidence which attacks the good faith of this transfer in trust, and so upon this record it was shown that, whatever may have been the derivation of the judgment Mrs. Starr obtained against John, the ownership thereof had passed to others not parties to the cause before Mrs. Starr had been joined in the divorce action. It was not competent, therefore, for the court to make any adjudication as to the validity of the judgment.

For the reasons given, the judgment rendered against Mrs. Starr is reversed.

PEEK and SCHOTTKY, JJ., concur.

Hearing denied; GIBSON, C. J., and SPENCE, J., dissenting.

141 Cal.App.2d 608

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Rubel Noll ARMENDARIZ and Earl Eugene Moreno, Defendants and Appellants.

Cr. 5539.

District Court of Appeal, Second District, Division 2, California.

May 16, 1956.

Defendants were convicted of robbery. The Superior Court, Los Angeles County, Kenneth C. Newell, J., entered judgment, and defendants appealed. The District Court of Appeal, Moore, P. J., held that evidence was sufficient to sustain conviction.

One defendant's purported appeal dismissed, and judgments against both defendants and order denying one defendant's motion for new trial affirmed.

1. Robbery ⇐24(1)

Evidence was sufficient to sustain conviction for robbery. West's Ann.Pen.Code, § 211.

2. Robbery ⇐15

Person, who, with criminal knowledge, aids and abets commission of a felony is a "principal" along with him who fires the fatal shot or breaks the door or bears away loot of the theft, and transporting robbers to scene of their banditries is in aid thereof.

David C. Marcus, Gladys Towles Root, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., Robert S. Rose, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

The sufficiency of the evidence is the only question posed by this appeal.

Four men were accused by information of robbery, armed with deadly weapons. Penal Code, sec. 211. Defendant Calderan was alleged to have suffered two prior felony convictions. Appellant Moreno had also been convicted previously twice, first for violating section 503 of the Vehicle Code and, second, violating section 11500, Health and Safety Code, both felonies. All parties were represented by counsel. All were convicted as charged, except Armendariz and Moreno were not personally armed. The fact is that the latter two were not present at the actual robbery, but became principals by virtue of having aided and abetted their codefendants in the commission of the robbery.

The trial court, at the hearing of the motion for a new trial and application for probation, struck the allegation of two prior convictions charged to Moreno. But judgments against both appellants were entered convicting them of robbery. Each appeals from the judgment. Moreno appeals from the order denying his motion for a new trial. Armendariz appeals from the sentence, but it is not appealable.

The Facts

The victim of the bandits was one Clayton, operator of a liquor store on West Valley Boulevard in San Gabriel. On February 14, 1955, about 8:00 p. m. while there alone he observed defendants Calderan and Chavez enter the store at the same time, and don masks. Chavez held an automatic pistol in his hand, ordered Clayton to open the cash register and threatened to shoot the proprietor if he should refuse. When the latter could not obey, Calderan inserted his hand into a pigeonhole under the cash register, withdrew a .32 special revolver, aimed it at Clayton and threatened to shoot unless the cash register be opened. Thereupon, Chavez ordered the merchant to go to the rear and lie down on the floor and thrice threatened to shoot the victim. The men took a metal box and a brown leather wallet containing checks and cash of the value of $429.47. With that box under his arm, Calderan emerged from the front door. Chavez, unable to make his exit through the rear door, started toward the front. Thereupon, Clayton took another revolver and effected the capture of Chavez. Contemporaneously with the arrest of the latter, as Calderan left the store, he was ordered by Officer Hatch to stop. As

the bandit ran, Hatch fired and the bandit fired twice at Hatch. At the same time Officer Cudahy of the radio car handcuffed Chavez. Calderan was subsequently arrested and duly convicted along with Chavez and appellants.

As to Appellants

Inasmuch as appellants contend that there was not sufficient evidence to prove that they aided and abetted their codefendants, a close scrutiny of the evidence is essential to answer their claims. Prior to the events at Clayton's store, at 7:15 p. m. February 14, 1955, Officers Hatch and Piotrowski of San Gabriel were sitting in the latter's automobile at Mission and San Gabriel Boulevards in the historic city. They observed a black sedan going south on San Gabriel driven by Armendariz, with Moreno by his side. The license number of the car was 1W5206 and was registered to Armendariz. Hatch knew both men. Their codefendants (Chavez and Calderan) sat in the rear seat. The officers trailed the slowly-moving car south on San Gabriel to Fairview, it made several turns until it reached Valley Boulevard at Del Mar. Thence it traveled west on Valley to Manley Drive, turned west and parked. There Calderan and Chavez left the black sedan and entered the liquor store of Clayton. Anticipating trouble, Piotrowski, at Hatch's suggestion, called for help which came at once. Hatch took a position some twenty feet from the store. It was almost 8:00 p. m. as Hatch saw the two brigands enter Clayton's store. While they were performing in the store as above recited, appellants were watched by Officer Piotrowski until the two shots were discharged by Calderan. Thereupon they drove away in a hurry. Some twenty minutes later Hatch and his associates were advised that Officer Durbin had two men in custody near the pool hall on south Del Mar. Hatch searched the black sedan only to find a blue sweater and a man's wallet, colored black and brown, in the rear seat. Thereafter, Calderan told Hatch that the garment was his; that he had taken it off prior to going into the store, and left it in the sedan. At the same time he admitted that he had fired the two shots at Officer Hatch. When the latter arrived, Durbin held the black sedan and appellants.

When an interview was attempted by Lieutenant Nelson of San Gabriel, Moreno declined to talk. After Hatch narrated the events he had witnessed, Nelson asked whether Moreno cared to comment. His answer was, "no, I have nothing to say." To the same inquiry by the Lieutenant, Armendariz said, "the whole thing was a lie."

[1, 2] That such evidence was sufficient to sustain the convictions of appellants for robbery is eloquently declared in People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778; People v. Beal, 108 Cal.App.2d 200, 204, 239 P.2d 84. A person who, with criminal knowledge, aids and abets the commission of a felony is a principal along with him who fires the fatal shot or breaks the door or bears away the loot of the theft. People v. Terman, 4 Cal.App.2d 345, 347, 40 P.2d 915. Transporting robbers to the scene of their banditries is in aid thereof. These appellants not only conveyed Calderan and Chavez to the liquor store, but they remained in the sedan at a point nearby until they heard the two shots fired by Calderan. From those occurrences and the fact that Armendariz drove his own vehicle for some distance to deliver Chavez and Calderan to the locality of Clayton's liquor store; that he and Moreno waited nearby; that appellants drove away from the immediate vicinity; that they refused to talk when asked to comment on the officers' narrative of events—from such facts it was not a strained inference to deduce that appellants had knowingly and feloniously aided in the commission of the robbery. People v. Le Grant, 76 Cal.App.2d 148, 153, 172 P.2d 554; People v. Soffer, 34 Cal.App. 2d 301, 304, 93 P.2d 183; People v. Benton, 32 Cal.App.2d 407, 410, 89 P.2d 1089. Whether appellants were present and whether they abetted the robbery are facts to be fairly found from all the evidence. People v. Sampsell, 104 Cal.App. 431, 442, 286 P. 434. Same were fairly determined by the court below. People v. Newland, supra; People v. O'Keefe, 138 Cal.App.2d 329, 291 P.2d 982; People v. Richardson;

136 Cal.App.2d 342, 346, 288 P.2d 521. Other facts support the inference, namely: Officer Piotrowski saw the black sedan continuously until the two shots were fired; Armendariz testified they "took off" as soon as he "left Chavez off." Although Calderan admitted his complicity to Lieutenant Nelson, he testified to the contrary at the trial. Conflicting stories of an accused are evidence of guilt. People v. Roche, 49 Cal.App.2d 459, 462, 121 P.2d 865; People v. Gibson, 64 Cal.App.2d 537, 539, 149 P.2d 25; People v. Cooper, 81 Cal.App.2d 110, 117, 183 P.2d 67; People v. Wayne, 41 Cal.2d 814, 823, 264 P.2d 547. The trial court having resolved all contradictory evidence against appellants, there is no reasonable basis for disturbing the judgment. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778.

Armendariz' purported appeal from the sentence is dismissed. Both judgments and the order denying Moreno's motion for a new trial are affirmed.

FOX and ASHBURN, JJ., concur.



141 Cal.App.2d 600

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Donald SCHRAIER and Jack Percy Almond, Jr., Defendants,

Donald Schraier, Appellant.

Cr. 5492.

District Court of Appeal, Second District, Division 2, California.

May 16, 1956.

Rehearing Denied May 29, 1956.

Hearing Denied June 12, 1956.

Defendant was convicted of illegal possession of marihuana cigarettes. The Superior Court, Los Angeles County, Joseph M. Maltby, J., entered orders granting him probation and denying his motion for new trial, and defendant appealed from both orders. The District Court of Appeal, Moore, P. J., held that where police, while watching suspected cottage, arrested and searched person seen to enter and leave cottage, in company with two others, and person was unknown to police and had no criminal record, arrest was without probable cause, and marihuana cigarettes discovered upon search of person were inadmissible in evidence in subsequent criminal prosecution for their illegal possession.

Judgment and order reversed.

1. Criminal Law ⇐1023(12)

An order granting probation is deemed a final judgment for purposes of appeal. West's Ann.Pen.Code, § 1237.

2. Searches and Seizures ⇐3(1)

A search cannot be justified by discovery of "contraband" objects.

3. Searches and Seizures ⇐3(1)

The fact that person actually did at time have narcotic cigarette in his pocket could not justify search of his person by police officer.

4. Arrest ⇐63(4)

While house was closed to curious eyes, and strange men drove upon its premises and sauntered upon its walks, these facts would not be authority to arrest a man standing on the adjacent street.

5. Arrest ⇐63(4)
Searches and Seizures ⇐3(1)

Mere suspicion does not justify arrest or search of person leaving suspected premises.

6. Arrest ⇐63(4)
Criminal Law ⇐395

Where police, while watching cottage, arrested and searched person seen to enter and leave cottage, in company of two others, and person was unknown to police and had no criminal record, arrest was without probable cause, and marihuana cigarettes discovered upon search of his person were inadmissible in evidence in subsequent criminal prosecution for their illegal possession. West's Ann.Health & Safety Code, § 11500.

Roger J. Pryor, Compton, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

[1] Convicted of having had possession of marijuana cigarettes, Health & Safety Code, § 11500, defendant appeals from the order granting him probation,[1] and from the order denying his motion for a new trial.

[2] Officers Naylor and McMahan of the Long Beach Police Department had for two hours been watching a cottage on Cherry Avenue, Long Beach, prior to the arrival of appellant and his companions in an automobile. The cottage was the residence of one Ray Anderson. It had been under surveillance by the police for several months by reason of their knowledge of certain undisclosed activities at the house during that time. On the evening in question, they were making a routine check on the house and particularly were looking for Messrs. Dement and Woods who were under bail for prior possession of marijuana. They had not been convicted. About 8:15 p. m. Dement emerged from the cottage, but was not arrested. When one Fowler later came out, Officer Naylor arrested him. But what, if anything, the officer found on him does not appear. At some time and for some reason the officers had also arrested one O'Donnell, but it does not appear that he came out of the Cherry Street house or that he had any marijuana on him. At 9:55 while Officer Naylor and his partner sat in their police car with Fowler and O'Donnell, Naylor observed a car with three occupants enter the driveway of the Anderson cottage. All three left the conveyance and entered the house. The officer had never seen defendant Schraier before. For about 15 minutes Naylor and McMahan observed the cottage from different positions. Their attempts to see the interior were frustrated by the drawn shades. The three men who came out of the front door about 10:15 were Almond, appellant, and Ord. The latter was also a stranger to the police, but they recognized Almond. While Naylor was about 35 feet away, Almond and Ord entered the conveyance on the passenger side. Then as Naylor for the first time observed Schraier standing near the driver's seat, Almond suddenly left the vehicle, and as promptly re-entered it. There was some conversation that the police could not hear, but as soon as Almond had entered it for the second time, Officer Naylor, with neither a search warrant nor a warrant for arrest, said to appellant, "I am a police officer." Whereupon appellant placed his right hand in his right outside coat pocket; the officer grabbed his right wrist and held his hand in that pocket. When it was finally withdrawn from the pocket, the hand was empty. Schraier's resistance was only casual, indeed he was cooperative. While Naylor was holding appellant, he saw Almond insert a white cigarette into his mouth and swallow it and at the same time lock the door on the passenger's side, thereby preventing McMahan from entering the car. Naylor searched defendant's person and brought forth the contents of his pockets, among which were two white paper, hand-rolled cigarettes. A chemical analysis subsequently disclosed them to contain marijuana. The officer did not testify which pocket of the jacket yielded the cigarettes, and there is no basis for an inference that they were in the right outside pocket. Of course, a search cannot be justified by discovery of "contraband" objects. People v. Brown, 45 Cal.2d 640, 643, 290 P.2d 528.

Almond admitted to the officers that he and Ord had gone to the cottage "to see what was happening" and that he had swallowed the marijuana cigarette. However, appellant denied all knowledge of the cigarettes which had been removed from his pockets, and stated that his mother and his girl friend had worn his "coat." He said he had seen marijuana before; was a musician; had associated with musicians who used marijuana cigarettes. He did

1. An order granting probation is deemed a final judgment for purposes of appeal. Penal Code, § 1237.

not "know how the two cigarettes happened to be in his pocket." After he had entered the house, he had doffed his coat and placed it aside. It was his belief that the two hand-rolled white paper cigarettes must have been placed in the coat pocket by some other person by mistake.

Of the five persons who were searched, the police arrested only those who had marijuana on them. Ord, who sat next to Almond when the latter swallowed the cigarette, was searched, but having no narcotic on his person, he was not then arrested.

Was There An Unlawful Search?

[3, 4] Appellant contends that if the arrest preceded the search, it was unlawful because it was without probable cause. Such contention is consonant with the law. There was neither knowledge of appellant's having a criminal record, nor of his being addicted to the use of narcotics. That he actually did at the time have a narcotic cigarette in his pocket cannot justify the search by the officer. People v. Brown, supra. While the Anderson cottage had been under surveillance by the narcotic detail for several months, it had not been raided by the police in search of people practicing crime. In so far as knowledge about appellant is concerned, the house had sheltered no associate of his known to have been a narcotic addict. While the house was closed to curious eyes, and strange men drove upon its premises and sauntered upon its walks, those facts are not authority to arrest a man standing on the adjacent street. The officers had no report that appellant would be present. They had visited the cottage to make a routine check and to find Dement and Woods who had been previously charged with possession of marijuana. Although the cottage had been under surveillance by the narcotic detail for several months, there is no evidence that appellant had visited it before or that its master had ever been convicted of crime.

[5] These activities at a suspected place at ten p. m. with five people emerging from the cottage at the same time, two suspects already under arrest, might have given rise to a suspicion that any associate of a criminal there was of the same ilk. But a mere suspicion does not justify the arrest or search of a person present under such circumstances. He bore no evidences of a criminal character; he had committed no act that would reasonably indicate a readiness to violate any law; he had no criminal record; no reliable informant had reported a fact or such a suspicious circumstance as would reasonably have warranted action by the law-enforcing agencies. In People v. Blodgett, 46 Cal.2d 114, 293 P.2d 57, and People v. Martin, 46 Cal.2d 106, 293 P.2d 52, cited by respondent, there was an act by each suspect that reasonably impelled the officer to search. Blodgett at 3 a. m. in downtown Oakland, sat in the rear seat of a cab, double parked. It had two other "fares." When the officers approached to investigate, Blodgett hastily withdrew his hand from behind the seat at its junction with the cushion. After his two companions alighted from the car, the officer removed the seat and found three marijuana cigarettes at the point whence Blodgett had withdrawn his hand. No one had sat in the seat after it had been cleaned until Blodgett and a Mrs. Sanders occupied it. In the Martin case, he and his companion sat in an automobile at eleven p. m. on such a street of Oakland as to arouse the suspicions of the police. When the latter approached Martin and his party in their police car, the two men fled in great haste pursued by the officers who duly stopped them. The right hand of Mr. Dial, the driver, and the left hand of Martin were on the center of the seat. When they held their hands in front of them, at the officers' request, the latter saw a small bag in the seat. It contained marijuana. In People v. Farrara, 46 Cal.2d 265, 294 P.2d 21, also cited by respondent, no evidence was presented for the purpose of showing whether the officers acted lawfully. The case had been tried prior to the Cahan decision, People v. Cahan, 44 Cal.2d 434, 282 P.2d 905. The court inferred that the officers had information indicating guilt, but there was no proof as to whether such information was such as to constitute reasonable cause to justify the arrests, hence the presump-

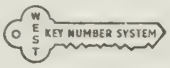
tion that they had acted lawfully. Therefore, the three cited authorities are not apropos.

[6] In searching Schraier, as the officers did, they had no information prior to the officer's seizing appellant's hand that he had committed a felony or that he was at the time doing an unlawful act. Therefore, the search was illegal and the contraband taken from his pocket was inadmissible.

The judgment and the order are reversed.

FOX and ASHBURN, JJ., concur.

Hearing denied; SHENK and SPENCE, JJ., dissenting.



141 Cal.App.2d 640

George D. GIDEON 3rd, Petitioner,

v.

The SUPERIOR COURT of the State of California, IN AND FOR the COUNTY OF LOS ANGELES, Respondent,

Marion B. Gideon, Real Party in Interest.

Civ. 21737.

District Court of Appeal, Second District, Division 1, California.

May 18, 1956.

Original proceeding in prohibition to restrain trial court from holding divorced husband in contempt for failing to make payments allegedly ordered in divorce proceedings. The District Court of Appeal, Nourse, J. pro tem., held that where affidavit by divorced wife charged that divorced husband was in contempt for failure to obey order made and entered on stated days, but date that it was stated order was made was date that trial was concluded and that clerk entered synopsis of court's oral decision that divorced husband was required to pay stipulated amounts as alimony, support, and attorney fees, but decree entered on date stated in affidavit did not follow oral pronouncement but changed payment of attorney fees, in view of fact that order specified in affidavit did not direct husband to do anything, he could not be in contempt for failure to comply with it, and prohibition would issue restraint to contempt proceedings.

Peremptory writ issued.

1. Trial ⇐400(1)

Until findings of fact, conclusions of law, decree and order for judgment were drafted, signed and filed, trial court retained control of matter and could have, on its own motion and without notice or further hearing, changed its conclusions and ordered an entirely different judgment.

2. Divorce ⇐269(1), 311

Prohibition ⇐11

Where affidavit by divorced wife charged that divorced husband was in contempt for failure to obey order made and entered on stated days, but date that it was stated order was made was date that trial was concluded and that clerk entered synopsis of court's oral decision that divorced husband was required to pay stipulated amounts as alimony, support, and attorney fees, but decree entered on date stated for order in affidavit did not follow oral pronouncement but changed payment of attorney fees, in view of fact that order specified in affidavit did not direct husband to do anything, he could not be in contempt for failure to comply with it, and prohibition would issue restraint to contempt proceedings.

George D. Gideon, 3rd, in pro. per.

Harold W. Kennedy, county counsel, Los Angeles, for respondent.

Hahn, Ross & Saunders, E. Loyd Saunders, Los Angeles, for real party in interest.

NOURSE, Justice pro tem.

Petitioner seeks a writ of prohibition to restrain respondent court from executing an order sentencing him to jail for five days and to pay a fine of $250, and in the event he fails to pay the fine to serve one day in jail for each $2 of the amount he fails to pay.

Petitioner is the defendant in an action for divorce. At the conclusion of the trial

on July 7, 1955, the court orally announced its decision, and the clerk entered the following synopsis thereof:

"After argument, interlocutory judgment of divorce is granted. * * * Defendant is ordered to pay plaintiff through the Court Trustee $50 monthly for the support of each of the minor children, and for the support of the plaintiff $100 per month for a period of 1 year, and $70 thereafter or until further order of Court. Defendant is ordered to pay plaintiff's attorneys fees in the sum of $1,250 payable $50 per month, and $267.64 costs payable $10 per month. * * * Findings and judgment are to be prepared by attorney for plaintiff."

Findings of fact and conclusions of law and an interlocutory decree of divorce were filed on October 6, 1955, and that decree was entered the following day. The decree ordered the payments of alimony and for child support in the amounts stated by the court at the conclusion of the trial; but ordered them to commence on August 1, 1955, and to be thereafter paid on the 1st of each month. It did not follow the court's oral decision, as reflected in the minutes, as to attorney's fees, but it reduced the additional fees allowed to $950 and made them payable at the rate of $50 per month, commencing August 1, 1955.

On December 7, 1955, the respondent court issued an order requiring petitioner to show cause why he should not be adjudged guilty of contempt for willfully disobeying "the Order heretofore made on the 7th day of July 1955, and entered October 7, 1955."

This order referred to and was based upon the affidavit of the plaintiff in the action. In this affidavit the plaintiff averred that "on July 7, 1955, entered Oct. 7, 1955 * * * the * * * Court made its Order" requiring the payments of alimony, child support, and attorney's fees heretofore mentioned, and averred that petitioner was in default in the payments claimed to be due on August 1 to December 1, both inclusive, except that petitioner had paid on account of child support the total sum of $225. She further averred petitioner's ability to pay.

Neither the order to show cause nor the affidavit contain any mention of the interlocutory decree. The matter was heard before a commissioner who made a written recommendation to the court. This recommendation was adopted by the court, and constitutes the judgment of contempt. It reads, in part, as follows: "The court finds that the defendant had knowledge of the order of July 7, 1955, entered October 7, 1955; that the defendant had the ability to comply with said order of court; that the defendant failed to comply with said order of court; and that his failure to comply was wilful. The defendant is therefore adjudged in contempt of court * * *"

The facts we have recited make it evident that the court was without jurisdiction to adjudge petitioner in contempt of an order of that court.

[1] Petitioner was not charged by the affidavit or found by the court to be in contempt of the interlocutory decree. He was only charged with a contempt of the order of July 7, 1955. This order did not direct the petitioner to do anything. It was merely the clerk's synopsis of the court's oral pronouncement of its conclusions, its order for judgment, and its direction that findings of fact and conclusions of law, and a decree be drafted by plaintiff's counsel. Until these were drafted and signed and filed, the court retained entire control of the matter and could have, of its own motion and without notice or further hearing, changed its conclusions and ordered an entirely different judgment. Reimer v. Firpo, 94 Cal. App.2d 798, 800, 212 P.2d 23.

[2] Inasmuch as the order specified in the affidavit did not direct that petitioner do anything, the petitioner could not, by failing to act, be in contempt of it. The affidavit, therefore, was wholly insufficient to clothe the respondent court with jurisdiction to adjudge petitioner in contempt. Warner v. Superior Court, 126 Cal.App.2d 821, 824, 273 P.2d 89.

Let a peremptory writ of prohibition issue.

WHITE, P. J., and DORAN, J., concur.

141 Cal.App.2d 553

Arbitration between FILM TECHNICIANS OF THE MOTION PICTURE INDUSTRY, LOCAL 683, Motion Picture Studio Cinetechnicians, Local 789, and Studio Projectionists, Local 165, I.A.T.S.E., and Studio Transportation Drivers No. 399, International Brotherhood of Teamsters, Respondents,

and

COLOR CORPORATION OF AMERICA, Appellant.

Civ. 21765.

District Court of Appeal, Second District, Division 1, California.

May 15, 1956.

Arbitration proceeding. The trial court entered minute order vacating award and remanding matter to arbitrator and an appeal was taken. On motion to dismiss appeal, the District Court of Appeal, Nourse, J. pro tem., held that portion of minute order remanding matter was separate from portion vacating award and was not appealable.

Appeal dismissed.

1. Appeal and Error ⇐155

An appellant had no right to appeal from order entered at his instance.

2. Appeal and Error ⇐155

An appellant could not avoid fact that order vacating arbitration award and remanding matter to arbitrator with directions for rehearing was entered at his instance and successfully appeal only from portion of such order remanding matter. West's Ann.Code Civ.Proc. § 1288.

3. Arbitration and Award ⇐57, 71

Where arbitrator failed to find on all issues submitted to him, no mutual, final and definite award upon subject matter submitted had been made and matter was left standing as it had not been heard by arbitrator, and court was required to remand whole matter rather than only issue on which arbitrator had failed to find. West's Ann.Code Civ.Proc. § 1288.

4. Arbitration and Award ⇐73, 76

In arbitration proceeding, court had no power to pass upon weight or sufficiency of evidence produced before arbitrator and could not say, as it could in passing on verdict of jury, that one issue had and another had not been properly decided, and thus vacate judgment as to one issue and leave it stand as to others.

5. Arbitration and Award ⇐73

In arbitration proceeding, portion of minute order which remanded proceeding to arbitrator was distinct from portion which vacated award, and was not appealable. West's Ann.Code Civ.Proc. § 1293.

Irving A. Bernstein, Beverly Hills, for appellant.

Gilbert, Nissen & Irvin, Robert W. Gilbert, Los Angeles, for respondents.

NOURSE, Justice pro tem.

Respondents have moved this court to dismiss the appeal taken by the appellant from an order made by the trial court, resubmitting to the arbitrator the issues framed by an agreement for arbitration.

The appellant was a party to a collective bargaining agreement with each of the respondents. Each of the agreements contained a provision for the payment by appellant to its employees of dismissal pay. They also provided for the submission to arbitration of any grievances claimed by the employees or the union representing them, including grievances as to the failure of the appellant to pay dismissal pay in accordance with the terms of the collective bargaining agreements.

Between the 1st of January, 1954, and March 31, 1954, the appellant dismissed certain of its employees, and thereafter dismissed others. Appellant claimed it was not obligated to pay dismissal pay, and respondents asserted that it was.

The parties agreed to submit the grievances arising under all contracts to one arbitrator. By the terms of the arbitration agreement, the following issues were submitted to the arbitrator:

"(a) Is the Color Corporation of America in violation of Paragraph 74 of the collective bargaining agreements with the Unions by reason of its failure to pay dismissal pay to qualified employees thereunder?

"(b) If the answer to (a) above is in the affirmative, which employees are qualified for such dismissal pay and in what amounts?"

The arbitrator, after hearings, made his award in writing. By his award he determined the first issue in favor of respondents and found that appellant was in violation of the collective bargaining agreements by reason of its failure to pay dismissal pay to qualified employees.

As to the second issue he found that certain named employees who were dismissed after March 31, 1954, were qualified and entitled to dismissal pay, and found the amount to which each employee named was entitled. He found that employees dismissed between January 1, 1954, and March 31, 1954, and who were not reinstated within 90 days, were entitled to dismissal pay, but failed to name these employees or make any award of dismissal pay to them.

Upon the filing of the award, the respondents filed a petition for an order confirming the award and moved the court for an order confirming the award and for the entry of the judgment thereon. Appellant moved the court for an order vacating the award, said motion being made upon the following grounds:

(1) The arbitrator exceeded his powers;

(2) The arbitrator so imperfectly executed his powers that a mutual, final, and definite award upon the subject matter submitted was not made;

(3) The arbitrator was guilty of misconduct and other misbehavior by which the rights of appellant were prejudiced.

It based its motion upon the points and authorities filed with its notice of motion and upon the affidavit of its counsel, which was also filed with the motion.

By its said points and authorities, and in support of ground (2) of the motion above stated, it asserted that the award was defective on its face in that the arbitrator had failed to name the employees laid off between January 1 and March 31, 1954, and failed to name which of these employees were eligible for dismissal pay and to how much each was entitled.

The court below denied the motion of respondents. It granted appellant's motion to vacate the award and remanded the matter to the arbitrator. Its minute order reads:

"Motion for order vacating award is granted *and, pursuant to Section 1288 of the Code of Civil Procedure, the matter is remanded to the arbitrator with directions for a rehearing so that the award made will specify each and every employee found to be qualified for dismissal pay and the amount thereof with respect to each of such employees.*" [Emphasis added.]

Appellant has appealed from that portion of the order which is set forth above in italics.

We have come to the conclusion that the motion to dismiss the appeal must be granted.

[1] The appellant treats the minute order as one order, and asserts his right to appeal from a portion of that order. If it is but one order, then it is an order made at appellant's instance, and from which he cannot appeal. In re Radovich's Estate, 74 Cal. 536, 16 P. 321; Steinberg v. Jacobs, 21 Cal.App. 765, 132 P. 1060; Coburg Oil Co. v. Russell, 100 Cal.App.2d 200, 204, 223 P. 2d 305.

[2] The appellant cannot avoid the fact that the order was entered at his instance by attempting to appeal from a part of the order, for, viewed as one order, all parts of it are so interwoven as to preclude an examination of the part challenged by the notice of appeal independent from the part which is not so challenged; and the result is that the notice of appeal would bring to this court the order entered at appellant's instance. American Enterprise, Inc., v. Van Winkle, 39 Cal.2d 210, 216, 246 P.2d 935.

In our opinion the minute order in question did not constitute a single order, but two severable orders. The first one vacat-

ed the award in its entirety. By the second order, the court exercised the discretion given it and remanded the matter to the arbitrator. The court did not, as both parties seem to assume, remand but one of the issues submitted to arbitration by the parties, but remanded the whole matter.

[3] This interpretation of the court's order is compelled by the fact that the court did not, and in fact had no power to, vacate a part of the award only. This is not a case where the arbitrator has found upon an issue not submitted to him and where his award may be modified by the court by striking therefrom the portion which attempts to make an award outside of the submission; but it is a case where the arbitrator has failed to find upon all of the issues submitted to him, with the result that "a mutual, final and definite award, upon the subject matter submitted" has not been made. In such a case there has, in reality, been no award, and the attempted award must be vacated as a whole, and the matter left standing as if it had not been heard by the arbitrator. Muldrow v. Norris, 12 Cal. 331, 334.

[4] That a court cannot, where the arbitrators have failed to make an award upon all of the issues submitted them, let the award stand as to the issues covered by it and resubmit it upon the issues not passed upon, follows from the fact that the court has no power to pass upon the weight or sufficiency of the evidence produced before the arbitrators, and therefore cannot say, as it may in passing upon the verdict of a jury, that one issue has and another has not been properly decided, and thus vacate the judgment as to one issue and leave it standing as to others.

The award having been vacated in its entirety by the court, thus leaving all issues undetermined, we cannot assume that it was the intent of the court to resubmit to the arbitrator but one of those issues, inasmuch as any award so made would be as defective as the one which the court had vacated.

[5] We hold that the portion of the minute order appealed from is a separate and distinct order from that portion thereof which vacated the award, and that it submitted to the arbitrator all of the issues covered by the agreement for arbitration. Such an order is not one of those specified in section 1293 of the Code of Civil Procedure as one from which an appeal may be taken.

The appeal must therefore be, and is hereby, dismissed.

WHITE, P. J., and DORAN, J., concur.



141 Cal.App.2d 681

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Tommy ANTONE, Defendant and Appellant.

Cr. 5392.

District Court of Appeal, Second District, Division 2, California.

May 21, 1956.

Defendant was convicted of receiving stolen property. The Superior Court of Los Angeles County, Clement D. Nye, J., rendered judgment on the jury's verdict, and defendant appealed. The District Court of Appeal, Fox, J., held that the thief was not an accomplice of defendant as to a sound amplifier and adding machine purchased from thief by defendant, in absence of evidence of prior conspiracy between them to steal such articles so that thief's uncorroborated testimony was sufficient to sustain conviction as to them, and that evidence that stolen typewriter was in defendant's home and his admissions that he knew that typewriter was "hot" and knew the thief, by whom defendant testified that stolen articles were left in his home for him to keep, sufficiently corroborated testimony of thief, who was accomplice of defendant as to typewriter, so as to sustain conviction of receiving it.

Judgment affirmed.

1. Criminal Law ⇐507(5)

Ordinarily, a thief is not accomplice of person receiving stolen goods with knowledge of their theft, unless evidence discloses prior conspiracy between them to steal goods.

2. Criminal Law ⇐507(5)

One stealing a sound amplifier and adding machine, subsequently sold by him to another, was not accomplice of buyer, in absence of evidence of prior conspiracy between them to steal such articles, so that thief's uncorroborated testimony was sufficient to sustain buyer's conviction of receiving stolen property as to such articles.

3. Criminal Law ⇐507½

In prosecution for receiving stolen property, evidence of telephone conversation, in which defendant asked the thief to get a typewriter for defendant, reasonably warranted inference that subsequent theft of typewriter was pursuant to prior understanding amounting to conspiracy between defendant and thief for theft of typewriter and purchase thereof by defendant, so that they were accomplices and corroboration of thief's testimony was necessary to sustain defendant's conviction as to typewriter.

4. Criminal Law ⇐511(6)

Possession of property stolen by possessor's accomplice is corroboration of such accomplice's testimony against possessor in his prosecution for receiving stolen property.

5. Criminal Law ⇐511(2)

Evidence corroborating accomplice's testimony against defendant is sufficient, if it tends to connect defendant with commission of crime charged in such a way as may reasonably satisfy jury that accomplice is telling truth.

6. Criminal Law ⇐511(6, 7)

In prosecution for receiving stolen property, evidence that stolen typewriter was in defendant's home and his admissions that he knew it was "hot" and knew the thief, by whom defendant testified that stolen articles were left at his home for him to keep, sufficiently corroborated testimony of thief, who was defendant's accomplice as to typewriter, so as to sustain conviction of receiving it.

Forno & Umann, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

FOX, Justice.

Defendant was convicted of receiving stolen property. He appeals from the judgment of conviction and from the order denying his motion for a new trial.

The property involved in this case consists of a sound amplifier, an adding machine and a typewriter, which had been stolen by one Eastin, a high school student 18 years of age. On the night the amplifier was stolen, Eastin met defendant Antone in the home of one Trillo. In a conversation among them, Eastin stated where he obtained the amplifier, and attempted without success to sell it to Antone. At a later date, Eastin and Antone had a telephone conversation in which the latter inquired whether Eastin could get a typewriter. Eastin told him that he would see whether he could get one. At a subsequent date Eastin and defendant had a further conversation relative to the sale of the sound amplifier, in which Eastin told defendant the amount he wanted for it. That evening Eastin went to the defendant's home; he had with him the amplifier, the adding machine and the typewriter, the latter being new. The articles, respectively, were worth $50, $225, and $150. Defendant had never inquired whether Eastin had an adding machine. Defendant paid Eastin $50 for the three items.

James E. Barrick, a member of the Los Angeles Police Department, went to defendant's home because of information that he would find articles that had been taken in burglaries. Upon being admitted, he observed various items of personal property, including radios and an adding machine. The officer asked whether everything in the house was defendant's property, and the latter replied in the affirmative. The officer then observed a typewriter in another por-

tion of the room; he inquired whether the machine belonged to the defendant and the latter replied in the negative. The officer then asked about the adding machine, and defendant stated, "That isn't mine, either. Some kid left them here for me to keep." The officer then inquired who the "kid" was, and defendant replied that he did not know. The officer then went to defendant's garage; there defendant remarked, "Oh, there's an amplifier that belongs to Trillo, too." Defendant then reached behind some boxes and removed the amplifier. The officer inquired of defendant whether it was not a fact that the amplifier, adding machine and typewriter had been left with him by Irving Eastin. Defendant replied, "Yes, I think his name is Irv." The officer then asked defendant whether he knew the property was "hot"; the latter replied in the affirmative.

Defendant's position is that Eastin, the thief, is an accomplice, and that the uncorroborated testimony of the latter is insufficient to sustain the conviction of receiving stolen property.

[1] The rule is established that a thief is not an accomplice of the person who receives goods, knowing the same to have been stolen, unless a prior conspiracy to steal is disclosed by the evidence. Thus, in the ordinary case of a thief's selling his loot, it may not be successfully asserted that the seller is an accomplice of a purchaser. People v. Lima, 25 Cal.2d 573, 576, 579, 154 P.2d 698; People v. Raven, 44 Cal.2d 523, 527, 282 P.2d 866; People v. Bycel, 133 Cal. App.2d 596, 600, 284 P.2d 927.

[2] With respect to the amplifier and adding machine, the record fails to disclose any evidence of a prior conspiracy to steal. As to these items, Eastin is not an accomplice. Therefore the uncorroborated testimony of Eastin is sufficient to sustain the conviction. People v. Raven, supra.

[3–6] A different picture is presented, however, with respect to the typewriter. In view of the previous telephone conversation between Eastin and defendant, it may be reasonably inferred that the theft of the typewriter was pursuant to a prior understanding between Eastin and defendant that the former would steal a typewriter and that the latter would purchase it. Such an understanding amounted to a conspiracy between the two whereby one was to steal and the other was to buy. In such circumstances it is held that they are accomplices. Since Eastin is an accomplice, it is necessary that his testimony be corroborated in order to sustain the conviction insofar as the typewriter is concerned. People v. Lima, supra, 25 Cal.2d at pages 578, 579, 154 P.2d 698; People v. Coakley, 108 Cal.App. 2d 223, 227, 238 P.2d 633. There is, however, ample corroboration. It will be recalled that the typewriter was in fact in defendant's home. "Possession of stolen property is corroboration of the testimony of an accomplice." People v. Morrow, 127 Cal.App.2d 293, 296, 273 P.2d 696, 698; People v. Coakley, supra, 108 Cal.App.2d at page 228, 238 P.2d 633. Also, defendant admitted that the typewriter did not belong to him, and that he knew the property was "hot." He stated that "some kid left" these articles "here for me to keep." At first he denied knowledge as to who the kid was; later he admitted knowing him. These admissions and contradictions provide independent corroborative evidence. People v. Coakley, supra; People v. Willmurth, 77 Cal.App.2d 605, 612, 176 P.2d 102; People v. Sandelin, 105 Cal.App.2d 179, 233 P.2d 147. In People v. MacEwing, 45 Cal. 2d 218, 224, 288 P.2d 257, 260, the court states that "The corroborating evidence is sufficient if it tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the witness who must be corroborated is telling the truth. [Citations.]" Under this rule it is clear that the above facts furnish sufficient corroboration of the testimony of the accomplice.

The judgment and the order denying motion for a new trial are affirmed.

MOORE, P. J., and ASHBURN, J., concur.

141 Cal.App.2d 467

Joseph FERNER, Plaintiff and Appellant,

v.

Mathew Charles CASALEGNO, Defendant and Respondent.

Civ. 16624.

District Court of Appeal, First District, Division 1, California.

May 14, 1956.

Action by pedestrian against motorist for injuries received when pedestrian was struck by motorist's automobile. The Superior Court, San Mateo County, Louis B. Dematteis, J., denied pedestrian's motion for judgment notwithstanding verdict for motorist and entered judgment on verdict, and pedestrian appealed. The District Court of Appeal, Peters, P. J., held that pedestrian, who crossed double white line in center of four lane highway 3.4 seconds before he was struck by automobile in outside lane toward which pedestrian was walking was not, as matter of law, in position of danger within last clear chance doctrine when pedestrian crossed such double white line, and, therefore, pedestrian was not entitled to recover under the doctrine as a matter of law.

Judgment and order affirmed.

1. Appeal and Error ⇐882(12)

Last clear chance doctrine instruction, which was given at plaintiff's request and over defendant's objections in personal injury action, could not be attacked by plaintiff on appeal.

2. Trial ⇐141, 142

Trial court can decide a factual matter as a matter of law only where the facts are uncontroverted, and reasonable minds can draw but one legitimate inference therefrom.

3. Appeal and Error ⇐997(1)

In determining whether plaintiff was entitled to recover, as a matter of law, under the doctrine of last clear chance, the District Court of Appeal would be required to determine whether, after disregarding conflicts, considering only the evidence most favorable to defendant, all elements of last clear chance were proved as a matter of law.

4. Negligence ⇐83.4

Last clear chance doctrine presupposes that plaintiff, as result of his own negligence, is in position of danger from which he cannot escape by exercise of ordinary care or because of physical impossibility or of total unawareness of his danger, that defendant knows, or in exercise of ordinary care should know, that plaintiff cannot escape, and that defendant has last clear chance to avoid accident by exercising ordinary care but fails to do so and accident results therefrom, and plaintiff's injury is proximate cause of such failure, and case will be governed by ordinary rules of negligence and contributory negligence if one of such elements is absent.

5. Automobiles ⇐217(6)

Pedestrian, who crossed highway without looking for approaching traffic, and who failed to yield right-of-way to vehicles on the roadway even though he was crossing at place other than an intersection or crosswalk, was negligent as matter of law. Vehicle Code, § 562(a).

6. Automobiles ⇐217(6)

Crossing highway without looking for approaching traffic constitutes negligence.

7. Automobiles ⇐217(6)

Violation of Vehicle Code provision requiring pedestrians, who are crossing a roadway other than at an intersection or crosswalk, to yield right-of-way to vehicles on the roadway constitutes negligence per se. Vehicle Code, § 562(a).

8. Automobiles ⇐227

Pedestrian, who crossed double white line in center of four lane highway 3.4 seconds before he was struck by automobile in outside lane toward which pedestrian was walking was not, as matter of law, in position of danger within last clear chance doctrine when pedestrian crossed such double white line, and, therefore, pedestrian was not entitled to recover under the doctrine as a matter of law. Vehicle Code, §§ 562(a), 648(d), 670.

9. Automobiles ⇐245(91)

In action by pedestrian against motorist for injuries sustained when pedestrian was struck by motorist's automobile in outside lane of four lane highway, question whether, as pedestrian crossed double white line in center of highway, motorist knew or should have known that pedestrian was in position of danger from which he could not escape was for jury. Vehicle Code, § 562(a).

10. Trial ⇐307(1)

Code of Civil Procedure provision allowing jury to take to jury room upon retiring for deliberation all papers which have been received as evidence, and notes of testimony or other proceedings on the trial, taken by jurors, permits jurors to take not only notes of evidence but also notes of arguments of counsel. West's Ann.Code Civ.Proc. § 612.

11. Negligence ⇐82

Any degree of plaintiff's negligence, which directly concurs in producing the injury, however slight, will not constitute a defense, but, if plaintiff's negligence, which amounts to absence of ordinary care, contributes, in any degree, proximately to the injury, plaintiff shall not recover.

12. Trial ⇐296(4)

In personal injury action, giving of instruction which pertains to contributory negligence was not error, even though words "slightest" and "slight" were used to modify word negligence, in view of other instructions given.

13. Trial ⇐295(7)

In personal injury action, giving of instruction that, where evidence is as consistent with neglect of duty or care on part of injured person as it is with neglect of duty or care on part of person charged with causing the injury, injured party cannot recover was not error, even though it failed to state that injured party's neglect of duty must be proximate cause of the accident, in view of other instructions given.

14. Automobiles ⇐227(3)

If, immediately prior to being struck by automobile, pedestrian had been in place of safety, that is, standing away from and clear of path of automobile, but voluntarily left such place of safety and placed himself in place of danger in front of automobile, and motorist did not have knowledge that plaintiff was in such position of danger in time to avoid the accident by use of ordinary care, plaintiff would not be able to recover if plaintiff's voluntary act either caused or contributed to happening of the accident.

15. Appeal and Error ⇐1064(1)

In action by pedestrian against motorist for injuries received when pedestrian was struck by motorist's automobile, giving of instruction, which denied pedestrian's recovery if he had been in place of safety immediately prior to accident and left such place of safety to place himself in place of danger was not prejudicial error, even if instruction was ambiguous, in view of fact that instruction was a general statement of a correct principle of law and was supported by the evidence.

Joseph E. Isaacs, Jarvis, Miller & Decker, San Francisco, for appellant.

Boyd & Taylor, San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff, in the middle of the night and while on foot and intoxicated, attempted to cross the Bayshore Highway. He was hit by an automobile driven by defendant. In this action for the resulting injuries the major contention of plaintiff was that defendant had the last clear chance to avoid the accident. The trial court gave complete and proper instructions on that doctrine. The jury brought in a defendant's verdict, and the trial judge denied plaintiff's motion for a judgment notwithstanding the verdict. Plaintiff appeals from the judgment and from the order denying his motion, his major contention being that, under the evidence, the doctrine of last clear chance was applicable as a matter of law.

The accident occurred at 11:55 p. m. on the evening of September 29, 1953, on Bayshore Highway in Palo Alto. Defend-

ant was proceeding northerly on Bayshore, driving a 1951 Oldsmobile sedan, and was alone in the car. Bayshore, in this general area, has four driving lanes. Down the center of the highway is a double white line, while the two northerly and the two southerly lanes are divided from each other by a single white line. The two inner lanes adjoining the double white lines are each 10 feet 4 inches wide, while the width of the two outer lanes is 9 feet 8 inches. In addition, there is an asphalt shoulder about 8 feet wide on each side of the highway. The highway is asphalt, level, straight, and, at the time of the accident, dry. At the scene of the accident it is well lighted by street lights and by lights from businesses located along the highway.

Just prior to the accident defendant was proceeding northerly in the proper lane adjoining the shoulder, at a speed of between 30 to 35 miles per hour. His brakes, horn, tires and lights, which were on normal beam, were in good working order. Defendant testified that he could see clearly as far ahead as the headlights showed. Under section 648, subd. (d), of the Vehicle Code, as it read at the time of the accident, it was required that the headlights illuminate a distance of 100 feet.

The accident occurred some 300 feet northerly from the intersection of University Avenue and Bayshore. Defendant testified that as he crossed that intersection there was no traffic ahead of him proceeding northerly, and that he could recall none proceeding southerly.

Plaintiff admitted that just prior to the accident he was intoxicated. He remembers being in a bar on the west side of Bayshore, coming out, asking somebody how to get to Palo Alto, and then trying to cross the highway. He stated that he "marched" straight ahead, without looking to the right or left, until his progress was stopped by defendant's car. Admittedly, at the point that he attempted to cross the highway there is no intersection, and no pedestrian crosswalk. He testified that he remembers seeing defendant's car a fleeting second before it hit him, and had a faint recollection of trying to leap out of the way.

Defendant testified that he first observed the plaintiff coming west to east across the highway when plaintiff was at the double line; that he observed that plaintiff was dressed in light blue clothes and was facing straight ahead in an easterly direction; that the plaintiff did not change his direction from the time defendant first saw him until the point of impact; that plaintiff was proceeding quite fast, either staggering or running; that he, the defendant, kept his eyes on plaintiff from the time he first observed plaintiff up to the moment of impact. The defendant did not testify as to how far he was from plaintiff when he first observed plaintiff, nor at what precise point he applied the brakes. The defendant's car proceeded straight ahead to the point of impact, with the right side of the automobile within one foot of the adjoining shoulder. There were skid marks 36 feet long measured from the front of the car to the beginning of the skid marks. These skid marks were in a straight line parallel to the shoulder. The damage to defendant's car indicates that the right front center section of the hood struck the plaintiff. A highway officer, from physical evidence, determined that defendant stopped about four feet from the point of impact. No one testified as to the precise speed of the car at the time of impact.

Plaintiff, in an attempt to fix the point where defendant was when he first observed the plaintiff, and to demonstrate, mathematically, that defendant could have stopped had he exercised due care, produced a professor of applied physics and mechanical engineering. The professor first testified that a car traveling 30 miles an hour travels 44 feet per second; at 35 miles per hour it covers 51.3 feet per second. Then he testified that a man walking rapidly would cover five feet per second; that it would take a man so walking 3.4 seconds to cover the 17 feet from the double white line to the point of impact; that a vehicle in the same period, proceeding at a constant speed of 30 miles per hour, would cover 150 feet. Therefore, so it was contended, if defendant was proceeding at 30 miles per hour and first saw plaintiff at the white line, defendant must have been 150 feet

from the point of impact at that moment. If defendant's speed was 35 miles per hour he must have been 175 feet from the point of impact when he first saw plaintiff. Plaintiff, using these mathematical computations as his base, then refers to section 670 of the Vehicle Code that requires that a car traveling at 30 miles per hour to be equipped with brakes capable of stopping in 83.3 feet, and a car traveling at 35 miles per hour within 113 feet—both distances being less than the distances the professor computed that the defendant was from the point of impact when he first saw the plaintiff.

These computations, although interesting, are, of course, not conclusive. They are based on the false premise that defendant proceeded at a constant speed of 30 miles per hour from the time defendant first saw plaintiff up to the point of impact. That, of course, is demonstrably untrue. During an appreciable portion of that distance, we know that defendant was braking the car, so that the car was slowing down. This factor was disregarded by the professor. Moreover, neither the professor nor anyone else could know the precise speed of the plaintiff, so that the figure 3.4 seconds required to cover the 17-foot distance is, at best, but a guess. Even a slight error in this guess would materially affect the ultimate computation.

[1] As already pointed out, the basic contention of plaintiff is that the trial court should have directed a verdict in his favor or should have granted his motion for a judgment notwithstanding because, so it is contended, as a matter of law, he was entitled to recover under the doctrine of last clear chance. It must be remembered that the trial court agreed with plaintiff that the last clear chance doctrine was involved in the case, and, over defendant's objections, gave plaintiff's proffered instructions on this subject which plaintiff does not and cannot attack.

[2, 3] Of course, a case in which the court is required to direct a verdict on the doctrine of last clear chance is a rare one. The trial court can decide a factual matter as a matter of law only where the facts are uncontroverted, and where reasonable minds can draw but one legitimate inference therefrom. Gaston v. Hisashi Tsuruda, 5 Cal.App.2d 639, 43 P.2d 355; Export Leaf Tobacco Co. v. County of Los Angeles, 89 Cal.App.2d 909, 202 P.2d 622; Southern California Collection Co. v. Napkie, 106 Cal.App.2d 565, 235 P.2d 434; Industrial Indemnity Co. v. Golden State Co., 117 Cal.App.2d 519, 256 P.2d 677; Hicks v. Reis, 21 Cal.2d 654, 134 P.2d 788. In applying this rule to the present case we are required to determine whether, after disregarding conflicts, considering only the evidence most favorable to defendant, all of the elements of last clear chance were proved, as a matter of law.

[4] What are these elements? They were plainly set forth in Doran v. City and County of San Francisco, 44 Cal.2d 477, 483, 283 P.2d 1, 5, in the following language: "Whether or not the doctrine of last clear chance applies in a particular case depends wholly upon the existence or nonexistence of the elements necessary to bring it into play. The doctrine presupposes: '"(1) That plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot escape by the exercise of ordinary care; and this includes not only where it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger and for that reason unable to escape; (2) that defendant has knowledge that the plaintiff is in such a situation, and knows, or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation, and (3) has the last clear chance to avoid the accident by exercising ordinary care, and fails to exercise the same, and the accident results thereby, and plaintiff is injured as the proximate result of such failure."' [Citing a case.] If any one of these elements is absent, the doctrine does not apply and the case is governed by the ordinary rules of negligence and contributory negligence."

If there was a conflict on any one of these elements, then, of course, the trial court properly submitted the issue to the jury.

[5–7] In the instant case the first part of the first element of the doctrine—that plaintiff was negligent—certainly appears as a matter of law. Crossing the highway without looking for approaching traffic constitutes negligence. Moreover, plaintiff clearly violated section 562(a) of the Vehicle Code requiring pedestrians crossing a roadway, other than an intersection or crosswalk, to yield the right-of-way to vehicles on the roadway. Violation of this section is negligence *per se*. Chase v. Thomas, 7 Cal.App.2d 440, 46 P.2d 200; Weissman v. Seehusen, 55 Cal.App.2d 391, 131 P.2d 10.

[8] The second part of the first element of the doctrine requires that, as a result of such negligence, plaintiff be in a position of danger from which he cannot escape by the exercise of ordinary care. Included within this concept are situations not only where it is physically impossible for plaintiff to escape, but cases where he is totally unaware of his danger, and for that reason unable to escape. The question is, was plaintiff in such a position of danger *as a matter of law* when he crossed the double white line some three seconds before he was hit? We think he was not. One of the leading cases on this subject is Dalley v. Williams, 73 Cal.App.2d 427, 166 P.2d 595. At page 435 of 73 Cal.App.2d, at page 599 of 166 P.2d it is stated:

"The last clear chance doctrine was not applicable until plaintiff arrived at such a point as to be in peril, and this was the point where he could no longer escape injury by exercising ordinary care. [Citing two cases.] In Cady v. Sanford, 57 Cal. App.2d 218, 224, 207 P. 45, 48, it was said:

"'At some appreciable time prior to the crash plaintiff was in a position of peril. He was in a position of peril at the very instant that he arrived at that point where he no longer could avoid an accident by exercising ordinary care. Then, and not until then, was the last clear chance doctrine applicable.'

"It has been likewise held that the term 'place of safety' ordinarily includes the position of the plaintiff while he is merely *approaching* the place of danger, and so long as he is only *approaching* but is not actually *in* a position of danger, the plaintiff cannot invoke the doctrine. [Citing 3 cases.] While a person may be in danger or peril, i. e., while he may be simply exposed to injury, that is not enough to constitute a position of danger within the meaning of the last clear chance doctrine, and in order to comply with the requirements of this element of the doctrine, his position of danger must not only be an exposure to injury but it must be one from which he cannot extricate himself by exercising ordinary care. [Citing 3 cases.] The fact that a defendant actually sees the plaintiff some considerable time before the accident, or at a time when either or both of them are a considerable distance away from the place of the accident does not necessarily make the doctrine applicable. [Citing 2 cases.] It has been held, in a certain class of cases, that if a defendant, while still a considerable distance away from the accident, sees the plaintiff approaching the place of danger, he has a right to assume, until the circumstances apprise him to the contrary, that the plaintiff will stop before reaching the place of danger. [Citing 4 cases.]" (See also Schouten v. Crawford, 118 Cal. App.2d 59, 257 P.2d 88.)

Under the rule of this case, fortified as it is by the many authorities cited in the opinion, we cannot say that plaintiff here was, as a matter of law, in a position of danger when he crossed the double white line about 3.4 seconds before the accident.

The second element laid down in the Doran case, supra, is that defendant has knowledge that the plaintiff is in a position of danger, and knows, or in the exercise of ordinary care should know, that plaintiff cannot extricate himself. This is, of course, closely related to the element last discussed. This court in Fleharty v. Boltzen, 137 Cal. App.2d 187, 290 P.2d 311, recently considered this element of the doctrine in a case involving substantially the same problem as the one here involved. At page 191 of 137 Cal.App.2d, at page 314 of 290 P.2d this court stated:

"* * * The fact that plaintiff approached the center line along a straight course, diagonally from the curb, to the

knowledge of defendant, was no notice or warning to defendant that plaintiff was approaching a position of danger from which he would be unable to extricate himself. His leftward diagonal movement toward the center was quite natural, necessary in getting from the curb (an appreciable distance from the pavement) over onto the paved southbound lane. That was no warning or notice to defendant that plaintiff would continue in that direction across the center line and into the northbound lane. Defendant was entitled to assume that plaintiff would observe traffic regulations, straighten out and run parallel to the center line and to the right of it when he reached it. * * *

"The doctrine of last clear chance '"should not be applied to the ordinary case in which the act creating the peril occurs practically simultaneously with the happening of the accident and in which neither party can fairly be said to have had a *last clear chance* thereafter to avoid the consequences."' Rodabaugh v. Tekus, 39 Cal.2d 290, 295, 246 P.2d 663, 666." See also Mehling v. Zigman, 116 Cal.App.2d 729, 254 P.2d 141; Johnson v. Southwestern Engineering Co., 41 Cal.App.2d 623, 107 P.2d 417; Jones v. Heinrich, 49 Cal.App.2d 702, 122 P.2d 304; Jobe v. Harold Livestock Comm. Co., 113 Cal.App.2d 269, 247 P.2d 951.

[9] Applying the rules of these cases, it is obvious that we cannot say that, *as a matter of law,* either of the first two elements uncontrovertibly were shown to exist. For reasons already stated, there was a conflict on whether plaintiff was in a position of danger from which he could not extricate himself. That was clearly a factual problem. It is equally clear that we should not and cannot say, as a matter of law, that defendant knew or should have known that plaintiff was in a position of danger, or knew, or should have known that plaintiff could not escape. The evidence would support such a finding, but the jury found to the contrary. The evidence supports this implied finding of the jury. Assuming that defendant had the ability to stop his car *before* hitting plaintiff had he put on his brakes when he first saw plaintiff at the double white line, a fact itself not shown as a matter of law, the inferences from the evidence on the issue being in conflict, nevertheless, the evidence supports the conclusion that defendant had the right to proceed in the belief that plaintiff would exercise due care, and yield to defendant the right-of-way as provided in Vehicle Code section 562(a). Clearly, we cannot hold, as a matter of law, that the defendant had the actual knowledge of defendant's dangerous position required by the doctrine.

These conclusions make it unnecessary to discuss the other two elements of the last clear chance doctrine. Even if they did appear as a matter of law, and we think they did not, the conflict on the first two elements renders the issue a factual one. The case does not present any unusual factual situation. It is the normal case where the issue as to whether last clear chance applies was a factual one and for the jury to decide. This the jury did by finding, on proper instructions on the doctrine, that the doctrine was inapplicable.

The next point raised by plaintiff is equally untenable. It is urged that several members of the jury were guilty of prejudicial misconduct by taking written notes of the evidence and arguments made by members of the jury into the jury room during their deliberations on the verdict. The plaintiff's counsel requested the trial judge to prohibit the jurors from taking their notes into the jury room, but was unable to furnish any authority to support his request, and these notes were taken into the jury room.

This was not error. It is true that in a few out-of-state cases cited by plaintiff the practice of allowing jurors to take notes prepared by them into the jury room has been severely criticized, but, even in the absence of statute, in many states such practice is permissible. See annotation 154 A.L.R. 878.

Whatever the rule may be in other states, the problem is governed in California by section 612 of the Code of Civil Procedure, which provides: "Upon retiring for de-

liberation the jury may take with them all papers which have been received as evidence in the cause * * * and they may also take with them * * * notes of the testimony or other proceedings on the trial, taken by themselves or any of them, but none taken by any other person."

[10] Plaintiff argues that here the notes taken by the jurors were not only of the evidence but also of arguments of counsel, and contends that section 612 does not refer to notes of arguments. But it does refer to "notes of * * * other proceedings on the trial," which obviously includes arguments. The code section is conclusive on this issue.

Plaintiff next complains of the giving of certain instructions. He first complains of the following instruction:

"It is the law in this state that if the plaintiff is guilty of the slightest amount of negligence proximately causing the accident, he cannot recover in this action, and this is true regardless of whether or not the defendant was negligent as charged.

"Stated in another way, the plaintiff cannot excuse any negligence on his part, found by you to have been a proximate cause of the accident, by claiming that the defendant was also negligent, or was more negligent than he was. If the plaintiff was guilty of any negligence, however slight, which was a proximate cause of the accident, your verdict must be against him."

[11] Plaintiff complains of the words "slightest" and "slight" used in this instruction, and contends that this indicated to the jury that there are degrees of negligence in California. It is of course the rule that: "The *formula* is not that any degree of negligence on the part of the plaintiff which directly concurs in producing the injury (however slight) will constitute a defense; but if the negligence of the plaintiff, which amounts to the absence of ordinary care, shall contribute, in any degree, proximately to the injury, the plaintiff shall not recover." Robinson v. Western Pac. R. Co., 48 Cal. 409, 422; see also Strong v. Sacramento & P. R. Co., 61 Cal. 326; Rush v. Lagomarsino, 196 Cal. 308, 237 P. 1066.

[12] Taken in context the above instruction could not possibly have been misleading. Just before giving this instruction the trial court told the jury not to attempt to classify negligence into degrees, and told the jury not to determine whether the plaintiff or defendant was guilty of the greater degree of negligence. The trial judge also clearly, correctly and fully defined negligence as the absence of ordinary care. The instructions must, of course, be considered together. Westover v. City of Los Angeles, 20 Cal.2d 635, 128 P.2d 350. The court clearly and properly defined negligence and told the jury there were no degrees of negligence. The court told the jury that negligence—the want of ordinary care—must first be found, and, if so found, then no matter how "slight," if it proximately contributed to the accident, plaintiff could not recover. Thus, the criticized instruction, properly construed in context, was not erroneous. See Creamer v. Cerrato, 1 Cal.App.2d 441, 36 P.2d 1094; Botti v. Savill, 97 Cal.App. 524, 275 P. 1029.

[13] Plaintiff complains of the following instruction: "Where the evidence is as consistent with a neglect of duty or care on the part of the injured person as it is with a neglect of duty or care on the part of the person charged with causing the injury, the injured party cannot recover in an action for damages for the injury sustained, if any."

It is contended that this instruction neglects to state that plaintiff's neglect of duty must be a proximate cause of the accident. But, again, plaintiff asks us to consider the instruction out of context. The above quoted instruction was only one of a group. The immediately preceding instruction clearly and unequivocally told the jury that contributory negligence, to be a defense, had to be a proximate cause of the accident. Proximate cause was clearly and correctly defined, as was the doctrine of last clear chance. It is impossible to believe that the jury could have been misled in the slightest degree by the instruction. See Sheldon v. James, 175 Cal. 474, 166 P. 8, 2 A.L.R. 1493.

Plaintiff next complains of an instruction which states: "If you find that plaintiff,

Joseph Ferner, had immediately prior to the accident in question been in a place of safety; that is, standing away from and clear of the path of defendant's automobile, and should you further find from the evidence that said plaintiff voluntarily left such place of safety and placed himself in a place of danger in front of defendant's automobile, and further should you find that defendant had no knowledge that plaintiff was in such a position of danger, in time to avoid colliding with him by use of ordinary care, and that the voluntary act of the plaintiff was a proximate cause of the accident and either caused or contributed to the happening of the accident, then and in such event the plaintiff cannot recover, and you must find for the defendant."

[14, 15] Plaintiff urges that there is no evidence that he was ever in a position of safety while on the highway. The instruction is ambiguous. If it was intended to imply that plaintiff was in a position of safety when he reached the double white line, it might be subject to some question, because under the rule announced in Peterson v. Burkhalter, 38 Cal.2d 107, 237 P.2d 977, the plaintiff, if his course was such as to place him in the line of impact with defendant's car, and was unaware of such, would then be in a position of danger. But the instruction does not state that plaintiff was in a position of safety when he reached the double white line. The instruction appears to be a general statement of a correct principal of law, Doran v. City and County of San Francisco, 44 Cal.2d 477, 283 P.2d 1; Chase v. Thomas, 7 Cal. App.2d 440, 46 P.2d 200, and finds support in the record in the evidence that before plaintiff started to cross the road he was in a position of safety. Certainly, the ambiguity in the instruction, if one exists, could not have been prejudicial.

The other instruction complained of was clearly a correct statement that contributory negligence of plaintiff, which was a proximate cause of the accident bars recovery.

The judgment and order appealed from are affirmed.

BRAY and FRED B. WOOD, JJ., concur.

141 Cal.App.2d 428

Roy C. KAISER and Geraldine C. Kaiser, his wife, Plaintiffs, Cross-Defendants, Defendants in Intervention and Appellants,

v.

Margaret MANSFIELD, Defendant, Cross-Complainant and Respondent,

Clara Holecheck, Plaintiff in Intervention and Respondent.

Civ. 5340.

District Court of Appeal, Fourth District, California.

May 10, 1956.

Action to quiet title to 140 acres of land wherein defendant, who filed a cross-complaint, and plaintiff in intervention resisted the suit on grounds that plaintiff's predecessor in interest and plaintiff, as co-conspirators, had defrauded the cross-complainant and the plaintiff in intervention of title to property of which the 140 acres formed a part. The Superior Court, Kern County, Norman F. Main, J., rendered judgment for the cross-complainant and the plaintiff in intervention and the plaintiffs appealed. The District Court of Appeal, Conley, J. pro tem., held that advancers who had accepted broker's note and had procured judgment and levied execution were precluded by doctrines of election of remedies and res judicata from asserting that broker had acquired title to realty in trust for them.

Judgment reversed.

1. Appeal and Error ⇐1071(1)
Trial ⇐395(3)

In action to quiet title, finding that allegations of answer of defendant to complaint, cross-complaint of defendant and complaint in intervention not inconsistent with "above findings" were true and correct and that all allegations of plaintiff's complaint and their answer to cross-complaint and to complaint in intervention which were inconsistent with such findings were untrue was too general to determine numerous issues of fact presented by pleadings and would necessitate reversal of judgment.

2. Appeal and Error ⇐1071(6)
Trial ⇐397(1)

A failure on the part of trial court to find on all material issues raised by the pleadings is ground for reversal.

3. Trusts ⇐350

Where advances were allegedly made on representation of broker that he would purchase property for advancers but advancers accepted broker's notes for amount advanced, instituted action and recovered judgment on notes and secured writs of execution, their course of action was incompatible with, and precluded them from successfully asserting, claim that broker had acquired title in trust for them.

4. Judgment ⇐589(1)

Where either of two remedies are available to enforce the same right, a judgment on the merits in an action seeking one of them, bars a resort to the other and the acceptance of the fruits of that judgment is an election to abide the judgment.

5. Appeal and Error ⇐161

The acceptance of fruits of a judgment by a party to an action is an election to abide by the judgment.

6. Judgment ⇐588

Where money had allegedly been advanced to broker in reliance on representation that he would purchase realty for advancers but advancers accepted broker's notes and recovered judgments on the notes, under doctrine of res judicata the advancers were precluded from subsequently asserting that broker acquired title in trust for them.

7. Judgment ⇐587

Where advances were allegedly made to broker on his representation that he would acquire realty for advancers but they accepted broker's notes and procured judgments thereon and thereby rendered trust theory unavailable to them, judgment in subsequent quiet title action based in part on the trust theory and findings interconnected on theory of trust and theory of title by purchase at execution sale under judgment could not stand.

8. Execution ⇐264

Purchaser at an execution sale of realty acquired only that interest which the judgment debtor had in the realty on the date of the sheriff's sale. West's Ann.Code Civ.Proc. § 700.

9. Quieting Title ⇐51

If advances were made to broker in reliance on his representation that he would procure title to realty for advancers and if subsequent holders of title were in fact co-conspirators with broker and subsequent holders of title were charged with knowledge and notice of use of advancers' money to buy land and broker's failure to carry out his promises to them, equitable remedy sought in quiet title action could be refused or granted only conditionally upon payment of amount due to the advancers on sale under execution pursuant to judgment obtained against broker.

Roland T. Williams and Roy C. Kaiser, Los Angeles, for appellants.

Thomas A. Wood, Larwill & Wolfe, Los Angeles, and Borton, Petrini, Conron & Brown, Bakersfield, for respondents.

CONLEY, Justice pro tem.

Roy C. Kaiser, an attorney at law, and his wife, Geraldine C. Kaiser, brought this action to quiet title to 140 acres of land in the Antelope Valley. The defendant and cross-complainant, Margaret Mansfield, and the plaintiff in intervention, Clara Holecheck, resisted the suit, claiming that they were defrauded and victimized by one Lees, predecessor in interest of and an alleged coconspirator with, the plaintiffs, not only as to the specific parcel of property described in the complaint but as to the entire 640 acres of which it formed a part.

The trial resulted in a complete and indeed overwhelming victory for the cross-complainant and the plaintiff in intervention. They were held to be the owners of the contract covering the whole 640 acres including the 140 acres described in the complaint and plaintiffs were ordered to deed and assign all interest in the land and

the contract to them, accompanied however by a contemporaneous payment by Margaret Mansfield of the sum of $2,831.52 to the Clerk of the Court for the benefit of the plaintiffs.

Respondents' major difficulty is logical rather than moral; they have stood on two irreconcilable theories, first that the property has always been held in trust for them, and secondly that they are the owners by virtue of a writ of execution issued on a judgment secured against the original alleged trustee on a note given by him to cover payments which respondents claim made him a trustee. Respondents long ago elected to follow a course which was wholly inconsistent with the trust theory; they brought actions to enforce the remedy selected by them, recovered judgments thereon and enjoyed, in part at least, the fruits of those judgments. It is now too late for them to repudiate their election. The trust theory of recovery must fail, and in view of the conflict in the findings caused by the simultaneous adoption by the trial court of the two theories, it will be necessary to remand the case for trial and disposition on the basis of the simplified issues.

On July 12, 1948, Joseph S. Lees, a real estate operator, and another person named Ortez secured an option to buy the 640 acres here involved from J. W. Eddington, for a total purchase price of $57,600; Mr. Lees gave a check for $1,000 for the option, drawn on the 9th Street Branch of the Bank of America National Trust and Savings Association at Los Angeles. But not having sufficient money in his account to cover his check, Lees induced Margaret Mansfield to advance him $1,000 for the purpose on July 16, 1948.

Lees worked in the same Los Angeles building and suite where the plaintiff Kaiser had his offices, being employed by Kaiser as a real estate broker. Margaret Mansfield was a stenographer in the same suite; she occasionally performed secretarial services for Kaiser and took messages and telephone calls for him; Kaiser also represented her as an attorney in the years 1948 and 1949. Clara Holecheck, a close personal friend of Margaret Mansfield, was a manual laborer in a factory. Lees had talked with Mrs. Mansfield, before getting the option, about buying land for her and Mrs. Holecheck in Antelope Valley, and in June, 1948, he told both women he would purchase property of this character for them. On August 20, 1948, Lees and Eddington executed a contract providing for the sale to Lees of the 640 acres; on August 24 Margaret Mansfield paid him an additional $1,000, and on August 25, she handed him two checks of Mrs. Holecheck for $800 and $1,700. Thus, a total of $2,000 in money was advanced to Lees by Margaret Mansfield and $2,500 by Mrs. Holecheck. The investors afterwards asked on numerous occasions for some kind of paper evidence to show their interest in the land, but without obtaining satisfaction. The record is somewhat murky as to how the women thought the deal was to be developed; there was talk about subdividing the acreage, and other talk about the formation of a corporation to handle the whole transaction.

In any event, on April 16, 1949, Lees gave the intervenor, Clara Holecheck, his one-year promissory note for $2,500 to cover the moneys that she had turned over to him, and on April 16, 1950, he paid her $100 interest on the note. Under date of April 17, 1950, Mrs. Holecheck acknowledged receipt of the interest by letter and wrote: "I hereby give written demand for payment in full of the above note which was due April 16, 1950."

In the meantime, in the month of August, 1949, after a conference between the women and Lees at which Kaiser was present, the two women had taken their claims to the District Attorney in Los Angeles; an investigation was conducted by that office and the plaintiff, Kaiser, then represented Lees, but no criminal complaint was actually issued. In October of 1949, while the District Attorney was still investigating, Lees told Mansfield and Holecheck that he had assigned the contract for the purchase of the land to another person; the record shows that an assignment was in fact made by him to a Mrs. Marion Elmira Fisher.

In 1950, the two women hired an attorney to prosecute their claims against Lees.

On March 7, 1951, Clara Holecheck filed an action against him in the Municipal Court at Los Angeles for $2,500, and on October 10, 1951, she secured a judgment for $2,650 and $100 attorney fees. Margaret Mansfield, after writing Lees a letter on April 16, 1949, demanding the return of her money, also filed suit against him in the same court for $2,000 and on November 27, 1951, she secured a judgment for $2,360.14, principal and interest together with costs of suit.

On August 8, 1950, Marion Elmira Fisher transferred the agreement for the sale of the real property to one, J. A. Long.

On December 15, 1952, the Sheriff of Kern County levied an execution issued by the Municipal Court of Los Angeles in the case of Mansfield v. Lees on all of the right, title and interest of J. S. Lees in and to the 640 acres; and on January 19, 1953, he held the sale at which Margaret Mansfield bid the full amount of her judgment, costs, accrued interest and expenses in the sum of $2,550.77.

On December 19, 1952, the Kern County Sheriff also levied an execution on all of the right, title and interest of J. S. Lees in and to the land, by virtue of the Los Angeles Municipal Court judgment in Holecheck v. Lees, and at the sale held on January 19, 1953, ten minutes after the sale in Mansfield v. Lees, Margaret Mansfield, who held an assignment of this judgment, bid in the property for the full amount due thereon, or $3,065.99; on February 11, 1953, the judgment was wholly satisfied of record.

On August 13, 1953, the plaintiffs secured an assignment of the contract from J. A. Long and wife, and on December 22, 1953, the Lees executed a quitclaim deed and an assignment of their right to redeem the property to the plaintiffs. The Kaisers redeemed the property from the sale under the execution in Mansfield v. Lees (the senior execution lien) paying $2,831.52 thereon. On January 21, 1954, the Sheriff of Kern County issued a Certificate of Redemption to the Kaisers as to that sale.

On March 18, 1954, the Kern County Sheriff issued a deed to Margaret Mansfield pursuant to the sale on execution under the judgment in Holecheck v. Lees.

The Court's findings of fact are to the effect that Lees was given the sum of $4,500 by Margaret Mansfield and Clara Holecheck to enter into the agreement with Eddington for the purchase of the real property for them; that after securing such a contract in his own name through the use of their money, he fraudulently transferred the instrument on or about October 24, 1949, to Mrs. Fisher without consideration and with knowledge on her part of the trust relationship between Lees and Mansfield and Holecheck; that the transfers, in turn, to Long and the Kaisers were similar and that the Kaisers took the property with full knowledge of the fraud and of the existence of the trust; that all of the persons involved in the chain of title "conspired to cheat and defraud the said Margaret Mansfield and said Clara Holecheck out of said agreement and out of said real property, and that all of said named persons knew that the said Margaret Mansfield and said Clara Holecheck were the true owners of said agreement and said real property and knew that said agreement and said real property were being held in trust for the said Margaret Mansfield and said Clara Holecheck".

The findings specify further fraud in the representation of Lees to the respondents that he had sold and assigned the contract to a *bona fide* purchaser and that they did not discover the fraud until 1954. The Municipal Court judgments are described in the findings as having been secured by the two women while believing the fraudulent representations as to the *bona fides* of the contract assignment.

It is next found that the Kaisers obtained a deed to the 140 acres from the Estate of J. W. Eddington and that they hold possession of all of the property.

[1] The findings of fact terminate with a summary and erroneous general finding with respect to various allegations in the answer of Margaret Mansfield, her cross-complaint and the Holecheck complaint in intervention and with respect to the va-

rious defenses set up by cross-defendant and the defendant in intervention as follows:

"XI

"All of the allegations of the answer of said Margaret Mansfield to the complaint herein, the cross-complaint of the said Margaret Mansfield and the complaint in intervention of said Clara Holecheck, not inconsistent with the above findings, are true and correct, and all of the allegations of plaintiffs' complaint and their answer to said cross-complaint and their answer to said complaint in intervention, which are inconsistent with these findings, are untrue."

This erroneous method of general coverage of numerous important factual issues would alone necessitate a reversal of the judgment. Without taking the space for a meticulous and detailed analysis of the pleadings, it will suffice to point out that the findings fail to determine numerous allegations of fact and that the answers to the cross-complaint and to the second amended complaint in intervention contain important affirmative defenses upon which the trial court makes no findings. As was said in the concurring opinion of Mr. Justice Thornton in the early case of Goodnow v. Griswold, 68 Cal. 599, 603–604, 9 P. 837, 839:

"The statute devolves on the lower court the labor and duty of finding facts. This such court cannot turn over to this court, or any other tribunal or person. The parties litigant have a right—a substantial right—to have the facts found by the court *a quo*. They have a right, secured to them by the statute, to have the judgment of that court as to the facts found to exist."

[2] It is elementary that a failure to find on all material issues raised by the pleadings is ground for reversal. Parker v. Shell Oil Co., 29 Cal.2d 503, 512, 175 P.2d 838; Fairchild v. Raines, 24 Cal.2d 818, 830, 151 P.2d 260; Herman v. Glasscock, 68 Cal.App.2d 98, 101–102, 155 P.2d 912; People v. Ocean Shore R. R., 22 Cal. App.2d 657, 659, 72 P.2d 167; Powell v. Johnson, 50 Cal.App.2d 680, 683, 123 P.2d 875; People v. One 1940 Chrysler, 77 Cal. App.2d 306, 315, 175 P.2d 585; Sturdevant v. Sturdevant, 3 Cal.App.2d 443, 446, 39 P.2d 433; Severance v. Knight-Counihan Co., 29 Cal.2d 561, 576, 177 P.2d 4, 172 A.L.R. 1107; Clements v. Lanning, 89 Cal. App.2d 817, 820, 202 P.2d 98; Andrews v. Cunningham, 105 Cal.App.2d 525, 528, 233 P.2d 563; Martin v. Chernabaeff, 124 Cal. App.2d 648, 655, 269 P.2d 25.

The Conclusions of Law are to the effect that Margaret Mansfield and Clara Holecheck at all times since August 20, 1948, have been and they now are the owners of the agreement of sale, that J. S. Lees and his succeeding assignees have held the agreement in trust for Mansfield and Holecheck and that the latter are entitled to have their title quieted, to be let into possession and to receive an assignment of the contract and a deed to the 140 acres and any other of such lands title to which the Kaisers have acquired in the meantime. The Conclusions of Law state that Margaret Mansfield should be required to pay $2,831.52 which was the amount paid by the Kaisers in redeeming the land from the execution sale in the Municipal Court action of Mansfield v. Lees.

[3] The judgment is fundamentally unsound and cannot stand in its present form, because it was rendered without giving due weight to the compelling effect of the election of remedies made by Margaret Mansfield and Clara Holecheck as evidenced by the bringing of actions by them in the Los Angeles Municipal Court, the subsequent acquisition by them of judgments therein and their enjoyment of the fruits thereof. Certainly there is no question but that they advanced $2,000 and $2,500 respectively to Joseph S. Lees and that the initial payments on the option and contract were made with, or by virtue of, their funds. But the two women did not thereafter consistently maintain that the property was theirs. As early as April 16, 1949, Mrs. Holecheck departed from any such theory by accepting Lees' note for $2,500; she collected interest on the note one year later and after de-

manding payment in full, brought suit against him in the Municipal Court, securing a judgment for the full amount of her $2,500 advance, with interest, costs and attorney's fees. Mrs. Mansfield similarly demanded payment of her $2,000 by letter of April 16, 1949, and at a later date instituted an action and recovered judgment against Lees for $2,360.14 principal, interest and costs of suit.

These two creditors did not stop there, but secured writs of execution on the Municipal Court judgments and caused levies to be made on the very property which they now claim was theirs; they had the land sold by the Sheriff, purchasing whatever interest Lees had for the full amount of the successive judgments; afterwards Margaret Mansfield accepted from the plaintiffs as successors of Lees the full amount which she had bid on the execution sale in Mansfield v. Lees. The Municipal Court judgments themselves were satisfied of record.

Whether it be considered that by their election of remedies the women rescinded their original contract with Lees and chose to sue him for the money previously advanced by them, Gutterman v. Gally, 131 Cal.App. 647, 653, 21 P.2d 1000; Bancroft v. Woodward, 183 Cal. 99, 101, 190 P. 445, or that in suing only for the moneys which they had turned over to Lees they conceded that the original transaction was legally nothing more than a loan, their course of action consistently pursued to judgment and execution is incompatible with the trust theory now urged by them and which the judgment in this case seeks to confirm.

[4, 5] Respondents argue that they were induced not to claim a trust at that time because of the fraud of Lees in telling them he had transferred the land contract to a *bona fide* purchaser. This may have affected in their own minds their prospects of successful recovery on a trust theory, and it may have led them to abandon the thought of trying to establish a trust, but it did not hide from them the existence of any *right* they may have had to bring such an action, or induce them by fraudulent representations to refrain from suit. It should be borne in mind that they had an attorney of their own, and that they had consulted with the District Attorney of Los Angeles with respect to the Lees deal. We think there can be no escape from the conclusion that the cross-complainant and plaintiff in intervention by choosing their remedy, took a road fork and followed that road to its very end, and that they cannot now choose the alternative route. Where either of two remedies is available to enforce the same right, a judgment on the merits in an action seeking one of them, bars a resort to the other. Evans v. Horton, 115 Cal.App.2d 281, 285, 251 P.2d 1013; Suisun Lumber Co. v. Fairfield School Dist., 19 Cal.App. 587, 593, 594, 127 P. 349. And the acceptance of the fruits of a judgment by a party to an action is an election to abide the judgment. Turner v. Markham, 152 Cal. 246, 92 P. 485; Pickens v. Coffey, 136 Cal.App. 105, 27 P.2d 914; Estate of Baby, 87 Cal. 200, 202, 25 P. 405; Estate of Shaver, 131 Cal. 219, 221, 63 P. 340; San Bernardino County v. Riverside County, 135 Cal. 618, 620, 67 P. 1047.

In this case, having elected to pursue to judgment an inconsistent remedy, the respondents cannot now successfully claim that the land is held in trust for them. Gray v. Gray, 25 Cal.App.2d 484, 486, 77 P.2d 908; Hilborn v. Bonney, 28 Cal.App. 789, 791, 154 P. 26; Hanly v. Kelly, 62 Cal. 155, 159; Evans v. Horton, 115 Cal.App.2d 281, 285, 251 P.2d 1013; LeClercq v. Michael, 88 Cal.App.2d 700, 703, 199 P.2d 343.

[6] Adopting another point of departure in attacking the problem, that of *res judicata,* the same conclusion is inevitable. At the time they instituted their respective actions for the recovery of the $2,000 and $2,500 the respondents had the opportunity by suitable allegations to urge the claim now made by them, but this they failed to do. They were not prevented from so doing by any extrinsic or collateral fraud, and as there must not only be a thread of decent consistency in the actions of litigants but an end to litigation itself there can not now be a successful contention that the relationship of the opposed parties gave rise to a trust rather than a debt. Thiriot v. Santa Clara Elementary School Dist.,

128 Cal.App.2d 548, 550, 275 P.2d 833; Pico v. Cohn, 91 Cal. 129, 133–134, 25 P. 970, 27 P. 537, 13 L.R.A. 336; Westphal v. Westphal, 20 Cal.2d 393, 397, 126 P.2d 105; Gaskill v. Wallace, 32 Cal.App.2d 354, 89 P. 2d 687.

[7] As the judgment is firmly based in part on the unavailable trust theory and the findings are hopelessly interconnected on the theory of trust and the theory of title by purchase at the second execution sale, a reversal must be ordered.

It may well be that respective counsel will apply for leave to amend their pleadings in view of the simplification of issues and this should be allowed if timely application is made therefor. Aside from the elimination of the trust theory, we do not intend to limit the scope of the trial court's enquiry into the facts or the equities of the case upon retrial, but one or two guiding principles which may be applied depending on the factual showing at the second trial may appropriately be mentioned.

[8] The effect of the levy and execution sale in the Municipal Court case of Holecheck v. Lees will depend upon what title the defendant, Joseph S. Lees, had in the realty on the date of the Sheriff's sale. Sec. 700, Code Civ.Proc.; Cook v. Huntley, 44 Cal.App.2d 635, 639, 112 P.2d 889. Apparently no attachment was ever run in either Mansfield v. Lees, or Holecheck v. Lees, and no recordation was made in Kern County of any abstract of judgment in either case. Reliance must therefore be placed by respondents upon the lien of the second execution. In view of the preceding execution sale in Mansfield v. Lees was there any title left in Lees which the purchaser acquired on the sale in Holecheck v. Lees?

Clark v. Cuin, 46 Cal.2d 386, 295 P.2d 401, holds that the lien of a judgment obtained by a judgment creditor after the sale of land at an execution sale but during the period it is still subject to redemption gives a right to the second judgment creditor to redeem pursuant to the provisions of Section 701(2) of the Code of Civil Procedure. It would seem that, assuming the ownership by Lees at the time of the sale under the first Municipal Court judgment (19 Cal. Juris.2d "Executions" p. 498, Sec. 113; Lehnhardt v. Jennings, 119 Cal. 192, 48 P. 56, 51 P. 195; Richman v. Bank of Perris, 102 Cal.App. 71, 88, 282 P. 801; Spear v. Farwell, 5 Cal.App.2d 111, 114, 42 P.2d 391, Lees had an interest in the land after that sale which could be reached by execution and effectively disposed of at the second sale and which, after the redemption by Kaiser from the sale in Mansfield v. Lees and the consequent restoration of the title, would develop into good title in Mansfield through her purchase, confirmed by the Sheriff's deed. Bristol v. Hershey, 7 Cal. App. 738, 95 P. 1040; Bateman v. Kellogg, 59 Cal.App. 464, 211 P. 46; Huling v. Seccombe, 88 Cal.App. 238, 241, 263 P. 362; Stetson v. Sheehan, 52 Cal.App. 353, 200 P. 387.

[9] It is proper, also, to point out that wholly apart from other issues, the trial court may well conclude upon an examination of the evidence, in the light of equitable principles, that the plaintiffs are not entitled to an unconditional decree quieting title to the land and to the contract in question. If upon retrial it should be determined that the plaintiffs and the intervening holders of title were in fact co-conspirators with Lees and that they are charged with knowledge and notice of the use of respondents' money to buy the land and Lees' failure to carry out his promises to them, the equitable remedy sought in the complaint may be refused, or granted only conditionally upon the payment of the amount due to the two women on the sale under the execution in Holecheck v. Lees. Richman v. Bank of Perris, supra, 102 Cal. App. 71, 83–88, 282 P. 801; Bateman v. Kellogg, supra, 59 Cal.App. 464, 481, 211 P. 46; Weyant v. Murphy, 78 Cal. 278, 282, 20 P. 568; Johnston v. San Francisco Sav. Union, 75 Cal. 134, 16 P. 753; 19 Am.Jur. pp. 319, 323.

The judgment is reversed.

BARNARD, P. J., and MUSSELL, J., concur.

141 Cal.App.2d 703

In the Matter of the ESTATE and Guardianship of Maria Culver MINNICAR, a Minor.

Jessie Viola BANKS, Petitioner and Respondent,

v.

Josephine Mary CULVER, Contestant and Appellant.

Civ. 5338.

District Court of Appeal, Fourth District, California.

May 21, 1956.

Proceeding for guardianship of a minor. The Superior Court, Kern County, Warren Stockton, J., appointed petitioner as guardian of the person and estate of the minor and an appeal was taken by the child's mother. The District Court of Appeal, Conley, J. pro tem., held that, under circumstances of the case, the appointment of a guardian for the person of the child appeared warranted by convenience and necessity but that appointment of a guardian of the estate of the child was neither necessary nor convenient.

Judgment affirmed as to appointment of guardian of person; reversed as to appointment of guardian of estate; findings to be amended in accordance with opinion.

1. Guardian and Ward ⇐9½

Where child for whom court appointed guardian of person and estate had no estate and no apparent prospect of acquiring one, it was neither necessary nor convenient to appoint guardian of estate of such child and judgment was to such extent erroneous. West's Ann.Prob.Code, §§ 1440, 1480.

2. Guardian and Ward ⇐9½

Where baby was born to mother during her service of prison term for felony and was turned over to county welfare department which placed baby with foster parents, and mother after her parole did not desire to care for child, appointment of guardian of child's person was warranted by necessity and convenience. West's Ann. Prob.Code, § 1440.

3. Parent and Child ⇐2(1)

If parent of child is not an unfit person, he will prevail, in contest with stranger over custody of child, even though stranger could do more financially for welfare of child than the parent. West's Ann. Prob.Code, §§ 1406, 1440.

4. Guardian and Ward ⇐13(1)

Where no actual petition for adoption was pending, it was unnecessary, in proceeding by foster parent for letters of guardianship of child, for court to consider relative advantages of adoption and guardianship, though guardianship was in fact opposed by children's home which had mother's consent to place child for adoption. West's Ann.Prob.Code, §§ 1406, 1440.

5. Guardian and Ward ⇐13(8)

Selection of guardian for infant is within sound discretion of trial court and will not be interfered with in absence of showing of abuse. West's Ann.Prob.Code, § 1406.

6. Guardian and Ward ⇐13(7)

Where child's mother was the party of record opposing appointment of guardian for child, but actual contest was between foster parent who sought guardianship letters, and children's home which had mother's consent to place child for adoption, finding as to fitness of mother was unnecessary. West's Ann.Prob.Code, §§ 1406, 1440.

7. Guardian and Ward ⇐13(4)

In proceeding for appointment of guardian for infant, evidence sustained trial court's unnecessary finding that mother was not fit person to have custody of child. West's Ann.Prob.Code, §§ 1406, 1440.

8. Parent and Child ⇐2(3.3)

Time at which fitness of parent for custody of child must be judged is the present and not the past. West's Ann.Prob. Code, §§ 1406, 1440.

9. Parent and Child ⇐2(3.3)

Mere fact that a parent has been convicted of a crime and has served a prison term is not an automatic bar to award of custody to such parent. West's Ann.Prob. Code, §§ 1406, 1440.

10. Guardian and Ward ⇐13(4)

In proceeding for appointment of guardian for child, evidence failed to sustain finding of abandonment. West's Ann. Prob.Code, § 1440.

11. Guardian and Ward ⇐10

In appointing guardian for minor, court should consider prospective guardian's religious affiliations, the religious views of minor's parents, and the latters' wishes as to his religious training and environment, but there is no religious qualification for office of guardian. West's Ann. Prob.Code, § 1406.

12. Adoption ⇐5

Existence of guardianship does not foreclose possibility of future adoption. West's Ann.Prob.Code, § 1440.

John B. Young and Richard E. Hitchcock, Bakersfield, for appellant.

Osborn & Hosking, Bakersfield, for respondent.

CONLEY, Justice pro tem.

Maria Culver Minnicar, whose guardianship is under question on this appeal, was born October 1, 1951, in Bakersfield. Her mother, Josephine Mary Culver, then under commitment to the women's prison at Tehachapi after a forgery conviction in San Francisco, was not married to the father. The baby when only a month old was placed by the Kern County Welfare Department in the home of the petitioner and respondent, Jessie Viola Banks, and her husband, as licensed foster parents, and they have since regularly received pay therefor; however, the respondent testified that she has not cashed the County warrants since her application for appointment was filed, and that she does not expect or desire any pay hereafter.

The child's mother, appellant herein, after continuing to serve her term at Tehachapi and at Corona was paroled in November of 1953 and has since resided in Los Angeles. On September 11, 1954, she signed an agreement with the Children's Home Society of California, purporting to give custody of the minor to that institution with a view to adoptive placement, and gave a written authorization to the Society to remove the child from the home of petitioner to a supervised boarding home of the Society.

Mrs. Banks thereupon filed her original petition to be appointed guardian of the person and estate of the minor; the petition was granted, but because personal service had not been secured upon the mother, an attack was made by her on that ground upon the initial appointment; at the time of the hearing on the amended petition, the court revoked the original letters of guardianship; and appeal from the order of revocation was filed by Mrs. Banks but thereafter she requested a dismissal and this court has so ordered. Rule 19(b) Rules on Appeal.

The amended petition for guardianship, filed on March 1, 1955, and the answer thereto of Josephine Mary Culver were the pleadings upon which the present hearing was based. The findings of fact establish the truth of the allegations of the amended petition; they determine that Jessie Viola Banks has been caring for Maria Culver Minnicar since November 1, 1951, that the minor "needs the care and attention of some fit and proper person"; that the mother of the child is not a fit and proper person to have her custody and that the contestant has abandoned said minor; "(t)hat there is need for an appointment of a guardian for said minor;" that the petitioner is a fit and proper person to act as such guardian and that "* * * it is not to the best interests of the said minor that the contestant be permitted to place said minor with the Children's Home Society of California."

The Order Appointing Guardian decrees: "That said Jessie Viola Banks be and she is hereby appointed guardian of the person and estate of said minor Maria Culver Minnicar and that Letters of Guardianship of the person and estate of said minor be issued to her upon giving bond (none required) and upon her taking and subscribing an oath, according to law."

The respondent took the oath prescribed by law and Letters of Guardianship of the

person and estate of the child were accordingly issued to her on June 29, 1955; the mother of the child appealed.

Three main lines of attack are made by appellant; first, it is argued that the guardianship is not shown by the record to be either necessary or convenient; secondly, it is urged there is insufficient evidence to justify the finding that the mother of the child is not a fit and proper person to have her custody; and thirdly, the argument is made that the mother should not be delayed in the exercise of her alleged right to initiate the selection of adoptive parents for the child through the Children's Home Society.

The Superior Court of the County where a minor resides or is temporarily domiciled is charged with the duty of determining whether "it appears necessary or convenient" to appoint a guardian of the "person and estate, or person or estate" of a minor "upon the petition of a relative or other person on behalf of the minor". Section 1440 Probate Code; In re De Leon, 59 Cal.App.2d 510, 515, 139 P.2d 109.

[1] The guardianship herein, as granted, was of the person and estate; there is no evidence that the minor has any estate or any prospect of acquiring one; in fact the County of Kern has been making a regular monthly payment for her subsistence and there is no basis for a legitimate contention that it is either necessary or convenient to appoint petitioner or any other person as guardian of a nonexistent estate of the minor. If the child had had any property it would have been essential that a bond be required in connection with the appointment of the guardian of the estate, Probate Code, § 1480; Brainard v. Brainard, 17 Cal.App.2d 520, 62 P.2d 403; In re Chin Mee Ho, 140 Cal. 263, 73 P. 1002; Murphy v. Superior Court of Santa Clara County, 84 Cal. 592, 24 P. 310, and the court specifically stated that no bond was required. The appointment of a guardian of the estate being thus neither convenient, nor necessary, the judgment is to that extent erroneous.

[2] But other considerations leading to an opposite conclusion apply to the guardianship of the person. A baby girl, born to a mother serving a prison term for a felony, is turned over at birth to a county welfare department; she is placed by the department with foster parents; the mother, afterwards paroled, does not desire to assume the personal custody of the child, and she states that she is not in a position to care for her. Certainly, on the face of things, it can not be said that it is neither necessary nor convenient that a fit and proper guardian of the little girl be named. The record establishes without contradiction that the petitioner is well able to care properly for the child, that she and her husband have been model foster parents and that the petitioner loves the baby as if she were her own child. Mrs. Banks has successfully raised children of her own, and the trial court had ample evidence before it to warrant the conclusion that she would be equally successful in her offer to do everything necessary and helpful in caring for and educating her ward.

[3, 4] The underlying realities of the situation are not those so often present in contests between a parent and a stranger. In such circumstances, if the parent is not an unfit person, he will prevail even though the stranger could do more financially for the welfare of the child than the parent. Roche v. Roche, 25 Cal.2d 141, 152 P.2d 999; Shea v. Shea, 100 Cal.App. 2d 60, 223 P.2d 32; In re White, 54 Cal. App.2d 637, 640, 129 P.2d 706; Stever v. Stever, 6 Cal.2d 166, 56 P.2d 1229; Newby v. Newby, 55 Cal.App. 114, 202 P. 891; Eddlemon v. Eddlemon, 27 Cal.App.2d 343, 80 P.2d 1009; In re Guardianship of De Ruff, 38 Cal.App.2d 529, 101 P.2d 521; Robertson v. Robertson, 72 Cal.App.2d 129, 164 P.2d 52.

As the mother does not desire the custody of her baby, the real contest here is between two strangers to the blood, one a woman who has given all the loving care to the child that a natural mother normally furnishes, the other a charitable corporation which is willing to undertake the care of the minor until adoptive parents can be found. And it should be noted further that there is no actual petition for adoption pending here, so that there is no

occasion as there was in In re Adoption of McDonnell, 77 Cal.App.2d 805, 176 P.2d 778, to consider the relative advantages of guardianship and adoption.

[5] In the circumstances, it would seem that the statutory injunction of Section 1406 of the Probate Code should apply: "In appointing a general guardian of a minor, the court is to be guided by what appears to be for the best interest of the child in respect to its temporal and mental and moral welfare * * *." In re Guardianship of Aviles, 133 Cal.App.2d 277, 281, 284 P.2d 176, 178; In re Guardianship of Kiles, 89 Cal.App.2d 445, 448, 200 P.2d 886; In re Guardianship of Levy, 137 Cal. App.2d 237, 290 P.2d 320; Guardianship of Walsh, 100 Cal.App.2d 194, 196, 223 P.2d 322, 22 A.L.R.2d 689. And, as the selection of a guardian "is within the sound discretion of the trial court and will not be interfered with in the absence of a showing of abuse", Guardianship of Walsh, supra, 100 Cal.App.2d 194, 196, 223 P.2d 322, 325, the order for the issuance of letters of guardianship of the person of the minor should be affirmed, unless other considerations urged by appellant prevent the granting of letters as a matter of law.

[6–10] It would not have been necessary in the particular circumstances of this case for the trial court to pass on the question of whether the mother is an unfit person to have the custody of the child, in view of the fact that this is in underlying essentials a contest between strangers. But the trial court did make such a finding and we can not say that it is not supported by substantial evidence. Appellant is right in saying that the time at which fitness must be judged is the present and not the past, In re Green, 192 Cal. 714, 719, 221 P. 903; In re Bensfield, 102 Cal.App. 445, 449, 283 P. 112; In re Guardianship of Snowball, 156 Cal. 240, 104 P. 444; In re Guardianship of Case, 57 Cal.App.2d 844, 847, 135 P.2d 681; In re Guardianship of McCoy, 46 Cal.App.2d 494, 497, 116 P.2d 103; that the mere fact that a parent has been convicted of a crime and has served a prison term is not an automatic bar to the award of custody, In re Guardianship of Case, supra, 57 Cal.App.2d 844, 848–849, 135 P.2d 681; and that the opinion testimony of the mother's parole officer and of the prison chaplain are much in her favor. We further believe that the finding of abandonment is not justified by the record.

But on the record there is still ground for a reasonable difference of opinion as to the mother's fitness, and the trial court's finding that she is presently unfit is supported by substantial evidence. Even the most ardent social worker would hardly contend that conviction of a felony is a good character reference; when proof of such a fact is made it would seem reasonable that the person convicted of such an anti-social act should at least have the burden of going forward with evidence to prove a change of heart and a present clear aptitude for the important duty of caring for and raising the child. When this consideration is coupled with the testimony that the mother has always appeared rather cold toward her baby, that she has not sought permission from her parole officer to visit the child even though Mrs. Banks offered to pay her traveling expenses, and that she is willing to surrender her parental rights to the Children's Home Society contrary to one of the strongest instincts in nature, we can not say that the trial court's finding is not supported by sufficient evidence.

Lastly, appellant argues that she has a natural and overriding right to name adoptive parents who are of an age and racial derivation, and who have a religious affiliation, approved by her, and that she should not be delayed in the exercise of this alleged right through the appointment of a guardian.

The appellant, in her early thirties, of Italian racial heritage, and a Catholic, desires that the baby be adopted by people of the same or similar age, blood and faith. Mrs. Banks is in her early forties, has no Italian blood in her veins and is a Protestant; she testified that if required by the Court as a condition to the guardianship, she would raise the child as a Catholic, pursuant to the baby's baptism as

such; the trial court did not, however, impose any condition relative to religious training.

[11] The comments of the court in the opinion in In re Guardianship of Walsh, 100 Cal.App.2d 194, 198, 223 P.2d 322, 325, 22 A.L.R.2d 689, there restricted to the religious question, apply in principle to all of these matters:

"The court should, of course, consider the religious affiliations of a prospective guardian, the religious views of the parents of the minor, and their wishes as to his religious training and environment. But there is no religious qualification for the office of guardian. State ex rel. Baker v. Bird, 253 Mo. 569, 162 S.W. 119, 123, Ann. Cas.1915C, 1353; In re Dixon, 254 Mo. 663, 163 S.W. 827; In re Waite's Guardianship, 190 Iowa 182, 180 N.W. 159, 161; In re Butcher's Estate, 266 Pa. 479, 109 A. 683; Describes v. Wilmer, 69 Ala. 25, 44 Am.Rep. 501; Jones v. Bowman, 13 Wyo. 79, 77 P. 439, 440, 67 L.R.A. 860; see also Purinton v. Jamrock, 195 Mass. 187, 80 N.E. 802, 805, 18 L.R.A.,N.S., 926. In In re Butcher's Estate, supra, 266 Pa. 479, 109 A. 683, 684, it was held that although a statute expressly provided that 'Persons of the same religious persuasion as the parents of the minors shall, in all cases, be preferred by the court' in appointing a guardian, the welfare of the minor still remained the paramount consideration. The court said, 109 A. 685: 'The welfare of the child must remain the primary consideration to which all other questions must yield. Its interest is paramount, and the court must consider not only the spiritual and temporal welfare, but the minors' further training, education, morals, and the ability of the proposed guardian to best take care of the child in each and all these respects.' See In re Guardianship of Bynum, 72 Cal.App.2d 120, 122, 164 P.2d 25."

[12] It is scarcely necessary to point out that the existence of a guardianship does not foreclose the possibility of a future adoption. In re Santos' Estate, 185 Cal. 127, 195 P. 1055.

Upon the going down of the remittitur, the trial court is instructed to amend the findings as indicated in this opinion, to amend the order appointing guardian to restrict the guardianship to a guardianship of the person of the minor and to issue amended letters of guardianship accordingly; as so amended, the judgment is affirmed as to the appointment of petitioner as guardian of the person of Maria Culver Minnicar; the judgment is reversed as to her appointment as guardian of the estate of said minor. Each party shall bear her own costs on this appeal.

BARNARD, P. J., and MUSSELL, J., concur.



AUTOMOTRIZ DEL GOLFO DE CALIFORNIA S. A. DE C. V., Plaintiff and Respondent,

v.

Erwin G. RESNICK, W. D. Cowan and R. William Cowan, Defendants and Appellants.*

Civ. 21263.

District Court of Appeal, Second District, Division 2, California.

May 16, 1956.

Rehearing Denied June 6, 1956.

See 298 P.2d 33.

Hearing Granted July 11, 1956.

Action for sales' price of eight automobiles. The Superior Court, Los Angeles County, Clarence M. Hanson, J., rendered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Moore, P. J., held that failure of defendants' corporation to issue shares and to obtain permit to issue securities did not as a matter of law fasten upon them status of joint adventurers, and held that the evidence established that plaintiff's transactions had been

* Opinion vacated 306 P.2d 1.

with the corporation and not with the defendants individually.

Reversed.

Opinion, 292 P.2d 578, vacated.

1. Commerce ⇐46

Statute preventing noncomplying corporation from maintaining action upon any intrastate business does not proscribe action upon interstate or foreign transactions of noncomplying foreign corporation. West's Ann.Corp.Code, §§ 6400, 6403, 6801 et seq.

2. Commerce ⇐46

In action brought by foreign corporation for balance due on sales' price of eight automobiles, burden was upon defendants to prove that sales had been in intrastate commerce and that plaintiff's failure to obtain permit to transact business within state was a bar to action; and, on evidence presented, it could not be said that such burden had been sustained. West's Ann.Corp. Code, §§ 6400, 6403, 6801.

3. Commerce ⇐46

It is beyond power of state to impose burdensome conditions or restrictions on interstate or foreign commerce, and a foreign corporation may recover on interstate transactions even though in other transactions it is doing intrastate business without a permit or license. West's Ann.Corp.Code, §§ 6203, 6400 et seq., 6403.

4. Joint Adventures ⇐1.5

Failure to issue shares and obtain permit to sell securities does not as a matter of law fasten upon promoters status of joint adventurers; creation of that relationship depending upon intent of parties. West's Ann.Corp.Code, §§ 25000 et seq., 25153, 25154.

5. Joint Adventures ⇐1.15

In action for balance due on sales' price of eight automobiles, evidence established that plaintiff's transactions were with corporation (adjudged bankrupt) and not with defendants individually, and that defendants were not joint adventurers, notwithstanding failure of their corporation to issue its shares or obtain or apply for permit to sell securities. West's Ann.Corp.Code, §§ 25000 et seq., 25153, 25154.

Levy, Bernard & Jaffe, Los Angeles, for appellants, petitioners for rehearing by Geo. W. Rochester, Beverly Hills, of counsel.

Francis B. Cobb, Los Angeles, for respondent.

MOORE, Presiding Justice.

Respondent, a Mexican Corporation, sued appellants for $10,747 as the balance due on the sales' price of eight automobiles sold on February 23, 1953. The complaint was in three counts but the facts simply stated are that the amount agreed upon to be paid by appellants was $13,747; they subsequently paid $3,000; the demand was for $10,747 with interest from date of sale. The defenses pleaded were: (1) the action should be abated for plaintiff's failure to comply with section 6801 et seq. of the Corporations Code [1] in that it obtained no permit to transact business within this state; (2) the sale was made to Erbel, Inc., a California corporation of which defendants were directors; (3) on July 2, 1953, Erbel, Inc., filed a voluntary petition in bankruptcy in the United States District Court, was adjudged a bankrupt and all the property of Erbel, Inc., was paid out to its creditors who filed claims.

Action Not Abated

[1–3] The action should not be abated by reason of the failure of respondent to file in the office of Secretary of State a statement setting forth (1) the location and address of its main office, the location and address of its principal office within this state, a certified copy of its articles in English and the name of an agent upon whom process directed to the corporation might be served within this state. Secs. 6400, 6403. It is further provided that a foreign corporation subject to the provision of the cited sections which transacts busi-

1. All sections cited refer to the Corporations Code unless otherwise designated.

ness in this State without complying therewith shall not maintain any action or proceeding upon any intrastate business until it has complied with such provisions and has paid the Secretary of State a penalty of $250 in addition to the fees due for filing the documents specified by sections 6400 and 6403 and has filed with the clerk of the court, receipts showing the payment of such fees and penalty and all franchise taxes, etc.

The fact is that at the time of the sale of the eight automobiles to Erbel, Inc., respondent was engaged in conducting an intrastate business in California in its sales of motor vehicles and, also a foreign commerce through sales arranged by telephone from Mexicali to Los Angeles and consummated by shipment from the Mexican City to the California metropolis. Now, while a Mexican exporter may owe to California a duty to comply with the latter's statute requiring certain performances in order to do an intrastate business, that obligation is a thing apart from the right of such exporter to transact foreign commerce by shipments into California of merchandise sold by contract prior to its shipment. That the cited statutes, secs. 6400, 6403, 6801, have been violated by respondent in connection with its sale of the eight cars must first be shown to warrant the penalties prescribed by section 6801 [2], supra. The burden of proof of such violation is imposed by law upon the party who asserts it. McMillan Process Co. v. Brown, 33 Cal.App.2d 279, 284, 91 P.2d 613; W. W. Kimball Co. v. Read, 43 Cal. App. 342, 346, 185 P. 192; Indian Refining Co. v. Royal Oil Co., Inc., 102 Cal.App. 710, 716, 283 P. 856. Appellant has failed to sustain such burden. The cited statute does not proscribe an action upon interstate or foreign transactions by reason of the foreign corporation's failure to qualify to do an intrastate business. The inhibition contained in section 6801, supra, is confined to suits involving intrastate transactions. It is noted that the act forbidden is to do intrastate business without first complying with the law, secs. 6400, 6403, but when the enforcement statute, sec. 6801, was enacted, it provided that the foreign corporation guilty of noncompliance with the statute, sec. 6400 et seq. "shall not maintain any action or proceeding upon any *intrastate* business so transacted in any court of this State, commenced prior to compliance with Chapter 3 [sec. 6403 et seq.] until it has complied with the provisions thereof * *."

Inasmuch as the transaction of intrastate business "means entering into repeated and successive transactions of its business in this State, other than interstate or foreign commerce", sec. 6203, one is likely to become confused with reference to the status of a person or corporation that has done both intrastate and interstate or foreign commerce simultaneously. Appellants herein have proceeded upon the hypothesis that by reason of the fact that respondent consummated transactions of both characters, appellants should be entitled to prevail and that the action should be abated. But, so to construe section 6801 is to disregard the exact language of that section as well as that of the Constitution of the United States, Article I, section 1, and the prerogative of the national government which controls in international relations. The section says that the foreign corporation shall "not maintain any action or proceeding upon any intrastate business" etc. It is "beyond the power of a state to impose burdensome conditions or restrictions on interstate or foreign commerce * * *. A foreign corpo-

2. Section 6801: "A foreign corporation subject to the provisions of Chapter 3 of this part which transacts intrastate business in this State without complying therewith shall not maintain any action or proceeding upon any intrastate business so transacted in any court of this State, commenced prior to compliance with Chapter 3 until it has complied with the provisions thereof, and has paid to the Secretary of State a penalty of two hundred fifty dollars ($250) in addition to the fees due for filing the copy and statement required by Sections 6400 and 6403, and has filed with the clerk of the court in which the action is pending, receipts showing the payment of said fees and penalty and all franchise taxes and any other taxes on business or property in this State that should have been paid for the period during which it transacted intrastate business."

ration may recover on interstate transactions although in other transactions it is doing intra-state business without a permit or license." 20 C.J.S., Corporations, § 1840 pp. 56, 57; see Little v. Armstrong Manufacturing Co., Tex.Civ.App., 58 S.W.2d 849, 850; Leverett v. Garland Co., 206 Ala. 556, 90 So. 343, 344; 14a C.J., section 3992, pp. 1284, 1286; 20 C.J.S., Corporations, § 1840.

The only evidence received with reference to the nature of appellants' purchase of the eight automobiles was the testimony of respondent's agent, one Hodges:

"Q. I ask you again, you sold at least twenty to thirty cars for which you received payment from Erbel, Inc. before February 23, 1953, isn't that so? A. Possibly, sir, yes, sir.

"Q. Now, these two checks upon which this complaint is based were for cars * * * that were sold to Erbel, Inc. * * * that were picked up by this company at the L. A. automobile auction, isn't that true? A. They were picked up at the automobile auction?

"Q. Yes. A. The last cars?

"Q. The very cars on which you are basing this suit, checks for February 23, 1953. A. It could be possible."

But Mr. Hodges testified also, that the transactions "were handled before anything through the phone and we would agree, if he was interested in the automobiles we had, on the price and they would be on approval when they got over here. So when we agreed on the price we call on the Truck Away and we send them over and he would pay for the Truck Away because we more or less have agreed on the price already."

The foregoing testimony refers to the sale of the eight cars sold to Erbel, Inc., February 23, 1953. Because Erbel had purchased other cars on an intrastate basis, the latter are not to be confused with the purchase made by Erbel, Inc., on February 23. The nearest approach to proving that the sale of the cars on that day was the genesis of the "rubber" checks then given to respondent is the answer of Mr. Hodges that it could be possible. A possibility of an occurrence is not a fact. The finding is that there is insufficient evidence to support the defense "that the above action should abate by reason of plaintiff's transacting intrastate business by means of entering into repeated and successive transactions of its business in the State of California other than the transaction of interstate or foreign commerce." Substantial evidence quoted above supports that finding. Therefore, respondent was properly permitted to maintain its action.

There Was No Joint Venture

[4, 5] Prior to the entry of the Cowans into the scene, Resnick had organized Erbel, Inc. His two original associates withdrew, leaving Resnick alone as owner of the corporation and of all rights with respect thereto. It had done nothing except to organize. When the Cowans came they agreed to join in conducting and operating a retail automobile sales business. They agreed upon a division of the profits and W. D. Cowan agreed to "advance $15,000 as capital for the business." Mr. Resnick and R. W. Cowan each paid into the bank account of Erbel, Inc., $2,500 to be used as capital and six weeks thereafter W. D. Cowan guaranteed the obligations of Erbel, Inc., to the extent of $100,000. Resnick was to receive 50 per cent of the profits of the company for his services and the Cowans 25 per cent each. Prior to operations, appellants filed a certificate of fictitious firm name as follows: "Erbel, Inc., d. b. a. Bi-Rite Auto Sales" under which appellants carried the corporation's bank account. The use of such name and the failure of Erbel, Inc., to issue its shares and not to obtain or apply for a permit to sell its securities gave rise to respondent's theory that they had conducted their business as a joint adventure of the three men, and the trial court found accordingly.

But it is now clear that there was no joint adventure. All three men devoted their services to the corporation in its conduct of a retail automobile business. The certificate of fictitious firm name was that "the corporation will do business fictitiously under the name that is given." The theory that the failure to issue shares and to obtain a permit to sell securities ipso

facto creates a joint venture has no authoritative basis except Geisenhoff v. Mabrey, 58 Cal.App.2d 481, 490, 137 P.2d 36, from which no petition for a hearing was filed. In that case, Mabrey as Vice President agreed on May 25, 1940, that "in consideration for the service rendered to date by A. C. Geisenhoff in the promotion of the ice skating rink known as Ice Bowl, Inc., *we* the *undersigned directors*, agree to allot to said A. C. Geisenhoff ten per cent of the promotion stock as allowed by the corporation commissioner * * * that the promotion stock is to be distributed on a basis of the effort and contribution to the success of said Ice Bowl, Inc., as rendered by the various individuals engaged in the promotion of said project." Mabrey was the only signatory to the agreement. He did not seek others. On the day of the agreement, two old directors were out and two new men were in. The court found that in February 1940 an agreement had been made that Geisenhoff should receive for his services an undivided 1/10 *interest in said project* and business and the property and profits thereof. However, the court held that the weight of the evidence showed he did not have an agreement in February 1940 for a definite percentage in the business but that a definite percentage interest was not fixed until May 25, 1940 and that Mabrey did not purport to bind anyone but himself; that the evidence is insufficient to show that the defendants, except one, ratified an agreement for plaintiff to have a ten per cent interest in the business; that the evidence shows that the promotional services were rendered at the express instance of Mabrey and that there was also an implied promise of Johnson and Hann that the plaintiff be paid the reasonable value thereof.

The court concluded that the finding that individual defendants "conducted the rink business 'as their individual enterprise and as a joint venture among themselves' under the name of the corporation is supported by the record." Also, it concluded that "those managing the business cannot claim immunity from individual liability when the corporate structure over a period of almost twenty-one months had not been completed by the issue of stock." We do not perceive clearly just why the court should have concluded that the nonissuance of stock had to do with the liability of those individuals who by their own behavior incurred the obligation to Geisenhoff, unless it is because (1) Mabrey acted for himself only and (2) the court may have concluded that by reason of the nonissuance of stock, Mabrey meant to obligate himself only in his dealings with Geisenhoff.

The law of this state is as hereafter demonstrated that the nonissuance of stock does not as a matter of law fasten upon promoters the status of joint adventurers; that the creation of that relationship depends upon the intent of the parties.

After Resnick had differences with his initial associates in the organization of Erbel, Inc., he persuaded the Cowans to join him. Each of them was to buy one fourth of the stock for $2500. The sum of $5,000 was advanced by W. D. Cowan and entered upon the corporate books, $2,500 as a loan to Resnick and R. W. Cowan for the purchase of stock. The three men then became the directors and officers of the corporation and it performed for some eight months as an active, corporate entity. It took a lease upon the La Brea premises; it made corporate returns and paid franchise taxes; it maintained a bank account and corporate books in which its assets and liabilities were carried as those of Erbel, Inc. Its incorporation was found by the court and its continuance is presumed. Section 313. It always paid its franchise tax; it paid respondent and other creditors with corporate checks. It had a certified public accountant to audit its accounts. It dealt with respondent in the transaction involved herein as a corporation; hence respondent is estopped to deny its corporate character. Not only did Cowan Sr. lend it large sums of money and take security therefor from the corporation, but when misfortune came and bankruptcy led the enterprise to judicial intervention, the assets which had been accumulated under the administration of appellants were delivered by the latter to the trustee as the property of the corporation as of the value of $49,000. In all its transactions prior

and subsequent to February 23, 1953, respondent dealt with appellants as officers of Erbel, Inc., and accepted its checks in payment for merchandise. No suggestion is found in the record that they ever indicated that they were, or desired to be known as joint adventurers or partners or that they intended to act for themselves personally and not for Erbel, Inc. Finally, after the bankrupt estate had run the gamut of federal proceedings, instead of filing its claim with the trustee in bankruptcy as all other creditors had done, respondent filed suit in the state court to collect from the directors of Erbel in their individual capacities.

While the Corporations Code authorizes corporate directors to organize by the election of officers, yet, they may in the name of and in behalf of the corporation apply for a permit to issue its shares. Corp. Code, secs. 25154, 25153. However, these sections do not prohibit the transaction of corporate business or the performance of any act by the corporation other than the issue or sale of securities. Prior to the enactment of the last cited sections, the courts had held that a partnership is not necessarily the result of an abortive attempt to organize a corporation or of a mere failure to issue corporate shares. Blanchard v. Kaull, 44 Cal. 440, 451; Williams Co. v. Leong Sue Ah Quin, 44 Cal.App. 296, 298, 186 P. 401. The idea that the organizers of a corporation would be penalized in any way for the transaction of corporate business prior to the issuance of its stock does not appear to have occurred to the authors of section 25154. The only penalties to accrue against directors with reference to the issuance of shares are those which result from the enforcement of the statutes for violations of the Corporate Securities Act. Corp.Code, sec. 25000 et seq. It makes felonious many acts of corporate officers in attempting to issue their company's securities without first having obtained a permit so to do. But nowhere is it there suggested that a corporation is emasculated by virtue of its failure to procure a permit to issue its shares. Nor is there any authority for holding that the failure of directors to obtain a permit makes of them a copartnership or a joint adventure except the Geisenhoff decision, supra, which imposed a sanction without legislative authorization. On the contrary, the point was before this court in Vogel v. Bankers Building Corporation, 112 Cal.App.2d 160, 168, 245 P.2d 1069. It was there held in effect that nonissuance of stock does not as a matter of law fasten upon promoters the status of joint adventurers; that the creation of that relationship depends upon the intent of the parties.

That appellants did or did not violate the Corporate Securities Act was of no concern to respondent. Austin v. Hallmark Oil Co., 21 Cal.2d 718, 727, 134 P.2d 777; Wortley v. Wood-Callahan Oil Co., 17 Cal.2d 762, 767, 112 P.2d 226; Wachner v. Richardson, 14 Cal.App.2d 422, 429, 58 P.2d 714; Pores v. Purity Milk Co., 135 Cal.App.2d 305, 310, 287 P.2d 169; Ramirez v. Thomas Productions, 10 Cal.App.2d 338, 340–341, 51 P.2d 895; German Publishing Co. v. Scheidt, 77 Cal.App. 238, 241, 246 P. 88. Nor can the point be urged by respondent as support for its contention that appellants were not in all transactions with respondent acting for Erbel, Inc.

In view of our conclusion that respondent's transactions were with Erbel, Inc., and not with appellants individually, and that the latter are therefore not personally liable for the debt, a discussion of the other contentions would be of no avail.

The judgment is reversed.

FOX and ASHBURN, JJ., concur.

141 Cal.App.2d 592

Dora B. WICKTOR, Petitioner and Respondent,

v.

COUNTY OF LOS ANGELES, a Body Politic and Corporate, and Retirement Board of the Los Angeles County Employees Retirement System, and Howard L. Byram, Walter J. Gastil, James K. Ingham, Gladys Johnson, William T. Cobb, Alfred J. Thomas and Harry S. Hargraves, Members of said Retirement Board, Defendants and Appellants.

Civ. 21520.

District Court of Appeal, Second District, Division 2, California.

May 16, 1956.

Hearing Denied July 11, 1956.

Action for a writ of mandate to compel payment of retirement allowance to widow of deceased member of county employees' retirement system. The Superior Court, Los Angeles County, Arnold Praeger, J., rendered judgment directing issuance of a peremptory writ of mandate, and defendants appealed. The District Court of Appeal, Moore, P. J., held that evidence as to decedent's belief that he changed designation so as to name wife as his beneficiary was immaterial and that evidence of his declarations as to change of beneficiary was inadmissible as hearsay.

Judgment reversed.

1. Mandamus ⇐168(3)

In action for writ of mandate to compel retirement board to pay widow of deceased member of county employees' retirement system the pension of which decedent's sister was the designated beneficiary of record, evidence that decedent believed he had changed designation so as to name wife as beneficiary was inadmissible as being incompetent and immaterial. West's Ann. Gov.Code, §§ 31500 et seq., 31765.1, 31780, 31782.

2. Evidence ⇐317(18)

Testimony as to declarations made by member of county employees' retirement system, since deceased, that he had changed designation so as to name wife instead of sister as beneficiary of pension in event of his death was inadmissible as hearsay in action for writ of mandate to compel retirement board to pay pension to widow. West's Ann.Gov.Code, §§ 31500 et seq., 31765.1, 31780, 31782.

3. Counties ⇐69(3)

Where a statute or contract requires that investment of a person with valuable rights or benefits be done by a specified method, adherence to such method is indispensable to the effective transfer of such rights. West's Ann.Gov.Code, § 31780.

4. Insurance ⇐587

Mere intention to change the beneficiary of life policy cannot effect such change.

5. Counties ⇐69(3)

Provisions of County Employees' Retirement Act of 1937 providing for death benefits are similar to a contract of life insurance, to be governed by principles applicable to such contracts. West's Ann. Gov.Code, §§ 31500 et seq., 31765.1.

6. Counties ⇐69(3)

Evidence that deceased member of county employees' retirement system and his wife had made mutual wills, giving all property of each to the other, and that husband had changed life policy so as to name wife as beneficiary and had made calculations as to amount she would receive from retirement system as pension in event of his death did not necessarily establish husband's intention to make wife his beneficiary. West's Ann.Gov.Code, §§ 31500 et seq., 31765.1, 31780, 31782.

7. Counties ⇐69(3)

That designated beneficiary rejected pension payable upon death of member of county employees' retirement system and insisted that it belonged to deceased's widow was immaterial on issue of change of designation so as to name widow as beneficiary. West's Ann.Gov.Code, §§ 31500 et seq., 31765.1, 31780, 31782.

8. Counties ⇐69(3)

Asserted declarations of member of county employees' retirement system, since deceased, expressing his wishes or aims, were not valid substitutes for his designation of beneficiary of pension in the

manner provided by statute. West's Ann. Gov.Code, §§ 31500 et seq., 31782.

9. Evidence ⇐317(18)

Use of a decedent's declaration in evidence is authorized by statute only when such declaration is against the pecuniary interest of decedent or his successor in interest, and unless such declaration or omission was against his interest, it is pure hearsay. West's Ann.Code Civ.Proc. §§ 1853, 1870.

10. Evidence ⇐272

Express statutory provision for receiving in evidence declarations against interest excludes evidence of all other declarations. West's Ann.Code Civ.Proc. §§ 1853, 1870.

11. Evidence ⇐278

Where right of member of county employees' retirement system to change his beneficiary was not restricted, declaration of member of retirement system, since deceased, that he had designated wife as his beneficiary was not a "declaration against interest" within statutes authorizing use of evidence as to such declarations. West's Ann.Code Civ.Proc. §§ 1853, 1870; West's Ann.Gov.Code, §§ 31500 et seq., 31765.1, 31780, 31782.

See publication Words and Phrases, for other judicial constructions and definitions of "Declaration Against Interest".

12. Evidence ⇐281

Declarations made by alleged testator before or after date of will are not "declarations against interest" within statutes authorizing use of evidence as to such declarations. West's Ann.Code Civ.Proc. §§ 1853, 1870.

13. Wills ⇐115

Where statute requires two witnesses, testimony as to declarations of a decedent cannot suffice for the testimony of one witness.

14. Evidence ⇐317(18)

Evidence as to declarations of a decedent, purporting to be declarations as to acts of others, is hearsay.

15. Evidence ⇐317(18)

Evidence as to declarations of a testator as to the fact of his signature is hearsay.

16. Wills ⇐297(1, 4)

Evidence as to declarations of a deceased person is not competent to prove that he has made a will or to prove its continued existence.

17. Evidence ⇐269(2)

Where intent is a material element of a disputed fact, declarations of a person since deceased made before or after an alleged act that indicates the intent with which he performed such act are admissible in evidence as an exception to hearsay rule.

18. Counties ⇐69(3)

"Designation of a beneficiary", as applied to retirement allowance or death benefit payable upon death of a member of county employees' retirement system, means the express, positive acts of member, specifying and naming some particular person. West's Ann.Gov.Code, §§ 31500 et seq., 31765.1, 31780.

See publication Words and Phrases, for other judicial constructions and definitions of "Designation of Beneficiary".

19. Counties ⇐69(3)

"Changing beneficiaries", as applied to benefits payable under county employees' retirement system, refers to the act of naming and specifying some person other than the one previously designated as beneficiary. West's Ann.Gov.Code, §§ 31500 et seq., 31765.1, 31780.

See publication Words and Phrases, for other judicial constructions and definitions of "Changing Beneficiaries".

20. Counties ⇐69(3)

Hearsay declarations of a member of county employees' retirement system, since deceased, were insufficient to effect a change of beneficiary, in view of express statutory provision for written designation of beneficiary to be filed with retirement board. West's Ann.Gov.Code, §§ 31500 et seq., 31765.1, 31780, 31782.

21. Counties ⇐69(3)

Rejection of retirement benefits by beneficiary of record of a deceased member of county employees' retirement system had no probative value on issue of whether member had effected a change of beneficiary prior to death. West's Ann.Gov.Code, §§ 31500 et seq., 31765.1, 31780, 31782.

22. Evidence ⇐272

Rejection of retirement benefits by beneficiary of record of deceased member of county employees' retirement system was merely a legal conclusion of such beneficiary and not within exception to hearsay rule admitting in evidence declarations against interest. West's Ann.Code Civ.Proc. §§ 1853, 1870; West's Ann.Gov.Code, §§ 31500 et seq., 31765.1, 31780, 31782.

23. Counties ⇐69(3)

Rights of designated beneficiary of record of deceased member of county employees' retirement system were not assignable, and hence rejection of pension by such beneficiary could not be regarded as an assignment of her rights. West's Ann.Gov. Code, §§ 31452, 31500 et seq., 31765.1, 31780, 31782.

Harold W. Kennedy, County Counsel, Edward H. Gaylord, Deputy County Counsel, Los Angeles, for appellants.

S. V. O. Prichard, Beverly Hills, for respondent.

MOORE, Presiding Justice.

Respondent is the widow of Dr. Carl Edward Wicktor, an employee of Los Angeles County from June 8, 1925, until his death on October 27, 1953. Also, he was a member of the Los Angeles County Employees' Retirement System as created by law. Stats. 1919, p. 782, Act 5841, Deering's General Laws; Stats.1937, Chapter. 677, p. 1898; Gov.Code, sec. 31500 et seq. The law in effect at the time of death of the doctor provided that the widow of a county employee might receive as a pension sixty per cent of the amount to which he would be entitled had the doctor retired on the date of his death. Government Code, sec. 31765.1.

Claiming that her husband had designated her as the beneficiary of the retirement benefits and that the Retirement Board had misplaced his designation and had refused to recognize respondent as such beneficiary, respondent filed this action for a writ of mandate to compel appellants to pay her "the amount to which she would be entitled had the said Carl Edward Wicktor retired on the date of his death with a retirement allowance."

The court found all the allegations of the petition true and directed the issuance of a peremptory writ of mandate requiring appellants to pay respondent a retirement allowance of sixty per cent of the amount to which he would have been entitled "had said Carl Edward Wicktor retired on the date of his death with a retirement allowance not modified in accordance with one of the optional settlements specified in Article II of the Los Angeles County Employees Retirement Act, which said amount of retirement allowance was and is the sum of $204.67 per month."

The controversy arose from the fact that no record was found of Dr. Wicktor's having designated his wife as his beneficiary. On the contrary, a card was found in the treasurer's office whereby the doctor had designated Mrs. Orrin Shoop as his beneficiary. Respondent was thus, at the threshold of her action, handicapped by the absence of a designation of herself as the beneficiary and by the recorded desire of the doctor that his sister, Mrs. Shoop, receive the benefits of his long service to the county. The situation inspired the exertion of Herculean efforts by respondent to make proof of decedent's designation of her as his beneficiary by circumstantial and hearsay evidence.

Respondent testified that after her marriage, she had a conversation with her husband in 1931; he told her of his county retirement and that it was his intention to change the beneficiary; now that he was married, he desired his wife to be the beneficiary of his retirement; subsequently, in the same year he told her he had filed with the Retirement System a designation of her as his beneficiary and that all arrangements had been completed and she "was now officially the beneficiary on his retirement setup." She testified, also, that the doctor had made calculations as to the amount of monthly payments she would receive. Dr. Schofield also testified to having witnessed decedent's calculations as to the pension his widow would receive.

The objections to such testimony were: (1) if introduced to show that decedent believed he had changed his beneficiary, it is incompetent and immaterial; (2) if it was introduced to prove that the doctor had changed his beneficiary, it is inadmissible as hearsay.

[1–5] Such objections should have been sustained. Where a statute or a contract requires that the investment of a person with valuable rights or benefits be done by a specific method, adherence thereto is indispensable to the effective transfer of such rights. Gov.C.A. sec. 31780. The mere intention to change the beneficiary of a life insurance policy cannot effect such change. Supreme Lodge v. Price, 27 Cal.App. 607, 616, 150 P. 803; Kell v. United States, 5 Cir., 202 F. 2d 143, 144; Butler v. Butler, 5 Cir., 177 F. 2d 471, 472. The cited authorities are peculiarly pertinent for the reason that the County Employees' Retirement Act of 1937 "providing for death benefits are similar to a contract of life insurance, to be governed by principles applicable to such contracts." Nichols v. Board of Retirement, 121 Cal. App.2d 176, 180, 262 P.2d 862, 865. Inasmuch as decedent made no written declaration of a change of beneficiary to the County Treasurer or to an official of the Retirement Board and did not make any assignment of interest to his wife, the quoted testimony of his wishes is immaterial and the testimony that he had filed a designation of respondent as his beneficiary is hearsay and neither advances her cause.

[6, 7] Respondent proved that after her marriage she and her husband made mutual wills whereby each gave to the other all his or her property and the doctor changed his life insurance policy, naming respondent as his beneficiary. From such events and the writing of the doctor showing his calculations of 60 per cent of his final salary as provided by section 31765.1 of the Government Code, she argues that decedent's intention to make her his beneficiary was by documentary evidence clearly proved. No such finding necessarily follows from that evidence. Giving her all his property and insurance might have been a good reason in his mind to let another have the benefits of his retirement allowance. Also, the act of Mrs. Shoop in rejecting the pension and in insisting that it belonged to respondent was immaterial. It proves nothing as to the wishes of decedent and does not bear in the slightest upon his failure to designate his wife as his beneficiary.

[8–12] The asserted declarations of the doctor, expressing his desires or his aims are not valid substitutes for his designation of respondent in the manner provided by law. Gov.Code, sec. 31782. Section 1853 of the Code of Civil Procedure authorizes the use of a decedent's declaration only when it is against the pecuniary interest of himself or of his successor in interest. To the same effect is section 1870. Unless his declaration or omission was against his interest, it is pure hearsay. The express statutory provision for receiving declarations against interest excludes all others. Collins v. City and County of San Francisco, 112 Cal.App.2d 719, 731, 247 P.2d 362. It cannot with reason be concluded that the naming of respondent as his beneficiary was against his interest. No restriction is provided against a county employee's change of beneficiary. If he can change his beneficiary daily, he suffered no detriment in making respondent his beneficiary at the time he is reputed to have done so. Declarations made by an alleged testator before or after the date of the paper are not declarations against interest, because they can have no effect upon his interest. Throckmorton v. Holt, 180 U.S. 552, 578, 21 S.Ct. 474, 45 L.Ed. 663; see Estate of Thomas, 155 Cal. 488, 495, 101 P. 798.

[13–16] The inefficacy of testimony offered to prove that a decedent had intended to or that he did change his beneficiary or that he had revoked his will or that he had been fraudulently induced to make a will is universally held. State ex rel. Gneckow v. Hostetter, 340 Mo. 1177, 105 S.W.2d 928, 929; Butler v. Butler, 5 Cir., 177 F.2d 471, 472; Estate of Thompson, 185 Cal. 763, 767, 198 P. 795; Estate of Anderson, 185 Cal. 700, 718, 198 P. 407; Estate of Ricks, 160 Cal. 467, 485, 117 P. 539; Estate of Gregory, 133 Cal. 131, 138, 65 P. 315; Estate of James, 124 Cal. 653, 660, 57 P. 578, 1008;

In re Kennedy's Will, 167 N.Y. 163, 60 N.E. 442, 444; Campbell v. Henley, 172 Tenn. 135, 110 S.W.2d 329, 331; Brownfield v. Brownfield, Mo., 249 S.W.2d 389, 391, 41 A.L.R.2d 387, 391. Testimony of the declarations of a decedent cannot suffice for the testimony of one witness where the statute requires two witnesses. Estate of Thompson, supra, 185 Cal. 767, 198 P. 795. Evidence of the declarations of a testatrix, purporting to be declarations of the acts of others is hearsay. In re Calkins, 112 Cal. 296, 300, 44 P. 577. Declarations of a testator as to the fact of his signature are hearsay. Estate of James, supra, 124 Cal. 660, 57 P. 578. Declarations of a deceased person are not competent to prove that he has made a will or to prove its continued existence. In re Kennedy's Will, supra, 167 N.Y. 163, 60 N.E. 442, 444.

[17] The trial court overruled appellants' objections to the hearsay testimony introduced by respondent to prove that decedent had designated her as his beneficiary on the strength of Whitlow v. Durst, 20 Cal.2d 523, 524, 127 P.2d 530, 531. That decision is inapt and not pertinent. The point at issue there was the state of mind of the deceased husband with reference to a reconciliation between him and his wife. Evidence had been received to show there had been no reconciliation. Thereupon it was proper to prove his declarations that they were still separated and would never be reconciled for the reason that "when intent is a material element of a disputed fact, declarations of a decedent made after as well as before an alleged act that indicate the intent with which he performed the act are admissible in evidence as an exception to the hearsay rule". Such ruling was rational and sound. A reconciliation depends upon the mental attitude of both parties to the rift.

[18, 19] Because she is entitled to one-half of that portion of the death benefit representing community property even in the absence of a waiver by Mrs. Shoop, respondent contends that she was by law designated as beneficiary even in the absence of an affirmative action by her husband. Such is not a fair construction of section 31765.1 which indicates that an affirmative act must be done to designate one as the beneficiary. If one's right to be the beneficiary were created by virtue of the kinship or the conjugal relationship of the claimant to the decedent, the provision for a designation would have been omitted. The word derives from the Latin verb *designare,* meaning to form a plan in the mind of something to be done. By the "designation" of a beneficiary, the legislature evidently meant the express, positive act of the member's specifying and naming some particular person, and by "changing" beneficiaries, the lawmakers could refer only to the act of naming and specifying some person other than that previously designated. Gov.Code, secs. 31765.1 and 31780; see Hanson v. Minnesota Scandinavian Relief Association, 59 Minn. 123, 60 N.W. 1091, 1093.

[20] Because the Act provides that the death benefit of a member of the Retirement System "shall be paid to his estate or to such person as he nominates by written designation duly executed and filed with the board", Gov.Code, sec. 31780, the conclusion is unavoidable that the hearsay declarations of decedent cannot be substituted for a "written designation duly executed and filed with the board." It would be unnecessary to observe that the verb designate in section 31780 has the same significance that it has in section 31765.1. Stillwell v. State Bar, 29 Cal.2d 119, 123, 173 P.2d 313.

[21, 22] Respondent contends that the written refusal of Mrs. Shoop to accept retirement benefits accorded to her after Dr. Wicktor's death, is an admission that respondent was the designated beneficiary. Such act of Mrs. Shoop has no evidentiary value on the issues raised by the pleadings. Mrs. Shoop might have opposed her brother's generosity at the time he filed the document designating her. Inasmuch as a declaration against interest refers here to only such declarations of decedent West Coast Life Insurance Co. v. Crawford, 58 Cal. App.2d 771, 784, 138 P.2d 384, the dramatic interposition of Mrs. Shoop's rejection of the benefit is nothing other than a legal con-

clusion of Mrs. Shoop and is not therefore within the exception to the hearsay rule, allowing declarations against interest.

[23] The communication of Mrs. Shoop with the County Treasurer rejecting the pension provided for her by deceased cannot be regarded as an assignment of her rights, for the reason that such a right is unassignable. Gov.Code, sec. 31452; see Hecht v. Whelan, 174 Misc. 146, 18 N.Y.S.2d 488, 490.

The judgment is reversed.

FOX and ASHBURN, JJ., concur.

Hearing denied; CARTER, J., dissenting.



LEWIS & QUEEN, Plaintiffs and Appellants,

v.

N. M. BALL SONS, a partnership of Irving T. Ball, Stanley A. Ball, Gordon H. Ball, general partners, Dorothy Ball and Georgia Ball, limited partners, Glens Falls Indemnity Company, a corporation, American Re-Insurance Company, a corporation, Defendants and Respondents.*

Civ. 16658.

District Court of Appeal, First District, Division 1, California.

May 7, 1956.

As Corrected on Denial of Rehearing June 6, 1956.

Hearing Granted July 5, 1956.

Action to recover rentals for equipment supplied to contractor to facilitate performance of work by contractor under contracts with state, and to recover under subcontract for performance of work on the state construction job. The Superior Court, Alameda County, Chris B. Fox, J., entered judgment in favor of contractor and sureties and subcontractor appealed. The District Court of Appeal, Bray, J., held that subcontracting partnership, which did not have contractor's license at time subcontract was entered into, could not maintain action against contractor or sureties.

Judgment affirmed.

1. Appeal and Error ⇐110

Order denying motion for new trial is not appealable.

2. Contracts ⇐141(3)

In action to recover rentals for equipment supplied to contractor to facilitate performance of work by contractor under contracts with state, and also to recover under subcontract for performance of work on construction job for state, evidence was sufficient to show that rental agreement and subcontract were each part of integrated subcontract entered into without consent of state and for purpose of circumventing provisions of contract between state and contractor, and that such subcontract was a subletting of more than 50 per cent of the work to be performed under the main contract in violation of terms of main contract.

3. Evidence ⇐437

Parol evidence is admissible to show illegality of a contract. West's Ann.Code Civ.Proc. § 1856.

4. Common Law ⇐9

An act which may not legally be done directly may not legally be done indirectly.

5. Evidence ⇐437

Under statute providing that parol evidence is always competent to show illegality of a written contract, parol evidence was admissible to show illegality of subcontract, which was entered into in violation of terms of main contract, even though terms of subcontract, in an attempt to eliminate illegality of subcontract, stated the subcontract contained all covenants, stipulations and provisions agreed upon by the parties. West's Ann.Civ.Code, § 1856.

6. Evidence ⇐437

Under Civil Code section providing several contracts relating to same matters between same parties and made as parts of substantially one transaction, are to be taken together, parol evidence was admissible to show illegality of subcontract, for rental of equipment and performance of work in-

* Opinion vacated 308 P.2d 713.

volved under main contract. West's Ann. Civ.Code, § 1642.

7. Licenses ⇐39.44

Where partnership entered into subcontract to supply equipment, break cement and apply water on parkway construction job, but partnership did not have contractor's license, such partnership could not maintain action against contractor for alleged breach of such subcontract, even though one of partners of the partnership did have contractor's license. West's Ann. Bus. & Prof.Code, §§ 7000 et seq., 7025, 7028, 7031.

8. Licenses ⇐39.44

Under Business and Professions Code sections prohibiting bringing of action on contract for which contractor's license is required without proof that party bringing action was duly licensed contractor during performance of contract, subcontractors, who did not have contractor's license at time of performance of subcontract, could not maintain action on labor and material bond or on stop notice bond even though defenses of illegality of subcontract did not apply to the action on the bonds. West's Ann.Bus. & Prof.Code, § 7031; West's Ann. Code Civ.Proc. § 1184d.

Howard B. Crittenden, Jr., San Francisco, for appellants.

Thelen, Marrin, Johnson & Bridges, San Francisco, for respondents.

BRAY, Justice.

[1] Plaintiffs appeal from a judgment in favor of defendants in an action for a money judgment based on a contract and on a labor and material bond and a stop notice bond.[1]

Questions Presented.

1. Was parol evidence admissible to show that the equipment rental agreements were actually subcontracts?

2. Were the rental agreements unlawful (a) because they attempted to circumvent the state highway contract specifications, (b) because plaintiff partnership had no contractor's license?

3. Does absence of contractor's license prevent recovery on statutory labor and material bond and on stop notice bond?

Record.

The trial consumed 23 days. The reporter's transcript contains 2,385 pages. However, to present the main issues requires but a brief statement of the facts. The defendants Ball (hereafter referred to as "Ball Sons") are contractors who held two contracts with the state for the construction of a portion of the Hollywood Parkway. Defendant Glens Falls Indemnity Company executed to the state, under each agreement hereafter mentioned, the labor and material bonds required by the Government Code. After a controversy arose plaintiffs filed a stop notice. Defendant American Re-Insurance Company executed the bond then provided for in section 1184d, Code of Civil Procedure. In July, 1949, two contracts were entered into between plaintiffs and Ball Sons relating to the work required under each contract between the latter and the state (four contracts in all). As to each state contract the contracts between plaintiffs and Ball Sons were as follows: One was admittedly a subcontract and was for concrete removal and application of water.[2] The other is entitled "Equipment Rental Agreement" and is in the form of a rental agreement[3] rather than a subcontract. During the progress of the work the parties disagreed in a number of respects. Each party claims that the other breached the agreements. Plaintiffs filed suit for the rental provided in the agreements and for the reasonable value of the equipment alleged to have been held over after the agreements terminated, and for attorney's fees. Ball Sons cross-complained alleging that the moneys expended by them

1. They also purport to appeal from the order denying motion for new trial. Such order is not appealable.

2. This contract evidently was performed by plaintiffs and all payments thereunder made by Ball Sons to plaintiff. It is not an issue in this case.

3. To distinguish the rental agreements from the subcontracts we hereafter refer to them as "agreements."

under the terms of the agreements for plaintiffs' benefit exceeded the moneys payable to plaintiffs and asked recovery of the excess. At the trial, evidence was received, over plaintiffs' objection, to the effect that the rental agreements were actually subcontracts made in rental agreement form in order to circumvent a provision, hereafter discussed, in the specifications which were a part of the contracts between the state and Ball Sons. Defendants claimed that therefore the agreements were illegal; that because of such illegality and also because plaintiffs did not have a contractor's license, plaintiffs were barred from recovery.

Findings of Fact.

The court found that while plaintiff George W. Lewis had the contractor's license required by division 3, chapter 9, Business and Professions Code, the partnership of Lewis & Queen did not, nor did plaintiff Queen; that the subcontract and the rental agreement were actually one integrated subcontract and were actually performed as such, and that the form of rental agreement was used with the intent and for the purpose of circumventing certain provisions of the standard specifications of the Department of Public Works, Division of Highways, which were a part of the contracts between the state and Ball Sons. These provisions required the contractor to perform "with his own organization and with the assistance of workmen under his immediate superintendence, work of a value of not less than fifty per cent (50%) of the value of all work embraced in the contract." They also required that "No portion of the contract shall be sublet, assigned or otherwise disposed of except with the written consent of the Director of Public Works," and all lists of subcontractors must be filed with the state. The court found that the parties agreed that plaintiffs' names would not be, and they were not, filed nor any consent obtained to the subletting of the work covered by the two rental agreements. The court further found that the value of the work subcontracted to all subcontractors and reported to the state amounted to 44.4 per cent of Ball Sons' contract with the state on job 1, and to 41.03 per cent on job 2. These percentages did not include any of the work included in the two rental agreements. If the value of that work were included in the value of the two jobs respectively, the value of work actually subcontracted would have exceeded 50 per cent of the value of all work embraced in Ball Sons' highway contracts.

The court further found that plaintiffs breached the agreements by failing to supply Ball Sons with equipment as therein required, and that plaintiffs abandoned their agreements requiring Ball Sons to use other equipment to finish the work. It found the value of the work done by plaintiffs, but expressly made no finding as to payments, credits, charges and offsets asserted by Ball Sons against plaintiffs or as to any asserted default or inadequacy of payment by defendants to plaintiffs under the rental agreements, "such matters not having been tried * * *."

Among the conclusions of law the court found that because of the failure to report the equipment agreements to the state, and to get its consent thereto, the rental agreements were contrary to and in violation of the provisions of the state highway contracts, of the policy of law and of public policy and contrary to good morals, and were invalid and unenforceable by either party thereto and the parties should be left where they are. Again, because plaintiff partnership had no contractor's license, plaintiffs are barred by section 7031, Business and Professions Code, from recovering any sums whatever under the agreements or for the work performed.

[2] While the evidence was conflicting upon most of the matters there was ample evidence to support every one of the court's findings. As to the finding that the rental agreements were intended to be and actually were subcontracts integrated with the designated subcontracts, among other evidence to support it is the following: The testimony of defendants to that effect; the fact that plaintiffs' bid for subcontracts; and the work was carried on under the subcontracts and the rental agreements as a single, integrated operation. The prices in the rental agreements were not the usual rental

prices found in rental agreements, but were unit prices such as are usually found in subcontracts. Plaintiffs retained and exercised control over the employees operating the equipment and in fact were plaintiffs' employees. There was no segregation of wages, payroll taxes and compensation insurance, all of which were paid in the first instance by Ball Sons, between the work under the designated subcontracts and the rental agreements. The equipment remained under plaintiffs' direction and control, and was moved by plaintiffs back and forth to and from other jobs. In case of conflict, the supervisory employees acted on behalf of plaintiffs. Monthly progress earnings and charges by defendants for disbursements for plaintiffs' accounts were invoiced together under the subcontracts and the rental agreements.

1. Parol Evidence.

[3–6] It is well settled in California that parol evidence is admissible to show the illegality of a contract. Section 1856, Code of Civil Procedure, so provides. "Parol evidence is always competent to show that a written contract, though lawful on its face, was illegal, or part of an illegal transaction * * *. 3 Williston on Contracts, 3060; Morey v. Paladini, 187 Cal. 727–739, 203 P. 760." Endicott v. Rosenthal, 216 Cal. 721, 728, 16 P.2d 673, 676. See also De Armas v. Dickerman, 108 Cal.App.2d 548, 552, 239 P.2d 65, where the evidence was admitted to show that the so-called option agreement was executed to evade the provisions of the Housing and Rent Act of 1947, 50 U.S.C.A.Appendix, § 1881 et seq., and was, in fact, a lease. See also El Claro, etc., Co. v. Daugherty, 11 Cal.App.2d 274, at page 281, 53 P.2d 1028, at page 1031, 55 P. 2d 488, where the court said: "Framing the contract in two papers did not change its legal effect. It is settled law that an act which may not legally be done directly may not legally be done indirectly." The fact that the agreements contain statements that they include "all covenants, stipulations and provisions agreed upon by the parties" cannot and does not change or affect this rule. The evidence was admissible under another exception to the parol evidence rule, namely, the one expressed in section 1642, Civil Code: "Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together."

2. Illegality.

The court having found on substantial evidence that the rental agreements were actually subcontracts, raises the question whether plaintiffs may recover in this action because of (a) claimed illegality of the rental agreements in that they were purposely entered into to and did circumvent the provisions of the specifications above mentioned, and (b) plaintiff partnership not having a contractor's license.[4] The claim under (a) is that these provisions of the specifications amount to a declaration of public policy and any agreement to circumvent or violate them is contrary to good morals and hence makes such agreements unlawful. In view of our decision hereafter under (b) which is determinative of this action, we deem it unnecessary to discuss the first contention. We see no escape from the fact that as the plaintiff partnership did not have a contractor's license, it cannot maintain this action. The agreements were between the partnership and Ball Sons. The recovery, if any were had, would be by the partnership. Plaintiff Lewis had a contractor's license. Plaintiff Queen did not, nor did the partnership, nor did it ever apply for one.

Section 7028, Business and Professions Code, provides: "It is unlawful for any person to engage in the business or act in the capacity of a contractor within this State without having a license" therefor. Section 7031, Business and Professions

4. Were the agreements true rental agreements, plaintiff partnership would not be required to have a contractor's license.

Code, provides: "No person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action in any court of this State for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that he was a duly licensed contractor at all times during the performance of such act or contract." Section 7025 defines "'Person' as used in this chapter" as including "an individual, a firm, *copartnership,* corporation, association or other organization, or any combination of any thereof." (Emphasis added.)

[7] In view of the decision in Loving & Evans v. Blick, 33 Cal.2d 603, 204 P.2d 23, there can be no question but that the partnership not having a contractor's license made the agreements between it and Ball Sons illegal and precludes recovery thereon. There, as here, only one of the two partners held a contractor's license, and the partnership did not. After completion of a building contract, the partnership sued the owner for work and services under the contract. The owner defended, setting up the lack of license by the parties. In denying recovery the court said, 33 Cal.2d at page 607, 204 P.2d at page 25: "There can be no question but that this case presents a clear violation of the statutes regulating the contracting business. Thus, while respondent Loving at all times possessed an individual contractor's license, his respondent partner Evans did not, and the partnership, as such, failed to procure such a license. As appellant maintains, it has been repeatedly declared in this state that 'a contract made contrary to the terms of a law designed for the protection of the public and prescribing a penalty for the violation thereof is illegal and void, and no action may be brought to enforce such contract' [citations]; and that 'whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case.'" There, as here, the plaintiffs contended that the cases of Catti v. Highland Park Builders, Inc., 27 Cal. 2d 687, 166 P.2d 265, and Citizens State Bank v. Gentry, 20 Cal.App. 2d 415, 67 P.2d 364, authorized a recovery where one of the partners had a license. The court, however, distinguished the Gatti case by pointing out that in it both plaintiffs possessed a license in their own names as individuals, and that during the performance of the contract a joint contractor's license was issued to both the parties and a third party. It distinguished the Citizens Bank case by pointing out that the contractor's license expired while the work was in progress but was renewed in the name of a corporation bearing the contractor's name and in which he was the dominant factor and that the work was completed by the corporation. In Norwood v. Judd, 93 Cal. App.2d 276, at page 283, 209 P.2d 24, at page 28, cited by plaintiffs, this court stated: "The principle that participants to an illegal contract who are *in pari delicto* can secure no relief based on such contract, is an ancient and most salutary one. It is part of the general rule that he who comes into equity must come with clean hands. See, generally, 2 Pomeroy's Equity Jurisprudence, Fifth Ed., §§ 397–404. The rule in license cases is most frequently applied to those situations where a firm or person required to be licensed fails to secure a license and sues a third person for services rendered or material furnished. In such event the unlicensed firm or person cannot recover because to do so would be to defeat the very purpose of the licensing statute. The contractor's license law expressly so provides." "The subcontractor is also a contractor, B. & P.Code, sec. 7026. A person is nonetheless amenable to the act because he is a subcontractor. He is as such required to obtain a license and must allege such fact in order to maintain an action on his contract." Albaugh v. Moss Construction Co., 125 Cal.App.2d 126, 132, 269 P.2d 936, 940.

The lack of a contractor's license made the agreements contrary to public policy unlawful and unenforceable. The courts must leave the parties where they find them.

The amounts which the court found to have been earned by plaintiffs under the agreements were much less than those claimed by plaintiffs. The agreements provided that Ball Sons were to pay all labor in the operation, maintenance and repair of plaintiffs' equipment and many other costs

incident to the work, and charge them against plaintiffs' earnings. Had the court proceeded to consider these charges and defendants' claims for damages due to plaintiffs' breach of the agreements, and offset them, it is doubtful if the balance would have favored plaintiffs.

3. Bonds.

[8] Plaintiffs, relying on Pneucrete Corp. v. United States Fidelity & Guaranty Co., 7 Cal.App.2d 733, 46 P.2d 1000, and Lewis & Queen v. S. Edmondson & Sons, 113 Cal.App.2d 705, 248 P.2d 973, contend that as it is held in both cases that "An action on a labor and material bond given by a contractor on a public work is a primary and direct obligation on the bond and enforcible without regard to the original prime contract and without reference to any contract between the contractor and the materialmen" the defenses of illegality of the contract cannot apply to their action on the labor and material bond. (See Lewis & Queen case, 113 Cal.App.2d at page 707, 248 P.2d at page 975.) They make the same contention as to the stop notice bond. Assuming, but not deciding, that their contention in this respect is correct, we are not concerned then with the legality or illegality of the plaintiffs' agreements with Ball Sons. But we are concerned with whether in view of section 7031, Business and Professions Code, plaintiffs may bring this action against the sureties. That section specifically prohibits the bringing of "any" action for the collection of compensation "for the performance of *any act* or contract for which a [contractor's] license is required * * * without alleging and proving that he was a duly licensed contractor at all times during the performance of such *act* or contract." (Emphasis added.) The court found that the work plaintiffs were performing was subcontracting and was more than merely leasing equipment, which latter would not have required a license. Therefore, the "acts" for which plaintiffs seek recovery, whether they be under the agreements or otherwise, required that plaintiffs have a license. Not having it, they are barred from bringing or maintaining this action against the sureties. See Loving & Evans v. Blick, supra, 33 Cal.2d 603, 204 P.2d 23; Franklin v. Nat C. Goldstone Agency, 33 Cal.2d 628, 204 P.2d 37. See also Cash v. Blackett,, 87 Cal.App.2d 233, 196 P.2d 585, and Siemens v. Maconi, 44 Cal.App.2d 641, 112 P.2d 904, holding that section 7031 precludes an unlicensed contractor and architect respectively from enforcing mechanics' liens.

The purported appeal from the order denying motion for new trial is dismissed, and the judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



141 Cal.App.2d 569

W. B. CAMP & SONS, Inc., a California corporation, and Frank Jeppi, doing business as Calolina Farms Gin and Kern Cottonseed Acid Delinting Company, Plaintiffs and Respondents,

v.

TURNER STEEL ERECTION COMPANY, a corporation, et al., Defendants and Appellants.

Civ. 5316.

District Court of Appeal, Fourth District, California.

May 15, 1956.

Action for fire loss of certain burlap patterns used in baling cotton. The Superior Court of Kern County, Norman F. Main, J., entered judgment for plaintiffs and defendant appealed. The District Court of Appeal, Conley, J. pro tem., held that evidence sustained finding that defendant was negligent in carrying on welding operations too close to the place where the patterns were stored and such negligence proximately caused the patterns to catch on fire.

Judgment affirmed.

1. Appeal and Error ⇐931(1)

In reviewing a record, all of the evidence, including reasonable inferences, will be viewed in the light most favorable to the party prevailing in the trial court.

2. Appeal and Error ⇐931(1)

Upon appeal, all intendments are in favor of the judgment of the trial court.

3. Appeal and Error ⇐1012(1)

Upon appeal from a judgment of the trial court, District Court of Appeal cannot reweigh the testimony.

4. Evidence ⇐20(1)

It is a matter of common knowledge that sparks are thrown off in the process of welding and the presence of wind increases the danger of a conflagration.

5. Evidence ⇐272

In action for fire loss of certain burlap patterns used in baling cotton, allegedly caused by defendant's negligence in carrying on welding operations too close to the place where the patterns were stored, admissions by defendant that the fire had to come from welding, that there was no manner by which the fire could have started other than from his men, and that the fire was defendant's responsibility, constituted declarations of a party against his interest and were proper proof to be considered by the trial court in determining the proximate cause of the fire. West's Ann.Code Civ.Proc. § 1870, subd. 2.

6. Negligence ⇐134(4, 11)

In action for fire loss of certain burlap patterns used in baling cotton, evidence sustained findings that defendant was negligent in carrying on welding operations too close to the place where the patterns were stored and that such negligence proximately caused the patterns to catch on fire.

7. Negligence ⇐121(3)

Where there was ample proof of defendant's negligence in carrying on welding operations too close to a place where burlap patterns were stored, proximately causing them to catch on fire, plaintiffs did not have to rely on doctrine of res ipsa loquitur.

8. Negligence ⇐135(1)

In action for fire loss of certain burlap patterns used in baling cotton allegedly caused by defendant's negligence in carrying on welding operations too close to the place where the patterns were stored, there was no evidence warranting trial court in finding any contributory negligence on the part of plaintiff.

Conron, Heard & James and Wayne M. Hamilton, Bakersfield, for appellants.

Mack, Bianco, King & Eyherabide and Robert E. King, Bakersfield, for respondents.

CONLEY, Justice pro tem.

The plaintiffs were granted judgment against the defendants for $3,064.40, the net fire loss resulting from the destruction and damage or burlap patterns used in baling cotton at their gin. The defendant, Harold Thomas Turner, individually and doing business under the name and style of Turner Steel Erection Company, had frequently done welding work for W. B. Camp & Sons, Inc., a California corporation, and Frank Jeppi, doing business as Calolina Farms Gin and Kern Cottonseed Acid Delinting Company. On the occasion in question, he sent his welding truck with two of his employees, Woods and Edwards, to the gin premises, where Edwards was to weld "T-shaped" strap iron strips on numerous open-ended 50 gallon oil drums for the purpose of permitting the hanging of buckets thereon, thus making them part of the fire protection system in the gin's enlarged bale yard. There is no question but that the defendant was an independent contractor and that through his employees, he chose the place where he was to carry on the welding work. Upon arrival at the gin, Mr. Woods stopped the welding truck within 25 to 40 feet of the bales of burlap patterns, and after instructing Edwards to proceed with the work, he went into one of the buildings to install machinery for the plaintiffs.

From about 8:00 o'clock until around 11:30 in the morning, when the fire broke

out, Edwards carried on his welding operations. The drums upon which the work was done were scattered about the area, some of them near the bales of burlap patterns and some farther away. Woods had instructed him to roll these drums to a position near the back of the welding truck so that he could do the work on them there. The leads on the welding machine were at least 100 feet long, and no one testified that the workman did not vary the position where he worked on the drums. At any event, it is plaintiffs' theory, upheld by the court's findings, that, through defendants' negligence, a spark from the welding equipment started the fire.

There is only one serious question on the appeal—whether there is substantial evidence to support the findings that defendant was negligent and that such negligence was the proximate cause of the fire.

[1–3] In reviewing the record, we shall apply the time-honored rules that all of the evidence, including reasonable inferences, will be viewed in the light most favorable to the respondents, that all intendments are in favor of the judgment, and that we cannot reweigh the testimony. Gates v. McKinnon, 18 Cal.2d 179, 180, 114 P.2d 576; Berniker v. Berniker, 30 Cal.2d 439, 444, 182 P.2d 557; Rudolph v. Tubbs, 46 Cal.2d 55, 291 P.2d 913; Gute v. Halstead, 75 Cal.App.2d 369, 370, 170 P.2d 1016; Davidson v. American Liquid Gas Corp., 32 Cal.App.2d 382, 390, 89 P.2d 1103.

In dealing with the question whether there is substantial evidence that the fire started from a spark thrown off as the result of the application of the stinger of the welding apparatus, it should be borne in mind that inferences have been liberally relied upon by our courts in these circumstances. The insidious nature of fire and the stealthy incidence of destructive blazes make this a virtual necessity. Numerous apt illustrations of the willingness of our courts to base a finding of proximate cause as to the origin of a fire on inference are furnished by the well considered opinion in Kennedy v. Minarets & Western Ry. Co., 90 Cal.App. 563, including the following excerpt quoted from page 576 thereof, 266 P. 353, at page 358:

> "In Hudspeth v. St. Louis & S. F. Ry. Co., 172 Mo.App. 579, 155 S.W. 868, in an action involving damages occasioned by sparks from a railroad engine where a barn situate some distance from a railroad track was burned, the court, in speaking of the proof required, held as follows: 'There was no direct proof that defendant's engine, which passed a short time before the fire was discovered, actually emitted sparks or fire, nor any positive testimony that such sparks, if emitted, could, on the day in question, have been blown the distance to plaintiff's hay and remained hot enough to ignite it. The evidence to make out liability on the part of the defendant was, as is usual in these cases, purely circumstantial. Nevertheless the probable origin of the fire may be shown by circumstantial evidence; provided the circumstances relied upon are consistent and tend in a substantial way to support the claim of plaintiff, and make it probable, and justify a reasonable inference, that the fire was caused by sparks from defendant's engine'". (See also Rudolph v. Tubbs, supra, 46 Cal.2d 55, 291 P.2d 913; Dibble v. San Joaquin Light & Power Co., 47 Cal.App. 112, 115, 190 P. 198; Viera v. Atchison, T. & S. F. Ry. Co., 10 Cal.App. 267, 268–269, 101 P. 690; Paiva v. California Door Co., 75 Cal.App. 323, 242 P. 887; Young v. San Joaquin Light & Power Corp., 83 Cal.App. 585, 592, 257 P. 152; Reuter v. San Pedro, etc., Co., 37 Cal.App. 277, 283, 174 P. 927; St. Paul Fire, etc., Co. v. Southern Pacific Co., 30 Cal.App. 140, 142, 157 P. 247; Fay v. Cox, 45 Cal.App. 696, 699–700–701, 188 P. 623.)

[4] The defendants' foreman, Woods, selected the place where the work was to be done. On a previous occasion he had performed welding services for plaintiffs near these bales of burlap patterns and

had then realized they might be burned from a spark emitted by the apparatus. On that morning, he said he gave the operator, Edwards, instructions relative to safety measures. It is a fact certainly known to every welder—it is even a matter of common knowledge—that sparks are thrown off in the process of welding and that the presence of wind increases the danger of a conflagration. The welder, Edwards, was not produced as a witness by either side, he having moved to Ohio between the date of the fire and the time of trial. But evidence of an oral statement made by him to his foreman, Woods, was admitted without objection. The statement, in part, is as follows: "I asked him if he knew how it caught fire and he said he didn't really know; that the wind had been coming in gusts, and it could have carried a spark over to the burlap. * * * The only thing that he could logically figure was that a spark from the welder had started the fire."

The witness, Charles Jump, Fire Captain of the Kern County Fire Department, who conducted an investigation on the day of the fire, testified, without objection, that the fire had started at the outside of the bales and worked in toward the center; that there was not any evidence of "spontaneous combustion"; that in his opinion, the fire was started by the welding operations, and that there could have been no other cause. (See Manney v. Housing Authority, 79 Cal.App.2d 453, 180 P.2d 69.)

Eugene Buerkle, an experienced welder, testified that during welding, sparks from the molten metal and flux could fly through the air as far as 35 or 40 feet and still be too hot to pick up.

[5] The defendant, Turner, admitted to the witness Wofford Benjamin Camp, Jr. on several occasions that "There wasn't any other manner by which the fire could have started, other than from his men"; that "it had to come from welding"; and that "it was his responsibility." Similar admissions were made by him to the witnesses Collins Hath and Harold Jewett. These constituted declarations of a party against his interest and were proper proof to be considered by the trial court. Bonebrake v. McCormick, 35 Cal.2d 16, 18–19, 215 P.2d 728; Card v. Boms, 210 Cal. 200, 204, 291 P. 190; Gates v. Pendleton, 71 Cal.App. 752, 756, 236 P. 365; Scott v. Sciaroni, 66 Cal.App. 577, 582, 226 P. 827; Code Civ.Proc. § 1870, subds. 2; 4 Wigmore on Evidence (3rd Ed.1940), sec. 1048, p. 2. There is ample evidence to sustain the court's finding of proximate cause.

[6] Similarly, the defendants' negligence was established by substantial evidence. The fact that the place selected by defendants' employees for the welding operations was so close to the combustible material that a spark from the apparatus started the fire, the fact established by the witness Buerkle that holes were burned in some of the drums through the application of excessive heat by the welder, and the fact that the foreman, Woods, absented himself and did not keep a fire watch at the scene of the work, all were factors which the court had before it, and the admissions against interest made by the defendant, Turner, were legitimately weighed by the finder of fact.

[7, 8] It is unnecessary to do more than mention the other two points raised by appellant. His argument that the doctrine of *res ipsa loquitur* is not available to respondents is of no importance in view of the holding herein that there was ample proof of negligence by direct evidence; and, as to the plea of contributory negligence, there is no proof that would have warranted the trial court in finding any negligence on the part of the plaintiffs.

The judgment is affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

141 Cal.App.2d 404

M. Norton ELLIOTT, Elizabeth Elliott and Ellsco, Inc., a Nevada corporation, Plaintiffs and Appellants,

v.

RODEO LAND & WATER CO., a corporation, John K. Keefe and Dorothy I. Keefe, Defendants and Respondents.

Civ. 21006.

District Court of Appeal, Second District, Division 3, California.

May 10, 1956.

Hearing Denied July 5, 1956.

Owners of first lot brought action against owners of second lot, which was located on hillside, and vendor of both lots for damage to first lot when earth slid down onto first lot from second lot, on ground that vendor was negligent in not providing retaining walls when it leveled second lot and deposited earth on hillside, and on ground that owners of second lot were negligent in failing to take protective measures. The Superior Court of Los Angeles County, Henry M. Willis, J., entered judgment adverse to the owners of the first lot, and they appealed. The District Court of Appeal, Shinn, P. J., held that evidence sustained findings that the proximate cause of slide was the excavation of the toe of the slope by the owners of the first lot, and that owners of second lot and vendor were not negligent.

Judgment and order affirmed.

1. Appeal and Error ⇐757(3)

The mere statement that certain findings are unsupported by the evidence, without an appropriate statement of the evidence applicable thereto, must be disregarded by the District Court of Appeal on appeal.

2. Appeal and Error ⇐930(4)

It is implicit in a general verdict that all material facts in issue, as to which substantial evidence was received, were determined in a manner consistent and in conformance with the verdict.

3. Adjoining Landowners ⇐3

In action by owners of first lot against owners of second lot, which was located on hillside, and vendor of both lots for damage to first lot when earth slid down onto first lot from second lot, on ground that vendor was negligent in not providing retaining walls when it leveled second lot and deposited earth on hillside, and on ground that owners of second lot were negligent in failing to take protective measures, evidence sustained finding that proximate cause of the slide was the excavation of the toe of the slope by the owners of the first lot.

4. Adjoining Landowners ⇐3

Where slide of earth onto first lot from second lot, which was located on hillside, was caused by excavation of toe of slope by owners of first lot, owners of first lot could not recover damages from owners of second lot and vendor of both lots, on ground that vendor was negligent in not providing retaining walls when it leveled second lot and deposited earth on hillside, and on ground that owners of second lot were negligent in failing to take protective measures.

5. Adjoining Landowners ⇐3

In action by owners of first lot against owners of second lot, which was located on hillside, and vendor of both lots for damage to first lot when earth slid down onto first lot from second lot, instructions that if excavation of toe of slope by owners of first lot or their act or omission was a cause of their injury, they could not recover, were not erroneous, on ground that they permitted jury to find that some acts or omissions of owners of first lot were the cause of the sliding of earth, even though owners of first lot were not negligent.

6. Adjoining Landowners ⇐3

If one removes a part of his land so as to take away necessary lateral support for his neighbor's land, and it caves in, he cannot justify his act by proof that he had no reason to expect that occurrence, and hence was not guilty of negligence.

7. Trial ⇐253(3)

In action by owners of first lot against owners of second lot, which was located on hillside, and vendor of both lots for

damage to first lot when earth slid down onto first lot from second lot, instructions that if excavation by owners of first lot at toe of slope or their act or omission caused the slide, they could not recover, were erroneous because of omission of element of proximate cause.

8. Appeal and Error ⇐1066

In action by owners of first lot against owners of second lot, which was located on hillside, and vendor of both lots for damage to first lot when earth slid down onto first lot from second lot, wherein jury impliedly found that owners of second lot were not negligent in any respect and impliedly found that the excavation at toe of slope by owners of first lot caused the slide, the erroneous omission of element of proximate cause from instructions that if jury found that excavation by owners of first lot or their act or omission caused their injury, then they could not recover, was not prejudicial error.

9. Appeal and Error ⇐1030

Where, on findings of trial court and implied findings of jury, which stood unchallenged, plaintiffs could have no valid claim for redress, only a clear showing that plaintiffs were deprived of a fair trial would justify a reversal of the judgment.

10. Costs ⇐199

Where some of the issues were tried to the jury and others to the trial court, and plaintiffs were seeking damages from corporate defendant on second cause of action, and the action was not terminated until judgment was entered, motion of plaintiffs to strike the corporate defendant's cost bill on ground that it was not filed within 5 days after the verdict was properly denied. West's Ann.Code Civ.Proc. § 1033.

Teschke, Rohe & Cramer, Beverly Hills, for appellants.

Belcher, Kearney & Fargo, Los Angeles, for respondent Rodeo Land & Water Co.

John E. McCall and James C. R. McCall, Los Angeles, for respondents John K. Keefe.

SHINN, Presiding Justice.

The complaint in this action contained three causes of action. The following facts were alleged in the first cause of action. From about the year 1929 until on or about the 12th day of October, 1950, Rodeo Land & Water Co. (Rodeo) owned lots 34 and 40 of tract 13101 in Los Angeles County, on which latter date it sold lot 40 to plaintiffs, and on or about June 18, 1951, sold lot 34 to John K. Keefe and Dorothy I. Keefe; lot 34 is on a hillside with a slope of approximately 60 degrees and lot 40 adjoins and lies below lot 34; between 1947 and 1951, in leveling the upper portion of lot 34, Rodeo deposited on the hillside and in a small gully extending down through lot 34 many tons of earth and that Rodeo failed to provide any retaining walls or bulkheads or other means to prevent the sliding of the loose earth in periods of rainfall; that from and after October 12, 1950, Rodeo knew or should have known that the condition created an unreasonable risk and hazard of injury to lot 40 but took no steps to prevent such an occurrence. Plaintiffs constructed on lot 40 a residence and other improvements at large cost; that when the Keefes bought lot 34 they were informed by Rodeo that the lot contained said fill and the Keefes knew or should have known that the condition constituted an unreasonable risk and hazard of injury to plaintiffs' improvements on lot 40 but that the Keefes negligently failed to provide retaining walls or take other measures to prevent the sliding of earth from lot 34 onto lot 40; that on or about January 17, 1952, the rainfall upon lot 34 and contiguous land caused large quantities of earth to move from lot 34 over and upon lot 40; that said sliding of earth was the direct and proximate result of the failure of Rodeo and the Keefes to take measures for the protection of plaintiffs' property therefrom; injury resulted to plaintiffs' residence, other improvements and the contents thereof, resulting in damages to plaintiffs in the amount of $78,714 and that the premises were rendered uninhabitable to plaintiffs' damage in the further sum of $6,000. It was alleged in the first cause of action that the failure of Rodeo and the

Keefes to take measures to prevent the sliding of earth was negligent and in wanton and reckless disregard of consequences.

The second cause of action repeated the allegations of the first cause of action omitting the words "negligently and carelessly" but alleging, nevertheless, that the conditions created by Rodeo and maintained by Rodeo and the Keefes constituted an ultrahazardous risk to plaintiffs' property, which fact was well known to defendants.

The third cause of action repeated the first except that the allegations of damage were omitted. It was alleged that there remained a fill which constituted an unreasonable risk and hazard to plaintiffs' property; that on January 20, 1952, plaintiffs had notified defendants Keefe of that fact and demanded that the condition be remedied but that it had not been remedied; that said condition has deprived and will continue to deprive plaintiffs of the use of their property; that the condition could be abated; that plaintiffs have suffered and will continue to suffer damage at the rate of $500 per month from January 17, 1952, until the condition is abated; that if it is not abated plaintiffs will suffer additional damage in the sum of $50,000 through depreciation of the market value of their property.

Rodeo and the Keefes demurred separately to the complaint. The demurrer of Rodeo was overruled as to the first cause of action and sustained without leave to amend as to the second and third causes of action. On motion of plaintiffs the order was modified and plaintiffs were granted leave to amend the third cause of action. The demurrer of the Keefes was sustained as to the second cause of action without leave to amend.

Plaintiffs filed an amended complaint containing three causes of action; it repeated the allegations of the first cause of action of the original complaint; as a second cause of action it repeated the allegations of the first cause of action with the exception of the allegations of damage to the lot and improvements and for loss of use. It alleged that there still remained on lot 34 tons of loose earth which Rodeo and the Keefes knew or should know constituted an ultrahazardous risk of injury to plaintiffs' property and that the dangerous condition could be abated. The third cause of action repeated the allegations of the second cause of action with the exception of the allegation that the condition could be abated. It was alleged that the condition could not be abated and that plaintiffs have suffered and will continue to suffer damage of $500 per month for loss of use of the property and temporary decrease in the market value thereof; that plaintiffs will continue to suffer irreparable injury, if the condition is not abated, through decrease in the market value of their property to the extent of $50,000. Plaintiffs sought judgment (1) for damages in the sum of $84,714; (2) a decree adjudging that the condition described constituted an unreasonable risk of injury to plaintiffs; (3) damages of $500 per month from January 17, 1952 for decrease in the market value of their property; (4) for a decree requiring the Keefes to abate the condition and awarding plaintiffs $500 per month from Rodeo and the Keefes while the condition continues; if it is decreed that the condition cannot be abated, plaintiffs have judgment against all defendants for $50,000 for permanent reduction in the market value of their property. Defendants answered. Rodeo admitted that in the year 1949 it caused to be deposited a very small amount of earth while grading a portion of lot 34. It is sufficient to state of the answer that it denied the existence of loose earth on lot 34 at the time of the slide and denied that any hazardous or unsafe condition existed thereon. The answer of the Keefes contained the same denials. It was admitted that a slide of earth occurred but both answers not only denied that the slide was caused by any act or omission upon the part of defendants or either of them, but alleged as special defenses to each cause of action of the complaint that plaintiffs took possession of lot 40, altered the contour thereof in a substantial manner, graded and excavated substantial portions of the lot, removed the toe of the slope, depriving it of natural support, and changed a natural

water course thereon; that the work was negligently performed and that as a direct and proximate result the soil was caused to descend upon said lot 40; that in making the excavation the plaintiffs had full knowledge of the natural contour of lot 40 and the property immediately above the same and voluntarily assumed whatever risk was involved in such alteration and excavation.

The issues framed by the first and third causes of action which sought damages, and the answers thereto, were submitted to a jury and the verdict was in favor of the defendants. The issues tendered by the second cause of action, which sought injunctive relief or in the alternative, damages, and the answers thereto, were tried to the court. The court made findings and conclusions, following which judgment was entered in favor of defendants. Plaintiffs appeal from the judgment and from an order to be mentioned later.

The court found that lots 34 and 40 were owned by the various parties at the several times alleged in the complaint. It was found that on or about January 18, 1952, during a heavy rainfall a large section of earth with trees and shrubbery slid down the steep hillside of lot 34 over and upon lot 40. The court made the following finding: "IX. It is true that Plaintiffs graded and excavated Lot 40 on which they constructed a residence in such a careless and negligent manner that it deprived Lot 34 of its natural support and said negligent grading and excavation was the proximate cause of the landslide and damage complained of in Plaintiffs' First Amended Complaint embraced in plaintiffs' second count in their amended complaint relating to injunctive relief." It was further found that the allegations of the separate defenses, namely, those accusing plaintiffs of having negligently excavated upon lot 40 in such manner as to cause the slide were true, and it was further found that plaintiffs with full knowledge of the conditions assumed whatever risk was involved in making the excavation. It was further found to be untrue that the presence of the remaining fill has caused or will cause harm and injury to plaintiffs or deprive them of the use of their property and untrue that because of the existence of the remaining fill plaintiffs have been damaged by reason of depreciation of the market value of their property or through loss of use of the same; that it was not true that between 1947 and 1951 (as alleged in the complaint) Rodeo deposited many tons of fill on lot 34 in an unprotected and loose state without reinforcing or compacting the fill and without providing measures to prevent the fill from sliding. It was found that neither Rodeo nor defendants Keefe had been negligent in any respect and that plaintiffs suffered no injury or damage as a result of any negligence on the part of defendants or either of them; there was no finding as to the extent of plaintiffs' damage. The conclusions of law were that plaintiffs' damages were not due to any negligent act or omission of the defendants proximately contributing to or causing said damages and that said damages did not afford a basis for the granting of injunctive relief; that the damages that plaintiffs sustained were due directly and proximately to an unavoidable and inevitable occurrence or accident, in so far as the defendants were concerned, and that the damages the plaintiffs sustained were due directly and proximately to their own acts of negligence contributing thereto, and causing the said damage.

The findings that defendants were not guilty of negligence consisted of findings that the allegations of certain paragraphs of the several causes of action of the complaint were untrue and the same may be said of the finding that the conditions presently existing on lot 34 do not constitute an unreasonable threat or hazard to the safety of plaintiffs' property or depreciate its market value or deprive plaintiffs of the use thereof. There was no finding that the remaining fill does not create a dangerous condition but only a finding that there exists no condition which depreciates the value or the usefulness of plaintiffs' property. The employment of the shiftless method of preparing findings by reference to paragraphs of the pleadings, declaring to be untrue allegations that are stated in the conjunctive, and are qualified by being made dependent upon a superfluity of descriptive adjectives, has resulted in a set

of findings that have been confusing and tedious to analyze. However, when all the findings are read together, including those that may be properly inferred, the following facts were established thereby: that the fill did not create a dangerous condition; it was not negligently created by Rodeo and was not negligently maintained by Rodeo or defendants Keefe through the omission of said defendants to take effective measures to prevent a slide of the fill; also the direct and proximate cause of the slide was the negligent removal of the toe of the slope by plaintiffs. All these findings must be deemed conclusive upon appeal. As to the findings to the effect that it was the excavation made by plaintiffs that caused the slide plaintiffs merely say "plaintiffs contend that there was no evidence in the record to support such a finding." As to the other material findings they say in their reply brief: "For Appellants to enter into lengthy disputes with Respondents regarding evidentiary matters, particularly as to the cause of the fill slide, would appear to unnecessarily take up the Court's time on appeal. * * * However, for the purposes of the appeal, it does not appear worthwhile to argue as to the facts, although the Court should realize that Appellants in no manner concede the asserted material facts set forth by Respondents which were highly contested issues in the case."

[1] Appellants, therefore, concede for purposes of the appeal, that the findings to which we have referred had support in the evidence. The mere statement that certain findings are unsupported by the evidence without an appropriate statement of the evidence applicable thereto must be disregarded. Goldring v. Goldring, 94 Cal. App.2d 643, 211 P.2d 342. We have no thought that the omission of plaintiffs to set out and discuss the evidence on the material issues was an oversight or was due to a lack of familiarity with the rule. Brief references to the record will demonstrate the futility of a contention that the material facts are not supported by the evidence. Some 25 years before the slide occurred Rodeo had graded the top of lot 34 and deposited on the slope a large quantity of earth which plaintiffs designate as a "fill." The earth was compacted, the slope was planted to shrubs and to pine trees which had grown to heights of as much as 25 or 30 feet; in fact the hillside was fully covered with a dense growth which would normally afford good protection against erosion. Our attention has not been called to any evidence, and we have found none, that any slide of earth had previously taken place; although not in its original condition the earth in the area was fixed and solid rather than loose and shifting as plaintiffs contend. In 1949 a very small quantity of earth was shoved on to the top of the slope but none of this was carried onto plaintiffs' property. There was evidence of engineers and other competent witnesses that there was no washing down or rolling of the earth but that a movement of an entire mass, three quarters of the way up the slope, took place and that this shift was due solely to the removal of the lateral support at the bottom resulting from plaintiffs' excavation of the toe of the slope which had previously held it in place. With respect to the court's finding that no dangerous condition existed at the time of the trial there was evidence that after the slide the Keefes took effective measures to make sure that their property would be protected in periods of rainfall; they sowed 200 pounds of rye grass and planted 1000 willow trees and 50 or 60 other trees on the slope. Plaintiffs also took effective measures in the rear section of their lot to take care of excessive run-off of water. In the finding that there was no presently dangerous condition on the property there was an implication that some of the deposited earth still remained on the slope, and, in fact, defendants did not contend otherwise.

[2] The special defense that the direct and proximate cause of the slide was the negligence of the plaintiffs was applicable to each cause of action. The first and third causes of action accused the defendants of negligence. These issues were submitted to the jury and the verdict implies that both were decided in favor of the defendants. It is implicit in a general verdict that all

material facts in issue as to which substantial evidence was received were determined in a manner consistent and in conformance with the verdict, or as stated in 24 Cal.Jur. page 893, "in favor of the prevailing party," listing a multitude of cases.

[3, 4] The findings that defendants did not create or maintain a hazardous condition, were not negligent, and that the proximate cause of the slide was the excavation of the toe of the slope on lot 40, being supported by the evidence, are determinative of the question of liability. Plaintiffs have filed elaborate briefs which ignore or brush off as inconsequential the findings upon the essential, ultimate issues of fact. They do not attempt to show how one whose acts cause injury to his own property may recover therefor from one whose acts or omissions did not cause the injury. They advance the theory, which was the basis of the second cause of action of the original complaint, to which demurrers were sustained without leave to amend, that defendants were responsible for the slide and the results thereof even if they were not negligent in any respect. Upon this ground they argue that it was error for the court to sustain the demurrer to the second cause of action without leave to amend. The merits of this assertion of defendants' liability without negligence would be presented were it not for the express findings of the court and the implied findings of the jury that it was the acts of the plaintiffs themselves and not those of the defendants that caused the slide. These findings, given an interpretation consistent with the verdict and judgment, mean that had it not been for the excavation made by plaintiffs the slide would not have occurred. This, of itself, is a sufficient answer to any claims of liability of the defendants.

[5] There is another assignment of error which should be noticed. At the request of Rodeo the court instructed as follows: "If you should find from the evidence that any acts or omissions of the plaintiffs, either removal of soil or altering of drainage or otherwise, was a cause of injury to the plaintiffs, the plaintiffs may not recover against the defendant, Rodeo Land & Water Co., or the Keefes, regardless of all other considerations in the case" and, further: "If the damage to the plaintiffs' property was caused by some agency beyond the control of Rodeo Land & Water Co., or the Keefes or if it was caused by some act of the plaintiffs themselves, the plaintiffs may not recover in this action against Rodeo Land & Water Co., or the Keefes and your verdict must be in favor of the innocent party." These instructions are criticized for the reason that they would permit the jury to find that some acts or omissions of plaintiffs were the cause of the sliding of earth even though they were not negligent and also because the instructions omitted the element of proximate cause. We do not find any merit in the first criticism. The only evidence to which the instructions could have related was that descriptive of the result of plaintiffs' grading and excavating upon lot 40, which deprived lot 34 of its natural support. Although defendants alleged that plaintiffs' acts were negligently performed it does not follow that if the grading and excavation were done without negligence, and yet caused the slide, plaintiffs could escape responsibility. Having created a condition which caused the earth to slide plaintiffs brought about that result and they could not, by proving that their work was carefully done, shift responsibility to the defendants. Responsibility attached for what they did and not for the manner in which it was done.

[6–8] Plaintiffs, in their endeavor to fasten liability upon defendants, invoke the rule stated in Green v. General Petroleum Corp., 205 Cal. 328, 334, 270 P. 952, 955, 60 A.L.R. 475, as follows: "It ought to be, and we are of the view that it is, the rule that, where an injury arises out of, or is caused directly and proximately by the contemplated act or thing in question, without the interposition of any external or independent agency which was not or could not be foreseen, there is an absolute liability for the consequential damage, regardless of any element of negligence either in the doing of the act or in the construction, use, or maintenance of the object or instrumentality that may have

caused the injury." Several other cases which applied the rule are listed in plaintiffs' briefs. We need only point out the applicability of the rule to the present case. There can be no doubt that if one removes a part of his land so as to take away necessary lateral support for his neighbor's land, and it caves in, he cannot justify his act by proof that he had no reason to expect that occurrence, and hence was not guilty of negligence. The second criticism, as to the omission of the element of proximate cause, is valid but the error was not prejudicial. Since the jury impliedly found that defendants were not negligent in any respect, and also impliedly found that it was the grading and excavation that caused the slide, it would necessarily follow that that work was the proximate cause of the occurrence, just as certainly as pulling a chair from under one about to be seated in it would be the proximate cause of the immediate consequences.

There were other instructions which correctly stated the rules of negligence and proximate cause, although plaintiffs do not mention them. We are convinced that the jury was not misled by the instructions that are criticized

[9] Appellants criticize the findings and conclusions of the court in many respects and also complain of numerous alleged errors. We have considered all their contentions and have found them to be unsubstantial and far removed from the decisive issues in the case. There is no merit in the appeal. Upon the findings of the court and the implied findings of the jury, which stand unchallenged, plaintiffs can have no valid claim for redress. Only a clear showing that plaintiffs were deprived of a fair trial would justify a reversal of the judgment. That has always been the rule in California and no court has ever spoken to the contrary. Plaintiffs were afforded a fair trial and the judgment is a just one.

We may add that we have not overlooked the contention of Rodeo that it committed no wrong when it graded lot 34 at a time when it owned both lots and that it could have had no liability thereafter to purchasers of the lots in the absence of a warranty or misrepresentation or concealment as to the conditions. See Daniels v. McPhail, 93 Cal.App.2d 479, 29 P.2d 19. It is unnecessary to consider the merits of this defense, or of other contentions of the defendants.

[10] The verdict was rendered September 20, 1954; judgment on the verdict was entered October 14, 1954; Rodeo's cost bill was filed five days later. Plaintiffs moved to strike the cost bill on the ground it was not filed within five days after the verdict. § 1033, Code Civ.Proc.[1] The motion was denied and plaintiffs assign error.

Plaintiffs' theory is that the case was ended, as to Rodeo, when the verdict was returned, that it was not concerned with the court trial and that its bill for costs of defending on the first and third causes of action was due within five days after the verdict. But plaintiffs were seeking damages from Rodeo on the second cause of action and the action was not terminated until the judgment was entered. We think it is not required that a cost bill be filed before the trial is ended when there are issues tried to a jury and others to the court. The action was tried in part "without a jury" and this was sufficient to bring it within the class of cases in which the time runs from the notice of entry of the judgment. Such was the holding in Whiting v. Squeglia, 70 Cal.App. 108, 232 P. 986, where there was a verdict upon special issues adopted by the court and findings on other issues by the court. To the same

1. "In superior courts * * * the party in whose favor the judgment is ordered, and who claims his costs, must serve upon the adverse party, and file at any time after the verdict or decision of the court, and not later than five (5) days after the verdict, or, if the action is tried without a jury, not later than five (5) days after notice of the entry of the judgment, a memorandum of the items of his costs and necessary disbursements in the action or proceeding * * *." (As it read at the time.)

effect is In re Estate of Weber, 113 Cal. App.2d 160, 174, 247 P.2d 939. The same rule should be applied where the verdict is upon one or more causes of action tried to a jury and others remain to be determined by the court before the trial is ended. A reasonable interpretation of section 1033 would be that only one cost bill need be filed. There was no error on denying the motion.

Before closing our opinion we will revert to the matter of the findings and repeat some observations we have made in other cases. Freeman v. Jergins, 125 Cal.App.2d 536, 563, 271 P.2d 210. The facts which were determinative of the rights of the parties were the following: some 25 years before the slide occurred Rodeo deposited large quantities of loose earth on the slope of lot 34 and compacted the same, planted shrubs and trees, which developed a thick growth of verdure and the earth was made settled and firm and safe from erosion and from sliding in periods of rainfall; plaintiffs graded lot 40 and made an excavation which removed the toe of the slope and thereby deprived the slope of necessary lateral support and that the same was the immediate and sole cause of the sliding of the earth and of the condition resulting therefrom.

The first six findings were that plaintiffs are husband and wife, the Keefes are husband and wife, that all are residents of Los Angeles County; Rodeo is a corporation, it owned the lots and sold them to plaintiffs and the Keefes. These were admitted facts. A tiresome study of the findings, consisting of references to the pleadings, discloses that the court made findings as follows: Rodeo did not deposit a large quantity of earth on the slope (which was contrary to the fact); Rodeo did construct bulkheads and retaining walls and drains for falling water (which it did not do); the Keefes did compact the earth on the slope and construct retaining walls and bulkheads (which they did not do); that it was not true that Rodeo informed the Keefes that lot 34 contained filled grounds (the admitted fact being that Rodeo did so inform them). Ambiguities in the findings of the untruth of allegations in the conjunctive are too numerous to mention. From our experience we have learned that such anomalies in findings should be overlooked as long as counsel fail to understand that findings should be made of the ultimate, determinative facts of the case and that all else should be omitted. It is frequently the case where the findings merely state that the allegations of certain paragraphs of certain pleadings are true or untrue, that upon analysis of those allegations it will be discovered that the findings have spoken untruths. The adoption of that method of finding the facts of the case has resulted in no improvement in this most important step in trial procedure. If the facts had been found simply and directly, as we have stated them, and the briefs had been confined to a discussion of those facts and the evidence pertaining thereto, the appeal would have been simplified for the attorneys and the court. As it is we have been presented with 183 pages of briefs, not a tenth part of which has any relevancy to the merits of the appeal.

The judgment and order are affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

SUNSET SECURITIES COMPANY, a corporation, Plaintiff, Cross-Defendant and Appellant,

v.

COWARD McCANN, Inc., a corporation, Defendant, Cross-Complainant and Respondent.*

Civ. 21254.

District Court of Appeal, Second District, Division 3, California.

May 18, 1956.

Rehearing Denied June 18, 1956.

Hearing Granted July 11, 1956.

Action involving title to motion picture rights. Both parties moved for summary judgment. The Superior Court of Los Angeles County, John J. Ford, J., rendered judgment granting defendant's motion. Plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that where publishing company assigned to plaintiff's predecessor the right to make, exhibit, sell and copyright a motion picture based on novel "Prelude to Night", for ten year term, at expiration of which time the rights were to revert to company unless company should be paid additional $25,000 and film "Ruthless" was made and copyrighted within ten year period and $25,000 was not paid, the copyright on film did not revert to company at end of ten year period and company did not then acquire title to film or right to possession of film.

Reversed with instructions.

1. Judgment ⇐178

On motion for summary judgment, trial court's duty is to determine whether plaintiff or defendant has presented any facts which give rise to triable issue or defense, not to pass upon or determine the issue itself. West's Ann.Code Civ.Proc. § 437c.

2. Judgment ⇐185.2(4)

An affidavit does not raise a triable issue of fact such as would preclude summary judgment unless it states fact showing that party has good and substantial defense to action or that good cause of action exists upon the merits. West's Ann.Code Civ. Proc. § 437c.

3. Judgment ⇐185.2(6)

On motion for summary judgment, movant's affidavits are to be strictly construed and opponent's affidavits are to be liberally construed and fact alleged in the latter must be accepted as true. West's Ann.Code Civ.Proc. § 437c.

4. Judgment ⇐178

Issue finding rather than issue determination is the pivot on which summary judgment law turns. West's Ann.Code Civ. Proc. § 437c.

5. Appeal and Error ⇐863

The only question which can arise on appeal from order granting summary judgment is whether trial court abused its discretion. West's Ann.Code Civ.Proc. § 437c.

6. Sales ⇐467

A conditional sale contract contemplates that possession of property will be delivered to purchaser while title to property will be retained by owner.

7. Copyrights ⇐50

Where publishing company assigned to plaintiff's predecessor the right to make, exhibit, sell and copyright a motion picture based on novel "Prelude to Night", for ten-year term, at expiration of which time the rights were to revert to company unless company should be paid additional $25,000, and film "Ruthless" was made and copyrighted within ten-year period and $25,000 was not paid, the copyright on film did not revert to company at end of ten-year period and company did not then acquire title to film or right to possession of film. 17 U.S.C.A. §§ 5(*l*), 24, 27.

Samuel B. Stewart, San Francisco, Hugo A. Steinmeyer, W. H. Taylor, Jr., and Walter S. Peake, Los Angeles, for appellant.

Sheppard, Mullin, Richter, Balthis & Hampton, and Frank Simpson, III, Los Angeles, for respondent.

SHINN, Presiding Justice.

This is an appeal from a judgment granting defendant's motion for summary judgment and denying a corresponding motion

* Opinion vacated 306 P.2d 777.

by plaintiff. Code Civ.Proc. § 437c. The judgment, inter alia, quiets defendant's title to the motion picture rights in and to a certain book published by defendant, subject to certain limited rights owned by plaintiff.

The facts, set forth in affidavits, which gave rise to the present controversy are as follows: In 1944, one Stoddart, author of a novel entitled *Prelude to Night,* assigned all his rights in the novel to defendant publishing company. This assignment included the right to sell the motion picture rights to *Prelude to Night,* subject to Stoddart's written consent, as well as the right to obtain a copyright of the book. The book was copyrighted by defendant in 1945. On February 21, 1946, and with Stoddart's consent, defendant gave an option to American-International Picture Corporation to purchase the motion picture rights to the book upon the terms and conditions of an agreement whose crucial provisions will be next set forth: "First: The owner does hereby give, grant, convey and assign unto the Purchaser, its successors, licensees and assigns, for a term of ten (10) years from and after the date hereof, the following rights in and to the property:

"(a) The sole and exclusive motion picture rights and motion picture copyright throughout the world in and to said Property.

* * * * * *

"(c) The sole and exclusive right to make, produce, adapt, sell, lease, rent, exhibit, perform and generally deal in and with and to copyright motion picture, and televised motion picture adaptations or versions of said Property * * * and to register and obtain copyright therein, throughout the world.

"Eighth: In full consideration of the rights herein assigned and granted to the Purchaser by Owner, the Purchaser agrees to pay to the Owner the total sum of $10,000 upon the execution hereof, receipt of which sum is hereby acknowledged by the Owner. It is expressly agreed that upon the expiration of ten (10) years from and after the date of this agreement, all of the rights in and to the Property herein granted to Purchaser shall automatically revert to Owner unless Purchaser shall elect to pay to Owner on or before the expiration of said period of ten years, an additional sum of $25,000, in which event Purchaser shall acquire, absolutely and in perpetuity, all rights in and to the Property herein granted. It is within the contemplation of this agreement that the rights herein granted to Purchaser shall be for a limited term of ten (10) years and that Purchaser, at its option, shall have the right to acquire said rights forever upon the payment of said additional consideration to Owner for the expiration of said designated period.

"Ninth: This agreement shall bind and inure to the benefit of the parties hereto, their respective successors and assigns and the rights herein granted may be freely assigned in whole or in part by the Purchaser, its successors and assigns."

American-International exercised its option on April 23, 1946 and purchased the above-mentioned rights according to the terms of the agreement. The sum of $25,000, however, has never been paid by anybody. A short-form assignment of these rights from defendant to American-International was executed on May 2, 1946 and recorded in the Copyright Office in August, 1947. Meanwhile, on August 1, 1946, American-International, by quitclaim assignment, assigned to Producing Artists, Inc., all of its right, title and interest in and to *Prelude to Night* and the various above-mentioned assignments and agreement. This quitclaim assignment was likewise recorded in August, 1947.

Between August 27 and October 29, 1947, the Bank of America loaned to Producing Artists, Inc., the sum of $810,000 for the production of a motion picture to be based on *Prelude to Night.* As security for its promissory note Producing Artists, Inc., gave the Bank a chattel mortgage, pledge and assignment of the motion picture and its rights thereto, which included a warranty by the mortgagor that it "owns and will own the full, complete, and unimpaired title in and to the Picture, free and clear of any claims, rights, liens, or charges thereon * * *." This mortgage was recorded.

Producing Artists, Inc., produced a film based on *Prelude to Night,* and copyrighted it in 1948 under the name *Ruthless* at a cost

of $1,366,000. Unfortunately, public approval fell lamentably short of expectations. In December 1949, a supplemental chattel mortgage of the film's copyright was executed to the Bank, Producing Artists, Inc. defaulted on its loan; the Bank foreclosed its lien on the motion picture, the motion picture rights and the copyright of the film, and purchased the mortgaged property itself at a foreclosure sale in February, 1951. The Bank then assigned *Ruthless* and the bank's rights thereto to plaintiff the following month. Plaintiff had no knowledge of the assignments from Stoddart to defendant or of the agreement between defendant and American-International prior to the assignment from the Bank.

Plaintiff filed its action to quiet title to *Ruthless,* the copyright of *Ruthless,* the right to exploit *Ruthless* and all revenues, etc., to be obtained from the release, exhibition, distribution and exploitation of the film. Defendant cross-complained, seeking a declaration that defendant "is the owner of the motion picture, television motion picture, publication, and incidental rights * * * in and to said literary composition" (i. e., *Prelude to Night*), subject only to the original agreement between defendant and American-International. The court refused to quiet plaintiff's title to *Ruthless,* but quieted defendant's title to "the motion picture, television motion picture, publication, and incidental rights, including radio rights, throughout the world, in and to that certain literary composition entitled 'Prelude to Night' * * *" subject to the rights granted by defendant to American-International under the 1946 agreement, which rights are to terminate on May 2, 1956 (ten years from the date of the agreement) unless plaintiff pay the sum of $25,000 to defendant.

[1–5] Since this appeal involves summary judgment procedure, it would be well, at the outset, to set forth some of the principles of law applicable thereto. "The issue to be determined by the trial court in considering a motion for a summary judgment is whether plaintiff or defendant has presented any facts which give rise to a triable issue or defense, and not to pass upon or determine the issue itself. [Citing cases.] * * * An affidavit does not raise a triable issue of fact unless it states 'facts showing that the party has a good and substantial defense to the plaintiff's action * * * or that a good cause of action exists upon the merits.'" Schulze v. Schulze, 121 Cal.App. 2d 75, 81, 262 P.2d 646, 649. The moving party's affidavits are to be strictly construed, and those of the opposing party are to be liberally construed, and the facts alleged in the affidavits of the party opposing the motion must be accepted as true. United States Fidelity & Guar. Co. v. Sullivan, 93 Cal.App.2d 559, 561, 209 P.2d 429. However, issue "finding" rather than "determination" of issues is "the pivot upon which the summary judgment law turns." Walsh v. Walsh, 18 Cal.2d 439, 441, 116 P.2d 62, 64, and cases therein cited. The only question which can arise on appeal from an order granting summary judgment is whether the court abused its discretion in so doing. Bank of America, etc., v. Oil Well Supply Co., 12 Cal.App.2d 265, 270, 55 P.2d 885. There is, however, no dispute as to the material facts involved in the instant appeal. Neither party raises the question whether the affidavits present a triable issue of fact. The determining issue is the proper construction to be placed on the agreement between defendant and American-International.

Defendant contends that the agreement (whose operative language we have already quoted) is effective as a contract of conditional sale of the motion picture rights to *Prelude to Night,* reserving title to the same in defendant until all the conditions of sale have been met: to-wit, the payment of $25,000 within the ten-year period therein specified. Defendant's theory is that it never parted with title to anything and, further, that absent payment of the added $25,000, all motion picture rights to *Prelude to Night* belong to defendant at the expiration of ten years, including the film and the right to exhibit the same, and that it is entitled to possession of the film as a concomitant to its right of exploitation.

[6, 7] We do not reach the question whether that portion of the judgment which quiets defendant's title to the motion picture rights to *Prelude to Night* is also sufficient to quiet defendant's title to the film *Ruth-*

less. It may be noted that defendant sought to quiet title to motion picture "rights" in the literary composition "Prelude to Night" and that the judgment was in accord with this demand. That demand is now enlarged to include the film itself in the following manner: At the expiration of the 10-year period the motion picture rights will be restored to defendant, it may make and distribute motion pictures based upon "Prelude to Night" and plaintiff may not; therefore defendant will have the exclusive right to exhibit "Ruthless" and plaintiff will have no such right and, as a necessary sequence, the film, in a practical sense, will belong to defendant. We have concluded that defendant's interpretation of the agreement with American-International is not tenable and that plaintiff has good title to the film. In the first place, a conditional sale contract contemplates that possession of the property will be delivered to the purchaser while title to the property will be retained by the owner. Defendant's agreement conveyed to the latter certain intangible rights, viz., the right to make, exhibit, sell and copyright a motion picture, to American-International. It would strain common sense to maintain that the agreement transferred the right to make and copyright a motion picture, as it certainly did, and at the same time reserved the "title" to the right to make and copyright the picture in defendant. In the second place, the film *Ruthless* was actually made and copyrighted within the ten-year period. The film is a separate entity from *Prelude to Night.* It may be separately copyrighted. 17 U.S.C.A. § 5(*l*). The agreement conveyed to American-International the right to copyright the film. As a copyright endures for twenty-eight years, exclusive of extensions, 17 U.S.C.A. § 24, defendant's contention that the copyright taken out on *Ruthless* would revert to defendant at the end of ten years is implausible. Furthermore, "the copyright is distinct from the property in the material object copyrighted, and the sale or conveyance, by gift or otherwise, of the material object shall not of itself constitute a transfer of the copyright, nor shall the assignment of the copyright constitute a transfer of the title to the material object * * *." 17 U.S.C.A. § 27. Therefore any claims which defendant might assert to the copyright of *Ruthless* would not embrace title to the film. In the third place, assuming that there was a reversion to defendant of the right to make a film from *Prelude to Night* after ten years, defendant would not be entitled to possession of the film made under the agreement. Only those rights could properly revert to defendant which were granted to American-International under the agreement. The agreement granted to the latter the motion picture rights and motion picture copyright to the novel, the right to reproduce the text of the novel in connection with a film based on the novel, the right to make, exhibit, deal in and copyright a film based on the novel, to make television adaptations of the novel, to use a musical score and songs in connection with the movie version, and to use part of the film or novel for advertising purposes. Not only did defendant *not* sell a film to American-International but nothing in the agreement suggests that the parties intended defendant to have any right, title or interest in and to any film made pursuant to the agreement. The film was actually made by the assignee of American-International. Any *other* interpretation of the agreement would result in a forfeiture to defendant, by third parties, of property which defendant did not sell and never owned.

It is clear, on the other hand, from a reading of the agreement, that the parties thereto intended to create a license, i. e., that American-International (or its successors) would have the right, for a period of ten years only, to make, sell, exhibit and copyright a film based on *Prelude to Night,* in return for the payment of $10,000; that unless a film were made, sold, exhibited and copyrighted within that ten-year period, the right so to do would revert to defendant unless such right were made perpetual by the payment of a further $25,000. As plaintiff concedes in his brief, the right to make *additional* films based on the novel reverts to defendant at the expiration of ten years. But since defendant originally conveyed only the right to make, copyright and exploit a film based on *Prelude to Night,* the rights in and to the *film itself,* together with

the copyright to *Ruthless* and the right to exploit *Ruthless* remains in American-International and its successors without limitation as to time.

Plaintiff is entitled to a judgment quieting its title to the film *Ruthless*, to the copyright of *Ruthless*, and to all rights of exploitation of *Ruthless*.

The judgment is reversed, and the court is instructed to enter judgment in accordance with the views herein expressed.

VALLÉE, J., concurs.

PARKER WOOD, J., did not participate.



141 Cal.App.2d 581

Veda F. EPPERSON, Plaintiff and Appellant,

v.

Harry MENDES, doing business as Ideal Hotel, Defendant and Respondent.

Civ. 21294.

District Court of Appeal, Second District, Division 1, California.

May 16, 1956.

Rehearing Denied June 6, 1956.

Hearing Denied July 11, 1956.

Action against landlord for injuries sustained by tenant of second floor apartment in fall on stairway. The Superior Court of Los Angeles County, Mildred L. Lillie, J., granted a nonsuit and entered a judgment of dismissal, and plaintiff appealed. The District Court of Appeal, Doran, J., held that private stairway used solely by occupants of second floor apartment in reaching common utility room on first floor of building was an integral part of premises rented to tenant of second floor apartment and not under control of landlord and that landlord was not liable for injuries sustained by tenant in fall allegedly caused by defective condition of stairway of which tenant had as full if not greater knowledge than landlord.

Judgment affirmed.

1. Trial ⇐142

A nonsuit should be granted only where it can be said, as a matter of law, that no other conclusion is legally deducible from the evidence.

2. Landlord and Tenant ⇐169(11)

Where, viewing the evidence in light most favorable to plaintiff's case, no breach of duty by landlord was shown in action for injuries sustained by tenant in fall on stairway, there was nothing to submit to jury and it was the duty of trial court to direct a nonsuit.

3. Landlord and Tenant ⇐169(6)

In action against landlord for injuries sustained by tenant of second-floor apartment in fall on stairway, evidence established that such stairway was used solely by occupants of second floor apartment in reaching common utility room on first floor of building and was not used in common by tenants of other apartments in building.

4. Landlord and Tenant ⇐164(7)

Where interior stairway leading from second floor apartment to common utility room on first floor of building was used solely by occupants of such apartment, who could lock door between utility room and stairway, such stairway was an integral part of premises rented to tenant of second floor apartment and was no more under control of landlord than any other part of rented premises and landlord was not liable for injuries sustained by tenant of second floor apartment allegedly as a result of defective condition of stairway of which tenant had as full if not greater knowledge than landlord.

5. Landlord and Tenant ⇐169(3)

In action against landlord for injuries sustained by tenant of second floor apartment in fall on stairway, allegations in complaint as to negligence and that stairway was used in common and remained under control of landlord could not supply lack of proof of such allegations, in view of record evidence showing that the contrary was true.

6. Landlord and Tenant ⇐169(11)

In action against landlord for injuries sustained by tenant in fall on stairway, no

issue was presented as to negligence of landlord, in absence of any proof of a duty owing by landlord to tenant and a breach of such duty.

7. Landlord and Tenant ⇐164(1)

In absence of fraud, concealment, or covenant in the lease, landlord is not liable to tenant for injuries due to defective condition or faulty construction of demised premises.

Erb, French, Picone & Griffin, Samuel B. Picone, Beverly Hills, for appellant.

Moss, Lyon & Dunn, Henry F. Walker, Los Angeles, for respondent.

DORAN, Justice.

This is an appeal by the plaintiff from a judgment of dismissal entered after the granting of a nonsuit in an action to recover damages for injuries suffered in a slip and fall accident. Plaintiff was a tenant of an upstairs apartment in a so-called annex of the Ideal Hotel, owned and operated by the defendant. The apartment occupied by plaintiff was the only one on the upper floor of the annex building; there were two apartments on the lower floor. Occupants of the three apartments were entitled to use refrigerator and bathroom facilities known as the utility room, located on the lower floor. The accident occurred as plaintiff was descending an interior stairway leading from plaintiff's apartment to this utility room.

The complaint alleges that "the defendants at that time had and reserved to themselves control of the various portions of said apartment house, to wit: the halls, passageways, vestibules, lobbies and staircases which were used in common by the tenants and others lawfully within the premises". The defendants are alleged to have "so negligently and carelessly permitted the hallways, passageways, and staircases to become worn and ragged on the walking surface thereof, to become and remain unlighted and to become and remain otherwise defective and out of repair as to become dangerous to the life and limb of a person traversing said hallways, passageways and staircases, as the defendants well knew and of which condition they had both actual and constructive notice, or by the exercise of ordinary care they should have known".

It is then alleged that by reason of such negligence, the plaintiff, on October 31, 1953, at about 7:00 P.M., "while lawfully walking down the staircase leading from her apartment on the second floor * * *, to the lower floor thereof, without fault or negligence * * * was caused to slip and fall to the floor of the said passageway". The answer denied liability, and alleged contributory negligence and assumption of risk.

The record discloses that the two downstairs apartments each had two doors, one opening from each apartment to the outside, and each apartment having another door leading to the utility room. The upstairs unit which was plaintiff's apartment, had an outside door and stairway which was the means of ingress and egress. There was also an inside stairway leading directly from plaintiff's unit down to a door into the utility room. There was no door at the top of these stairs, and the door at the bottom could be locked on the inside by the plaintiff. The stairway did not go anywhere except from plaintiff's apartment to the utility room, and was not designed for use by other tenants.

The plaintiff's family had moved into the upstairs apartment about three weeks before the accident, and about a month and a half before moving upstairs, had occupied one of the two downstairs units. Plaintiff had used the inside stairs daily and at night and testified that caution had to be used "at all times going down the stairs". There was no handrail, and the area was lighted by an exposed 60-watt bulb hanging from the ceiling in plaintiff's apartment. Conditions on the night of the accident were the same as during all of plaintiff's tenancy.

Plaintiff's account of the accident is as follows: "Well, I started down the stairs and I got down to the first landing and started around, and as I took a couple of steps, maybe three, and it was just so dark that I just slipped and fell down and when

I reached up to grab, I just automatically reached up to grab something, why, there was no step there. There was just all there was to it, I just went all the way down on my back, and that is what happened". At the close of plaintiff's evidence the defendant's motion for a nonsuit was granted.

[1, 2] Appellant's contention that the questions of respondent's negligence should have been submitted to the jury, cannot be sustained. While it is true, as stated in appellant's brief, that a nonsuit should only be granted where it can be said, as a matter of law, that no other conclusion is legally deducible from the evidence, the record herein presents just such a situation. Considering the evidence in the light most favorable to plaintiff's case, no breach of duty on the defendant's part has been shown, and without such a prima facie showing, there is nothing to submit to a jury. In such a situation it is undoubtedly the right and duty of the trial court to take the case from the jury and direct a nonsuit.

[3] As hereinbefore indicated, the evidence shows that the stairway in question was not one used in common by the tenants, but one used solely by plaintiff's family in reaching the common utility room. In the language of respondent's brief, "If others than the tenants of unit No. 10 (plaintiff's apartment) had the right to use that stairway, there could be no peaceful enjoyment of the upper apartment and the tenants thereof would have no right to lock or keep closed the door at the bottom of said stairway". The cited cases dealing with stairways, etc., used in common, have no application to the facts of the instant controversy.

[4] All that the evidence shows is that the tenant, with full knowledge of existing conditions, fell down a private stairway and sustained injuries. The stairway was an integral part of the rented premises, and no more under the control of the landlord than any other part. And, as said by respondent, "This is not a case where the claimed danger is concealed or not patent. This is not a case where the tenant had no knowledge. On the contrary, her own testimony showed that she had as full if not greater knowledge than that of defendant concerning any danger".

[5, 6] The allegation in appellant's complaint that the stairway in question was "used in common", and that it remained under the landlord's control, is, of course, an attempt to bring the case within one of the exceptions to the general rule. However, in view of the record evidence showing that the contrary was true, such allegations cannot supply appellant's lack of proof. The same is true in respect to allegations of negligence. In the absence of some proof of a duty owing by the landlord to the tenant, and a breach of such duty, no such issue is presented. In such a situation a jury should not be permitted to indulge in speculation upon the possible existence of facts which are not shown by the evidence.

[7] To sustain appellant's contentions in the instant case would, in effect, amount to a departure from the well-established rules concerning a landlord's liability. The general rule is thus stated in Ellis v. McNeese, 109 Cal.App. 667, 670, 293 P. 854, 855: "'In the absence of fraud, concealment, or covenant in the lease, a landlord is not liable to a tenant for injuries due to the defective condition or faulty construction of the demised premises.'" There is no merit in any of the appellant's contentions, and the record discloses no reversible error.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

141 Cal.App.2d 630

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Charles A. LAWRENCE, Defendant and Appellant.

Cr. 1067.

District Court of Appeal, Fourth District, California.

May 17, 1956.

Defendant was convicted in the Superior Court, San Diego County, William A. Glen, J., of inflicting a corporal injury upon a child, and he appealed. The District Court of Appeal, Mussell, J., held, inter alia, that corpus delicti of offense was conclusively established when defendant took witness stand in his own defense.

Affirmed.

1. Infants ⇐20

Conviction for infliction of corporal injury upon child both by striking her and by scalding her was sustained by evidence. West's Ann.Pen.Code, § 273d.

2. Criminal Law ⇐1144(12)

Where no demand for election was made by defendant, it would be presumed that prosecution had relied upon charge upon which it first submitted evidence.

3. Criminal Law ⇐1168(2)

Where evidence was sufficient to support jury verdict finding defendant guilty of inflicting corporal injury upon child based upon both or either of acts of defendant in striking child or scalding her, any error in alleged failure of prosecution to make an election between two acts could not have been prejudicial.

4. Criminal Law ⇐406(1)

Corpus delicti of offense of inflicting corporal injury upon a child was established when it was shown that corporal injury had been inflicted upon child by defendant and circumstances and injuries to child demonstrated that such injuries had been deliberately and intentionally inflicted upon her, and these facts having been established independently of defendant's statement that he had hit the child hard and fast until she blistered, there was no error in admission of statement. West's Ann.Pen.Code, § 273d.

5. Criminal Law ⇐406(4)

Corpus delicti of offense of inflicting corporal injury upon child was conclusively established when defendant took witness stand in his own defense. West's Ann.Pen.Code, § 273d.

Charles A. Lawrence in pro. per. and Clair M. Christensen, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Arlo E. Smith, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Defendant was charged with the crime of inflicting a corporal injury upon a child in violation of section 273d. of the Penal Code. He entered pleas of not guilty and not guilty by reason of insanity. The latter plea was withdrawn, and a jury trial on the plea of not guilty resulted in a verdict finding the defendant guilty as charged. He was sentenced to imprisonment in the state prison and appeals from the judgment of conviction.

On August 14, 1955, the defendant and his wife, together with her daughter, Lucille, aged 2 years, were living in a trailer in Carlsbad. Donald Walden and his wife also lived in the trailer. They occupied the bedroom. Defendant and his wife slept in the living room and Lucille slept on a bed made up on a dresser in the bedroom. At about 10:00 o'clock in the morning, Lucille had "messed her pants" and Donald Walden picked her up out of her bed, put her down on the floor, and sent her out into the living room, where defendant and his wife were in bed. Defendant hit the child three or four times on her face and head with his hand, and when Mrs. Lawrence attempted to hold his hand back, he turned on her. The blows thus inflicted on Lucille caused bruises above one eye, on

her cheek, and a swelling on her lip. A few moments thereafter defendant and his wife arose and dressed and defendant took the child to the shower, a short distance from the trailer, to clean her. Approximately one-half hour later defendant brought Lucille back to the trailer. She was crying and when she sat down to eat breakfast, Mrs. Lawrence and the Waldens observed she had a red mark on her back. When asked what had occurred, defendant stated he had scratched her on a doorknob. Defendant then took the child to the beach, a short distance from the trailer, and approximately 30 minutes later returned with her to the trailer. He then started to remove the child's training pants and the skin of her buttocks came off with the pants. Her flesh was raw and "near bleeding". On the afternoon of August 14, Mrs. Walden asked the defendant how the child was injured and he stated that he "hit her hard and fast so that it blistered." On the same afternoon defendant told his wife that he "had hit the child real hard and fast with his hand", and when he was asked why he did it, he said, "If he couldn't train her one way, he was going to train her another."

The child was taken to the hospital on August 15, 1955. She was examined by a physician who testified at the trial that she had a second degree burn of the upper buttocks and lowermost back region, and that there was evidence of contusions over her right eyebrow, left cheek and over her right collarbone.

Defendant testified that on some occasions he had struck the child with sufficient force to cause bruises, but that on August 14 he did not strike her with such force; that on that date he took her to the washroom and was going to give her a shower; that he took her pants off, turned the water on and sat her in the sink; that she said "hot" and "hollered"; that he then took her out, gave her a shower, and took her back to the trailer.

[1–3] Appellant contends that the court erred in failing to require that the prosecution make an election between the two acts upon which it would rely, i. e., the striking of a child in the face, or the spanking, or scalding of the child. This contention is without merit. No demand was made at the trial by the defendant or his counsel that the prosecution make an election or that the court instruct the jury concerning this subject. The record does not contain the instructions and we are not able to determine therefrom whether any instructions were in fact given. The information herein charges but one offense, the infliction of corporal injury upon the child involved, and the evidence is amply sufficient to establish that such injury was inflicted by the defendant, both by striking the child and scalding her. All of the acts causing the injuries occurred on the same day and within a comparatively short time. In People v. Enright, 140 Cal. App. 649, 35 P.2d 1033, in a prosecution for rape, it was held that the trial court did not err in failing to require the prosecution to inform the defense as to which specific offense it intended to rely upon for a conviction because the indictment charged but one offense and the evidence tended to prove two or more separate and distinct acts, either one of which would have supported the charge of rape, where the acts complained of were perpetrated on the same occasion and within a few minutes of each other, and constituted one continuous felonious act. Where, as here, no demand for election was made by the defendant, it is presumed that the prosecution relied upon the charge upon which it first submitted evidence, People v. Byrnes, 84 Cal.App.2d 64, 71, 190 P.2d 286, and since the evidence is sufficient to support the verdict of the jury based upon both or either of the acts of the defendant in striking the child or scalding her, no prejudicial error appears.

[4, 5] It is next argued that prejudicial error was committed by the court in the admitting in evidence of statements by the defendant when the corpus delicti had not been established. This contention is likewise without merit. The statement of the defendant that he had hit the child "hard and fast until she blistered" was properly admitted. The corpus delicti was established when it was shown that the corporal injury was inflicted upon the child by the defendant and the circumstances and injuries to the child demonstrated that such injuries

were deliberately and intentionally inflicted upon her. This was established independently of the statements to which objections were made. Moreover, the corpus delicti was conclusively established when the defendant took the witness stand in his own defense. People v. Kinsley, 118 Cal.App. 593, 602, 5 P.2d 938.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



141 Cal.App.2d 634

Emma Pauline Sears FLINSPACH, Special Administratrix of the Estate of Sara Belle Sears, Deceased, Plaintiff and Appellant,

v.

Elsie W. SEARS, as Executrix under the Will of William A. Sears, Jr., Deceased, and Elsie W. Sears, Individually, Defendants and Respondents.

No. 16727.

District Court of Appeal, First District, Division 1, California.

May 18, 1956.

Action by daughter to have trust declared in realty and proceeds of sales of part of such realty which mother had deeded to son, upon son's assumption of mortgage. The Superior Court, County of Contra Costa, Norman A. Gregg, J., rendered judgment for administratrix of estate of son, and daughter appealed. The District Court of Appeal, Agee, J. pro tem., held that evidence sustained finding that mother intended gift to son of balance over mortgage, and that no trust had been created or came into existence.

Judgment affirmed.

1. Trial ⇐397(2)

In action by daughter to have trust declared in realty and proceeds of sales of part of such realty which mother had deeded to son, upon son's assumption of mortgage, trial court's failure to make express finding on allegation in complaint that administratrix of estate of son wrongfully detained as involuntary trustee funds and realty rightfully belonging to heirs of mother, as allegedly tantamount to failure to find on issue of existence of express or constructive trust, was not error, in view of adequacy of other findings to resolve issue negatively.

2. Gifts ⇐49(4)
Trusts ⇐44(2)

In action by daughter to have trust declared in realty and proceeds of sales of part of such realty which mother had deeded to son, upon son's assumption of mortgage, evidence sustained finding that mother intended gift to son of balance over mortgage, and that no trust had been created or came into existence.

Hoey, Hoey, Hall & Conti, Martinez, Max B. Jamison, Porterville, for appellant.

Gordon B. Turner, Tinning & DeLap, Martinez, for respondents.

AGEE, Justice pro tem.

This is an action brought by a daughter to have a trust declared in certain real property and the proceeds of the sales of certain real property which had been deeded by a mother to her son. The trial court held that no trust had been created.

For many years, Sara Belle Sears had owned as her separate property some 137 acres of land located at Pacheco, California. In 1927, she mortgaged it to the Bank of Martinez for $4,400. The mortgage was renewed in 1932 for the same amount. Later on, the bank sued to foreclose, but on April 14, 1939, again renewed the mortgage in the amount of $5,428.24, and dismissed the suit. In April, 1940, the bank again threatened foreclosure. In order to avoid this, Sara Belle Sears and William A. Sears, Sr., her husband, executed a grant, bargain and sale deed of the property to their son, William A. Sears, Jr. The deed was dated April 22, 1940, and contained an agreement by the son to as-

sume and pay the mortgage. The son accepted delivery of the deed and caused it to be recorded on April 25, 1940. The only consideration, other than love and affection, was the agreement to pay the mortgage. The son did in due course pay the mortgage in full, as well as all taxes and assessments. He went into possession and made substantial improvements on the property. In a letter from the son to his mother, dated April 19, 1940, he enclosed the form of deed to be signed by her and her husband and in the letter he stated: "Remember my agreement with you that when a sale is made, it is all yours." Sara Belle Sears filed state and federal gift tax returns for the year 1940 in both of which she reported the transfer of the property as a gift and placed the gross value of the property as $8,965.40, the amount due on the mortgage as $5,428.24, and the net value of the gift as $3,537.16. William A. Sears, Sr. died on July 19, 1941, leaving his entire estate to his wife, Sara Belle, from which she received $1,200 in cash, $1,000 in stocks, an automobile and a note secured by a deed of trust on which there was due some $16,000. In 1944, she received $3,300 from another source. This is of significance because William Jr. had told his mother that she could have the property back any time by paying him what he had paid out. The mother never attempted to get the property back. On May 13, 1945, Sara Belle Sears died intestate, leaving as heirs, two sons, William A. Sears, Jr. and George Sears, her daughter, Emma Pauline Sears Flinspach, appellant herein, and two grandsons, Richard Baird and Robert Baird, the children of a daughter who had predeceased her. Sara Belle Sears had made complete provision for disposition at her death of all of her properties. Her home at Porterville, California, was transferred to her daughter, appellant herein, by a deed of gift. Money, bonds and a note secured by a deed of trust went to the daughter as surviving joint tenant. After all expenses of last illness, taxes, and legal fees were paid the net value of what was received by the daughter was $21,740. The daughter was the one who took charge of all of her mother's estate, she employed an attorney and executed the California Inheritance Tax Affidavit, form 22, in which she stated that the decedent, Sara Belle Sears, did not execute or enter into a declaration of trust or trust agreement and that decedent was not a beneficiary under a trust. The daughter testified that she saw and read William's letter of April 19, 1940, to his mother at the time it was received by her.

No sales of the property were made before the death of Sara Belle Sears but, in 1948, 25 acres were sold to the County of Contra Costa for $21,500 and on July 6, 1953, Elsie W. Sears, as executrix under the will of William A. Sears, Jr. (who died March 13, 1952) sold 22 acres for $48,200. This latter sale was made to subdividers who planned to build homes on the portion bought.

On September 14, 1953, appellant, Emma Pauline Sears Flinspach, caused herself to be appointed special administratrix of her mother's estate and on September 25, 1953, she filed this suit as such administratrix. She seeks to impress a constructive trust upon the balance of the real property and the proceeds of the sales made.

The trial court held that there was no trust created at any time, that all of the heirs, including appellant, had acquired full knowledge, not later than August 31, 1948, that William A. Sears, Jr. claimed to hold and own the whole of the property free of any trusts, that William A. Sears, Jr. and his successor in interest had acquired title by adverse possession, that appellant and the other heirs had been guilty of laches and unreasonable delay in bringing this action, and that the action is barred by sections 318 and 338, subd. 4 of the Code of Civil Procedure.

[1] Appellant complains of the failure of the trial court to make an express finding on the allegation in her complaint (Paragraph XXII) that "said Elsie W. Sears, as executrix of the Last Will and Testament of William A. Sears, Jr., deceased, now wrongfully detains and holds in said estate as an involuntary trustee the funds [proceeds of sales of portions of the

original 137 acres] and real property [remaining after said sales] rightfully belonging to the heirs at law and next of kin of Sara Belle Sears, deceased." Appellant's specific complaint, as expressed in her brief, is that "no finding was made on the issue of the existence or non-existence of an express or a constructive trust." In our opinion, very clear and comprehensive findings were made by the trial court. Moreover, as said in Haigler v. Donnelly, 18 Cal.2d 674, 677–678, 117 P.2d 331, 333: "There is no error in the failure of the trial court to make an express finding upon the issue if it is implicit in the findings made, and there is no necessity expressly to negate contradictory allegations." Here, the trial court found, inter alia: "The true consideration for said deed was the promise and agreement of the said William A. Sears, Jr. made to his parents, Sara Belle Sears and William A. Sears, Sr., to assume, pay and discharge said promissory note and mortgage held by said Bank of Martinez and also the love and affection which the said Sara Belle Sears and William A. Sears, Sr. had and bore unto their said son, William A. Sears, Jr. The execution and delivery of said deed constituted a gift of said real property to the said William A. Sears, Jr. * * * It is not true that the said William A. Sears, Jr. agreed to hold said real property in trust for his parents, or either of them. * * * The said William A. Sears, Jr. did not *wrongfully* fail to make an accounting to plaintiff or to the other heirs of Sara Belle Sears, deceased of all or any of the aforementioned sales. The said William A. Sears was not under any obligation to pay to plaintiff or to any other heir of Sara Belle Sears all or any part of the proceeds of the aforementioned sales. * * * The real property * * * was conveyed by Sara Belle Sears and William A. Sears, Sr., her husband, to William A. Sears, Jr. as a gift by deed dated April 22, 1940, * * * [and] became the *sole* and separate property of the said William A. Sears, Jr. now deceased, upon the delivery of said deed and the said William A. Sears, Jr. thereupon became the owner in *fee simple absolute* of said real property *free* and *clear* of all claims and interests of the said Sara Belle Sears and William A. Sears, Sr., her husband, other than the obligation of the said William A. Sears, Jr. as grantee to assume, pay and discharge the mortgage which was a lien thereof at the date of said conveyance." (Emphasis added.) There are additional findings to the same effect which are not included herein because it seems abundantly clear that the trial court found that no trust was ever created or came into existence.

[2] While appellant does not raise the point, we are satisfied of the sufficiency of the evidence to support such a finding. We need only refer to the unconditional deed of April 22, 1940, the gift tax returns executed by Sara Belle Sears declaring the transfer to her son to be a gift and the fact that she made complete provision for the disposition at her death of all of her other properties and made no attempt to include any provision relating to the ranch or any proceeds therefrom. Also, although the daughter lived with her mother for many years prior to the mother's death, she went ahead and closed the mother's estate without asserting any interest which it had or claimed to have in the property and, in fact, stated that it did not have any such interest.

We see no necessity of reviewing the trial court's holdings on adverse possession, laches and the statute of limitations because its holding that there was no trust is determinative of the entire litigation.

At the oral argument before this court, appellant's counsel agreed that there was sufficient evidence upon which to base a finding that there was no trust and that if an express finding had been made on this material issue, which he does not concede, the judgment of the trial court would have to be affirmed. As we have said, the findings which were made more than cover this issue.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

46 Cal.2d 534

ESTATE of Harry A. SHERMAN, Deceased.

Jacob H. KARP, Petitioner,

v.

HOPALONG CASSIDY, Inc., Appellant,
Theodora Lois Sherman et al., Respondents
(two cases).

L. A. 23078, L. A. 23115.

Supreme Court of California.
In Bank.
May 26, 1956.

Estate proceeding. Appeals were taken from orders of the Superior Court, Los Angeles County, Newcomb Condee, J., vacating order confirming sale of personalty and confirming for second time the sale of such property. The Supreme Court, Shenk, J., held, inter alia, that testamentary direction to executor to do "any and all things necessary in management and distribution of my estate as he, in his discretion shall deem advisable," properly construed, was not authority to sell property and did not allow him, under statute, to make sale without giving notice and justification.

Order vacating first order of confirmation affirmed; second order of confirmation reversed.

Opinion, 284 P.2d 62, vacated.

1. Appeal and Error ⇐436

For purposes of statute providing that appeal stays further proceedings upon matters embraced therein but not other matters embraced in action and not affected by orders appealed from, it is substantive issues and not procedural aspect of appeal which cannot embrace matter on which court below may proceed while appeal is pending. West's Ann.Code Civ.Proc. § 946.

2. Executors and Administrators ⇐168

An order vacating executor's sale was appealable only because it was in effect and order directing executor not to convey property. West's Ann.Prob.Code, §§ 754, 756.5, 770, 772, 1200, 1202.

3. Executors and Administrators ⇐168

Where purchaser appealed from order vacating confirmation of executor's sale, appeal ousted trial court of jurisdiction, while such appeal was pending, to entertain subsequent hearing for confirmation of sale. West's Ann.Prob.Code, §§ 754, 756.5, 770, 772, 1200, 1202.

4. Executors and Administrators ⇐138(1), 158

Testamentary direction to executor to do "any and all things necessary in management and distribution of my estate as he, in his discretion shall deem advisable," properly construed, was not authority to sell property and would not allow him, under statute, to make sale without giving notice and justification. West's Ann.Prob.Code, §§ 754, 756.5, 770, 772, 1200, 1202.

5. Executors and Administrators ⇐138(1), 158

Under statute providing that where will directs or authorizes property to be sold, executor may sell it with or without notice as he may determine, power of sale must be clearly and definitely indicated. West's Ann.Prob.Code, § 757.

6. Executors and Administrators ⇐168

In estate proceeding, evidence failed to show that film footage was "perishable property" or "other personal property which will depreciate in value if not disposed of promptly" as terms are used in statute authorizing sale without notice and passing of title without confirmation. West's Ann.Prob.Code, § 770.

H. P. Babson and John C. Goff, Los Angeles, for petitioner.

Gang, Kopp & Tyre, Hermione K. Brown, Arthur London and Milton A. Rudin, Los Angeles, for Hopalong Cassidy, Inc.

Morris Lavine and Wm. J. Clark, Los Angeles, for Theodora Sherman and others.

SHENK, Justice.

These are consolidated appeals from orders of the superior court sitting in the probate of the estate of Harry A. Sherman. The contestant Hopalong Cassidy, Inc., in action No. 23078 appeals from an order of August 10, 1953, vacating an order of June

22, 1953, confirming the sale of personal property from the estate to Hopalong individually. The contestants in action No. 23115, who claim to be heirs at law and creditors of the decedent, appeal from an order of August 24 confirming for the second time the sale of the property to Hopalong.

Harry A. Sherman died testate on September 25, 1952. Jacob H. Karp was appointed and qualified as executor of his will. The testator provided in his will that the executor might "do any and all things necessary in the management and distribution of my estate as he, in his discretion, shall deem advisable." The estate consisted in part of 200,000 feet of film footage. The executor negotiated for and made a private agreement for the sale of the film to Hopalong for $5,000. He petitioned for and obtained the order of June 22nd confirming the sale but he failed to serve notice of the hearing on the heirs and creditors appearing herein. (See §§ 1200, 1202, Probate Code.) On motion of those heirs and creditors the order of confirmation was set aside and vacated by the order of August 10th, and the petition for confirmation of the sale to Hopalong was reset for hearing. Hopalong appealed from the order of vacation but the court nevertheless proceeded with the second hearing as scheduled and again confirmed the sale on August 24th. The heirs and creditors appeal on procedural grounds from the latter order of confirmation. That appeal will be disposed of first.

[1–3] It is contended by the heirs and creditors that the appeal by Hopalong deprived the court of jurisdiction to entertain the second hearing on the petition to confirm the sale. Section 946 of the Code of Civil Procedure provides as follows: "Whenever an appeal is perfected * * *, it stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein * * *; but the court below may proceed upon any other matter embraced in the action and not affected by the order appealed from. * * *" Hopalong contends that the two matters embraced different subjects because the first appeal tested only the propriety of the order vacating the original confirmation of the sale and the second appeal tested the authority of the court to approve the sale, and that such matters were purely collateral, supplemental or independent of each other. Cf. Hennessy v. Superior Court, 194 Cal. 368, 228 P. 862; In re Estate of Waters, 181 Cal. 584, 185 P. 951; People v. Hall, 115 Cal.App.2d 144, 251 P.2d 979. This argument fails to recognize that it is the substantive issues of the hearings and not the procedural aspects of the appeals which cannot embrace the same matters if the court below is to proceed. In the present case if the matter embraced within the order of vacation is the same as that embraced in the second order of confirmation, the proceeding resulting in the second confirmation should have been stayed. The order of vacation was an appealable order only because it was in effect an order directing the executor not to convey the property. In re Estate of West, 162 Cal. 352, 356, 122 P. 953; see also, In re Estate of McCarty, 169 Cal. 708, 709, 147 P. 941. Certainly a second proceeding to obtain an order directing and confirming a conveyance of the same property to the same buyer embraces the same subject matter. Accordingly it would appear that the appeal by Hopalong ousted the court of authority to confirm the sale pending that appeal.

As to the propriety of the order of vacation of the first confirmation of the sale, from which order Hopalong has appealed, it is claimed that the requirement for giving notice of and justification for the sale was unnecessary in the present case by operation of section 757 of the Probate Code. That section provides that "When property is directed by the will to be sold, or authority is given in the will to sell property, the executor may sell the same either at public auction or private sale, and with or without notice, as he may determine; but he must make a return of sales and obtain confirmation thereof as in other cases. In either case no title passes unless the sale is confirmed by the court; but the necessity of the sale, or its advantage or benefit to the estate or to those interested therein, need not be shown. * * *" The question thus

raised is whether the will provided a direction to the executor to sell the film footage at his discretion. If so the sale was properly conducted and no valid objection can be taken thereto in a proper hearing for confirmation. If not, and no other exception can be shown to be applicable, the sale was not made according to statutory requirements, Probate Code, §§ 754, 772, 1200, 1202. It should not have been confirmed and the first order of confirmation was properly vacated.

[4] It is contended by Hopalong and disputed by the adverse parties that the direction to the executor to do "any and all things necessary in the management and distribution of my estate as he, in his discretion shall deem advisable" constituted authority to make the disputed sale. It cannot be denied that selling must be included as one of "any and all things" which might be done, but whether selling is "necessary in the management and distribution" of the estate is a different question. Nothing in the will indicates that a power to sell was necessary or intended to be included in "management and distribution." It is said that generally a will must be liberally construed to carry out the intent of a testator. But there are no decisions indicating that a will must be liberally construed to create a nonexistent intent. There must be an indication on the part of the testator sufficient to raise a reasonable inference that he intended to authorize the particular activity. Where such activity consists of selling the assets of the estate the courts look for an unequivocal expression of an intent to do so. It is stated on 33 C.J.S., Executors and Administrators, § 275, at pages 1294–1295 that the power "to manage and control does not authorize a sale of the land; and the mere fact that a sale would be beneficial to the estate is not sufficient to raise an implied power of sale, where this is not necessary to carry out the provisions of the will." In Bancroft's Probate Practice, Volume 3, it is stated at page 218 that no "power of sale is given unless the language to that effect is express or it is clear from the entire will that a power of sale is intended." In Goad v. Montgomery, 119 Cal. 552, 51 P. 681, 683, a will had conferred an express power of sale on executors, but had not expressly conferred such power on the same persons as trustees of a testamentary trust into which the proceeds of the estate were disbursed. The decree of distribution required the trustees to " 'manage the said property and pay over and deliver the same' " to beneficiaries. This court held that the "trust herein to 'manage' the property implies, by force of the term used, that the trustees are to retain it under their control, and is inconsistent with the idea that they have authority to sell or otherwise dispose of it. 'To manage an estate is, in common parlance as well as legal acceptation, no authority to part with the entire interest.' Roosevelt v. Fulton's Heirs, 7 Cow. [N.Y., 71] 81."

[5] It appears from the foregoing that a power of sale must be clearly and definitely indicated and that the language in the present case is insufficient to confer such a power.

[6] It is also contended by Hopalong that the sale of the film footage was authorized and conducted under section 770 of the Probate Code. That section provides for the sale of "Perishable property and other personal property which will depreciate in value if not disposed of promptly, or which will incur loss or expense by being kept * * *." Such property may be "sold without notice, and title shall pass without confirmation" subject only to an approval by the court of an accounting for its actual value by the executor. Relying on the foregoing section Hopalong contends that the court improperly vacated its original order of confirmation on the ground that no notice was required; that in fact no confirmation of the sale was required and the court could only deny its approval of the sale and charge the executor with responsibility for the value of the property if it concluded that the sale was improper, and that although the sale might originally have been attempted and confirmation sought under sections of the Probate Code other than 770, there was nothing to prevent the consideration of a subsequent petition for approval under section 770 resulting, apparently, in the second order of confirmation. By this theory, of course, the

question whether a power of sale was conferred on the executor would become immaterial. But there is no adequate showing in the record that the property is of the nature contemplated by section 770. The proceedings were for confirmation as required by section 757 rather than for the approval required by section 770. The record clearly indicates this to be so, particularly in view of the fact that the parties contemplated the receipt of bids at the hearings, a procedure specifically not required when a sale under section 770, is contemplated. Probate Code, § 756.5. The argument that a sale had been completed under section 770 is without merit.

It therefore appears that the court was without authority to proceed with the hearing resulting in a second order of confirmation, and that order is reversed. As there was no power of sale conferred on the executor, the first order of confirmation was not properly made and the order vacating it is affirmed.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER, and SPENCE JJ., concur.



46 Cal.2d 517

BENEFICIAL FIRE AND CASUALTY INSURANCE COMPANY, a California corporation, Plaintiff and Respondent,

v.

KURT HITKE & COMPANY, Inc., a California corporation, Defendant and Appellant.

L. A. 23697.

Supreme Court of California.
In Bank.
May 22, 1956.

Action by insurer against insurer's general agent to obtain judgment declaring insurer's rights under the written agency contract. The Supreme Court, Los Angeles County, Clarence M. Hanson, J., entered judgment for insurer, and general agent appealed. The Supreme Court, Carter, J., held that, where contract between insurer and insurer's general agent was ambiguous, extrinsic evidence should have been admitted as an aid in construing the contract, and trial court should have considered meaning given by parties to contract, the preliminary negotiations, and question whether custom and usage in insurance business had given meaning to terms of contract.

Judgment reversed.

Opinion, 290 P.2d 46, vacated.

1. Appeal and Error ⇨205

Where an entire class of evidence has been declared inadmissible or trial court has clearly intimated it will receive no evidence of a particular class or upon a particular issue, an offer of proof is not a prerequisite to raising the question on appeal and, if made, may be broad and general.

2. Insurance ⇨146(1), 153, 154, 155

Where contract between insurer and insurer's general agent was ambiguous, extrinsic evidence should have been admitted as an aid in construing the contract, and trial court should have considered meaning given by parties to contract, the preliminary negotiations, and question whether custom and usage in insurance business had given meaning to terms of contract.

John S. Bolton and F. V. Lopardo, Los Angeles, for appellant.

Hill & Attias, Henry Attias, Philip Glusker and Frank Mankiewicz, Beverly Hills, for respondent.

CARTER, Justice.

Plaintiff, an insurance company, obtained a favorable declaration of its rights under a written agency contract in its action against defendant agent.

The contract was made in February, 1950, and according to its terms and as found by the court, plaintiff appointed defendant its general agent to solicit and obtain purchasers of insurance policies of a certain type in a specified area, the policies to be issued in plaintiff's name as in-

surer. Generally the insurance to be sold was for property damage and public liability in connection with a certain class of motor vehicles. The contract was to remain in force until 30 days after written notice of cancellation was given by either party. As far as appears, the contract has not been cancelled by either party.

The action, for declaratory relief, was commenced by plaintiff in October, 1952, and apparently the contract had been carried out by the parties for at least two years prior thereto.

The contract provided that defendant would keep records of business transacted for plaintiff and send monthly "all dailies on business written." (Par. 2.) All monies of plaintiff and all premiums collected by defendant on policies issued were to be paid to plaintiff as provided in the contract. (Par. 3.) Any credit for premiums extended to insureds by defendant was to be at its risk and the premiums on such policies were to be paid by defendant to plaintiff not later than 60 days after the end of the calendar month in which the policy was written. (Pars. 4 and 6.) Plaintiff could reject any risk submitted and defendant was not to be entitled to any commission thereon. (Par. 7.) Plaintiff was not to be "responsible" for any of defendant's expenses in conducting the agency. (Par. 9.) Defendant was to provide inspection and safety service, investigate losses claimed to be payable under policies and cooperate with plaintiff in settlement of losses. (Par. 13.) Paragraph 14 deals with defendant's compensation as follows: "On or before the 30th day of each month, the Company [plaintiff] will compute all premiums earned during the previous month and will furnish the General Agent [defendant] with a statement thereof, together with a record of all losses and loss expense paid and of all reserves for loss incurred on a case basis. At such time the Company *shall remit* to the General Agent all *commission earned* during said previous month. In the event the *computation of commission earned at the end of any regular monthly adjustment period results in a deficit against the General Agent, this deficit shall be fully covered by a subsequent commission earning before any earned commission shall be due the General Agent.*" (Emphasis added.) Paragraph 15 provided that defendant agreed to accept as compensation in full for its services and plaintiff agreed to pay compensation to be determined as follows: "From the gross earned premium under all policies of insurance * * * there shall be deducted the following items: (a) losses and allocated loss adjustment expense; (b) a fixed charge by the Company of a sum equal to 20% of such gross earned premium; (c) from the residue remaining shall be paid a sum as commission to the General Agent not to exceed 30% of the gross earned premium." Loss adjustment expense is defined as the "allocated" overhead cost of defendant in the adjustment of each claim and is subject to review and in the event of dispute it shall be settled by arbitration. The last sentence of that paragraph provided: "As soon after December 31 of each calendar year as practicable, the underwriting profits arising out of the net retained business under this contract shall be computed and 50% thereof shall be payable to the General Agent. That retained business shall be defined as the net amount of risk assumed by the Company after deducting quota share reinsurance." If the parties could not agree on the "reserves for the outstanding losses and loss adjustment expense," arbitration was provided for and the decision "shall be used for the reserve in the computation of the compensation and underwriting profits provided for in Paragraph 14 until subsequent developments occur which may change the extent of liability." (Par. 16.) Defendant could appoint agents for plaintiff. (Par. 17.) The agreement was to remain in force until cancelled as heretofore mentioned and such cancellation was to apply to all provisions in the contract except those items which pertain to the compensation of the General Agent, which items were to remain in full force and effect until all premiums had been earned and losses had been paid, or until an earlier mutually agreeable date had been set. "With respect to *those items the Company agrees to pay the General Agent any and all amounts due the General Agent and the General Agent agrees to pay the*

Company any and all amounts due the Company." (Emphasis added; par. 19.)

The trial court determined that defendant's compensation was to be determined under paragraph 15 of the contract; that paragraph 14 provided for "interim monthly payments to defendant on *account* only"; that under paragraph 19 the final determination of the compensation was to be fixed after all premiums had been earned (that is, after the term of the policies written had expired) and all losses had been paid, and that defendant's compensation was contingent in that whether defendant received any compensation at all depended upon a favorable loss experience under the policies written which could not be determined until all losses had been paid and loss adjustment expenses had been paid and premiums earned. That as a result, prior to cancellation of the contract, any overpayment made to defendant under paragraph 14 might be recovered by plaintiff only out of commissions later earned and payable to defendant but that after cancellation of the contract defendant must repay to plaintiff any portion of the sums received under paragraph 14 which exceeded the amount necessary to pay losses and the other items mentioned in paragraph 15. In other words, the trial court decided that while the contract was still in effect defendant could keep the commissions paid to it monthly under paragraph 14 and would not be personally liable to return them to plaintiff, but if they were too much, as shown by later events, any overpayment could be deducted from the monthly commissions payable but at the end of the contract, defendant would be personally liable for any deficiency which could then be deducted from commissions found to be still payable in the final accounting. The monthly payments were treated like advances on commissions for which defendant would be ultimately liable if they exceeded the commissions in fact earned, that is, in effect, that defendant agent alone bore the risk of whether it would be paid anything for its services or for the expense of operating the agency business.

Defendant contends that none of the commissions paid to it monthly under paragraph 14 are returnable to plaintiff and that if the contract is not unequivocally subject to that construction, evidence offered by it to explain the contract and indicating such construction should have been admitted. Plaintiff, of course, contends the trial court's construction was correct and there was no ambiguity in the contract.

[1] Defendant offered to prove: (1) That the parties construed the contract during the time it was being carried out as urged by defendant and to that end plaintiff's vice president would testify, as he had by deposition, that the sums paid monthly to defendant were fully earned and not returnable at any time and that plaintiff had never demanded a return of those sums although they showed in a deficit position; (2) that under trade custom and usage in the insurance business with respect to general agency contracts, in which both parties were engaged, earned commissions are never returnable. The trial court rejected the offer. While the offer of proof is general and somewhat vague it is sufficient. The trial court had previously indicated that it would receive no extrinsic evidence of any kind bearing upon the construction of the contract. Where an entire class of evidence has been declared inadmissible or the trial court has clearly intimated it will receive no evidence of a particular class or upon a particular issue, an offer of proof is not a prerequisite to raising the question on appeal, and an offer, if made, may be broad and general. Heimann v. City of Los Angeles, 30 Cal.2d 746, 185 P. 2d 597; Lawless v. Calaway, 24 Cal.2d 81, 147 P.2d 604; Caminetti v. Pacific Mut. Life Ins. Co., 23 Cal.2d 94, 142 P.2d 741; In re Estate of Kearns, 36 Cal.2d 531, 225 P.2d 218. As said in the Kearns case: "At the hearing on the petition for instructions the trial judge stated that the will was not ambiguous and that he did not wish to hear any extrinsic evidence. Accordingly, no witnesses were called, but a statement was made of the proof which appellants could produce if permitted to do so. Respondent asserts that some of the evidence which appellants state they could produce is not relevant and that some is incompetent under section 105 of the Probate Code. We

need not, however, discuss in detail the different items of proof because it is apparent from the record that respondent objected to the admission of any extrinsic evidence and that it was the purpose of the court to exclude all such evidence. Although the statement made by appellants did not amount to a formal offer of proof, none was necessary since the trial court had declared the will was unambiguous and had clearly intimated that no extrinsic evidence would be received." 36 Cal.2d at page 537, 225 P.2d at page 222.

Extrinsic evidence should have been admitted. The contract was ambiguous. (With regard to the trade usage, ambiguity is not necessary; this is later discussed.) The contract could mean that the sums paid defendant monthly were not returnable except possibly out of commissions earned in the future either before or after cancellation. Paragraph 14, supra, provides that plaintiff was to compute the premiums earned during the previous month and give defendant a statement thereof *together* with a record of all losses and loss expense and all reserves. At *that* time, plaintiff, and presumably on the basis of those records, was to pay to defendant all commission shown to have been "earned" during the previous month. If from such regular monthly adjustment period there is shown a deficit against defendant, it was to be covered by subsequent or future commissions, that is, paid from them. Paragraph 15, supra, could mean that it dealt only with the method of computing defendant's commission or compensation and not as indicating that any earned commissions paid monthly were to be returned. Paragraph 16, supra, could refer only to the method of arriving at reserves in determining the commission and the subsequent developments there mentioned could refer only to a deduction from future commissions of any overpayment of commissions. Following this is paragraph 19, supra, which provides for cancellation but reserves, in event of cancellation, the provisions with regard to compensation, and, as to those provisions, plaintiff agrees to pay defendant and defendant to plaintiff all amounts due to the other. This could mean, as indicated by the trial court, that an accounting was to be had in which all of the monthly commission payments would be re-examined and that any difference between the parties offset and the balance owed by one to the other, if any, paid. It could also mean that the commissions accruing after cancellation on business transacted before cancellation were to be computed in the same way as those before and that against those commissions only would the amounts owing plaintiff be balanced.

On the question of ambiguity and the admission of extrinsic evidence, we said in Chastain v. Belmont, 43 Cal.2d 45, 51, 271 P.2d 498, 502: "Parol evidence is also admissible to aid in the interpretation of an ambiguous contract or writing * * *. As the court said in California Employment Stabilization Commission v. Walters, supra, [64 Cal.App.2d 554, 149 P.2d 17] *'(t)he very fact, however, that plaintiff questioned the meaning of certain words and clauses used in framing the agreement in itself shows that it was ambiguous.* Body-Steffner Co. v. Flotill Products, 63 Cal.App.2d 555, 147 P.2d 84.'" (Emphasis added.) And: "When the language used is fairly susceptible to one of two constructions, extrinsic evidence may be considered, not to vary or modify the terms of the agreement but to aid the court in ascertaining the true intent of the parties * * * not to show that 'the parties meant something other *than* what they said' but to show 'what they meant *by* what they said.' * * * Where any doubt exists as to the purport of the parties' dealings as expressed in the wording of their contract, the court may look to the circumstances surrounding its execution—including the object, nature and subject matter of the agreement * * *—as well as to subsequent acts or declarations of the parties 'shedding light upon the question of their mutual intention at the time of contracting.' * * * To this latter point, it is said that 'a construction given the contract by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight and will, when reasonable, be adopted and enforced by the court.'

Woodbine v. Van Horn, 29 Cal.2d 95, 104, 173 P.2d 17, 22 * * *." Barham v. Barham, 33 Cal.2d 416, 422, 202 P.2d 289, 293. " 'Once something has to be read into a contract to make it clear, it can hardly be said to be susceptible of only one interpretation. It would have been error for the trial court to read something into the contract by straining "to find a clear meaning in an ambiguous document, and having done so exclude the extrinsic evidence on the ground that as so construed no ambiguity exists." ' Union Oil Co. [of California] v. Union Sugar Co., 31 Cal.2d 300, 306, 188 P.2d 470, 473. It is apparent that the lease, as amended, is not clear on its face, and, under the theory of the parol evidence rule that has been accepted by the majority of this court, evidence of the negotiations of the parties and of surrounding circumstances was admissible for the purpose of determining the meaning of its provisions." Decter v. Stevenson Properties, Inc., 39 Cal.2d 407, 416, 247 P.2d 11, 16. The rules are stated in Walsh v. Walsh, 18 Cal.2d 439, 443, 116 P.2d 62, 65: "When a contract is in any of its terms or provisions ambiguous or uncertain, 'it is primarily the duty of the trial court to construe it *after a full opportunity afforded all the parties in the case to produce evidence of the facts, circumstances, and conditions surrounding its execution and the conduct of the parties relative thereto.*' Barlow v. Frink, 171 Cal. 165, 172, 152 P. 290, 292. (Italics added.) The governing principle as to when parol testimony may be introduced to explain the language of a contract or to ascertain the intention of the parties is clearly set forth in Kenney v. Los Feliz Investment Co., 121 Cal.App. 378, 386, 387, 9 P.2d 225, 229, as follows: 'It is a settled rule that, when the language employed is fairly susceptible of either one of two constructions contended for without doing violence to its usual and ordinary import an ambiguity arises where extrinsic evidence may be resorted to for the purpose of explaining the intention of the parties, and that for this purpose conversations between and declarations of the parties during the negotiations at and before the execution of the contract may be shown. Balfour v. Fresno Canal & Irrigation Co., 109 Cal. 221, 41 P. 876.' "

In regard to trade usage it is clear that both parties were engaged in the business of issuing and selling insurance and in that connection in making arrangements for a general agent. Aside from other instances, the phrases "earned commission" and "earned premiums" alone, referred to in paragraph 14, supra, of the contract, may have a special meaning in that business. They may mean that such commissions are such as the agent is entitled to, and, as ascertained at the time, are not returnable in light of subsequent events. This court said in Ermolieff v. R. K. O. Radio Pictures, 19 Cal.2d 543, 550, 122 P.2d 3, 6: "* * * while words in a contract are ordinarily to be construed according to their plain, ordinary, popular or legal meaning, as the case may be, yet if in reference to the subject matter of the contract, particular expressions have by trade usage acquired a different meaning, and both parties are engaged in that trade, the parties to the contract are deemed to have used them according to their different and peculiar sense as shown by such trade usage. Parol evidence is admissible to establish the trade usage, and that is true even though the words are in their ordinary or legal meaning entirely unambiguous, inasmuch as by reason of the usage the words are used by the parties in a different sense. See Code of Civil Procedure, sec. 1861; Civil Code, secs. 1644, 1646, 1655; Jenny Lind Co. v. Bower & Co., 11 Cal. 194; Callahan v. Stanley, 57 Cal. 476; Higgins v. California Petroleum, etc., Co., 120 Cal. 629, 52 P. 1080; Caro v. Mattei, 39 Cal. App. 253, 178 P. 537; Wigmore on Evidence, vol. IX, sec. 2463, p. 204; Restatement, Contracts, secs. 246, 248, Hurst v. W. J. Lake & Co., 141 Or. 306, 16 P.2d 627, 89 A.L.R. 1228." In Body-Steffner Co. v. Flotill Products, 63 Cal.App.2d 555, 558, 147 P.2d 84, 86, the court held that evidence of custom and usage was admissible to show that a contract phrased as one of sale was considered one of agency only. The court there said: "It is a rule of practically universal acceptation in common law jurisdic-

tions that however clear and unambiguous the words of a particular contract may appear on its face it is always open to the parties to the contract to prove that by the general and accepted usage of the trade or business in which both parties are engaged and to which the contract applies the words have acquired a meaning different from their ordinary and popular sense. (Civ. Code, § 1644; Code Civ.Proc., § 1861; Restatement of Contracts, § 246(a); 2 Williston on Sales, 2d Ed., § 618, p. 1556; 3 Williston on Contracts, Rev.Ed., § 648, pp. 1871–1872, § 650, pp. 1874–1879; 9 Wigmore on Evidence, 3d Ed., § 2463, p. 204; 25 C.J.S., Customs and Usages, § 24, pp. 111–112; 17 C.J., Id., sec. 61, pp. 498–499; 12 Am.Jur., Contracts, § 237, pp. 762–763; note 89 A.L.R. at page 1228 et seq.)

"The rule is clearly and simply stated in the Restatement of the Law of Contracts, § 246, Comment on Clause (a) in the following language: 'The rule stated in the Clause is not confined to unfamiliar words or to words often used ambiguously. Familiar words may have different meanings in different places. A usage may show that the meaning of a written contract is different from an apparently clear meaning which the writing would otherwise bear.'

"Thus, for example, such an apparently clear expression as 'one thousand' may be shown by a trade usage to mean more than the number one thousand (Smith v. Wilson, 3 Barn. & Adol. 728, 110 Eng. Reprint 266) or less than that number (Soutier v. Kellerman, 18 Mo. 509; Louisiana Red Cypress Co. v. George Gilmore & Co., 13 Ga.App. 472, 79 S.E. 379) or to be estimated in an arbitrary manner without regard to actual number (Brunold v. Glasser, 25 Misc. 285, 53 N.Y.S. 1021; Walker v. Syms, 118 Mich. 183, 76 N.W. 320), and the word 'white' may, by similar usage, be shown to include its antithesis black (Mitchell v. Henry (1880), L.R. 15 Ch.Div. 181). * * *

"It is true that the parties by their contract may evidence an intention not to be bound by the usage. But the mere use of language which is prima facie inconsistent with the usage cannot be held to show an intent not to be bound by the usage where the usage gives to that very language a meaning different from that which would normally be ascribed to it. * * *

"Where two parties engaged in the canned goods trade in the same locality, as here, enter into a contract they are bound by a generally accepted usage of the trade in that locality giving to the terms and language actually used in their contract a particular meaning and legal significance, even though that meaning may be at variance with the normal meaning and interpretation which would be given to that language in the absence of proof of the usage of the trade."

[2] It should be clear, therefore, that extrinsic evidence was admissible here as an aid in construing the contract. The meaning given by the parties to the contract since its existence and their performance thereunder, the preliminary negotiations and the question of whether custom and usage in the insurance business has given meaning to the terms of the contract are all relevant to the interpretation of it and should enable the trial court to ascertain the meaning of the contract. Whether all that defendant offered to prove will be relevant and admissible cannot, of course, be now determined. That will depend upon the nature and character of the proof sought to be made.

The judgment is reversed.

GIBSON, C. J., SHENK, TRAYNOR, SCHAUER and SPENCE, JJ., and DOOLING, J. pro tem., concur.

46 Cal.2d 474

Jesse R. HUDSON, Plaintiff and Appellant,

v.

Patricia Y. RAINVILLE, Defendant and Respondent.

Sac. 6691.

Supreme Court of California.
In Bank.
May 11, 1956.
Rehearing Denied June 6, 1956.

Action by pedestrian against motorist for injuries received when struck from rear by motorist's automobile as pedestrian pulled bale of hay on small wagon along edge of pavement on motorist's side of road. The Superior Court, Sutter County, Arthur Coats, J., entered judgment for motorist, and pedestrian appealed. The Supreme Court, McComb, J., held that questions whether motorist was negligent, whether such negligence, if any, was proximate cause of accident, and whether pedestrian was contributorily negligent were for jury.

Affirmed.

Carter, J., dissented.

Opinion, 290 P.2d 864, vacated.

1. **Automobiles ⇐245(6, 55)**

In action by pedestrian against overtaking motorist for injuries received when struck from rear by motorist's automobile as pedestrian pulled bale of hay on small wagon along edge of pavement on motorist's side of road, questions whether motorist, who alleged that she had been blinded by sun, was negligent, and whether such negligence, if any, was proximate cause of accident, were for jury.

2. **Negligence ⇐136(9, 14, 26)**

Question whether defendant is guilty of negligence or plaintiff of contributory negligence is ordinarily one of mixed fact and law and may be determined as matter of law only if reasonable men, who are following the law, can draw but one conclusion from the evidence presented.

3. **Automobiles ⇐245(72)**

In action by pedestrian against overtaking motorist for injuries received when struck from rear by motorist's automobile as pedestrian pulled bale of hay on small wagon along edge of pavement on motorist's side of road, question of pedestrian's contributory negligence was for jury.

4. **Automobiles ⇐218**
Municipal Corporations ⇐705(10)

Pedestrians, as well as every other person who travels over the highways by whatever means, must exercise reasonable care for their own safety, considering existing conditions, and, if they fail in exercise of such care and thereby contribute proximately to cause of any injury they may sustain as result of act of another who has equal rights to use the highway, they are guilty of contributory negligence.

5. **Appeal and Error ⇐999(1)**
Automobiles ⇐245(72)

Where there is room for an honest difference of opinion between men of average intelligence, question whether pedestrian is negligent in failing to look again in direction from which defendant's automobile is approaching is one of fact for jury, and finding of trier of fact is conclusive.

6. **Automobiles ⇐218**
Municipal Corporations ⇐705(10)

Law does not set arbitrary standards as to what constitutes due care for one's own concern when pedestrian is walking along edge of street, but whether, under circumstances then existing, pedestrian's conduct evinces a proper care for his own safety, is generally a question of fact for determination of the trier of fact.

Clewe & Blade, Clewe, Blade & McDonald and Ernest Clewe, Oroville, for appellant.

Peters & Peters and Jerome D. Peters, Jr., Chico, for respondent.

McCOMB, Justice.

From a judgment in favor of defendant after trial before a jury in an action to recover damages for personal injuries, plaintiff appeals.

On March 6, 1951, about 5 p. m., an accident occurred in Yuba City on B Street. It runs in a generally easterly and westerly

direction. Plaintiff lives on the north side of the street about 300 feet east of the point where the accident occurred. The street in front of plaintiff's home is paved with concrete and is 56½ feet from curb to curb.

Two hundred sixty-six and one half feet west of a path which leads from plaintiff's house to the sidewalk the concrete pavement abruptly narrows to 25 feet in width with earth and rock shoulders upon either side.

There is a concrete sidewalk on the north side of the street from a point east of plaintiff's home to a point about 60 feet west of it.

The day had been cloudy with intermittent rain and sunshine, and the pavement was wet. The sun was low on the horizon to the west. Traffic on the portion of B Street where the accident occurred was generally heavy about 5 p. m., and this fact was known to plaintiff.

Plaintiff took a bale of hay out of his garage, put it on a little wagon which he pulled after him as he started toward his horses which he kept in a fenced pasture just west of his home and located on the same side of the street.

He followed the sidewalk on the north side to the end thereof, and proceeded along near the curb for about 200 feet to the point where the street pavement narrowed. Here he turned left and followed the pavement edge to the point where the narrow pavement began. At this time he looked in both directions. He saw a car approaching from the west several hundred feet away, but saw nothing coming from the east. He turned right and proceeded to walk west. All four wheels of the wagon he was pulling were on the north edge of the 25-foot pavement. After he had gone about 33 feet west from the beginning of the narrow pavement he was struck from the rear by an automobile driven by defendant. He had not looked back as he walked along the narrow pavement.

Defendant entered the street at a point east of plaintiff's home and proceeded west. When she arrived in front of plaintiff's home she saw two automobiles double-parked on the north side of the street. At this time she was traveling about 30 miles per hour. As she approached the two parked cars she saw an automobile coming from the west. She swerved left to go around the parked cars and then drove her car back to the right side of the road.

During the moment preceding the accident the only vehicles moving on the street were the automobile coming from the west and defendant's car.

As defendant came close to the point where the pavement narrowed and as she turned right into her own lane of travel, having passed the parked cars, the sun suddenly emerged from behind the clouds and its direct light and the reflection from the wet pavement blinded her. She immediately applied her brakes and threw her hands in front of her face. At approximately the same time she struck plaintiff. At this time she was traveling about 30 miles per hour and had not seen plaintiff until the moment she struck him.

Plaintiff claims the trial court erred:

First: In refusing to give the following instruction which he requested: "You are instructed that the evidence in this case has established as a matter of law that the defendant was guilty of negligence and that such negligence was the proximate cause of the accident here in question."

This instruction was properly refused. There was testimony that defendant was blinded by the clouds suddenly lifting and the sun striking her eyes; also that she was blinded by the reflection of the sun from the wet pavement.

[1] From the evidence the jury could have found that defendant was guilty of negligence that proximately and solely caused the accident in failing to see plaintiff. On the other hand, the jury could have found that the accident was proximately and solely caused by defendant's being blinded by the rays of the sun which suddenly appeared as she passed the double-parked car and turned back to her own lane of travel to avoid the on-coming car and that her conduct was that of a reasonable and prudent person in view of the circumstances.

Thus, there was a question of fact which the trial court properly left for the determination of the trier of fact. (See Kalfus v. Fraze, 136 Cal.App.2d 415, 288 P.2d 967; Ribble v. Cook, 111 Cal.App.2d 903, at page 907 [2], 245 P.2d 593; Garcia v. Heaton, 90 Cal.App.2d 591, at page 592 [1], 203 P.2d 560; and Lenning v. Chiolo, 63 Cal.App.2d 511, at page 515 [3], 147 P.2d 410.)

[2] The rule is accurately stated by Mr. Justice Schauer in Gray v. Brinkerhoff, 41 Cal.2d 180, at page 183 [1], 258 P.2d 834, 836, thus: "Whether or not defendant was guilty of negligence (citing cases) or plaintiff was guilty of contributory negligence (citing cases) is ordinarily a question of mixed fact and law and may be determined as a matter of law only if reasonable men following the law can draw but one conclusion from the evidence presented (citing cases)." (McGough v. Hendrickson, 58 Cal.App.2d 60, 62 et seq., 136 P.2d 110; see also cases cited in 34 West's Cal.Dig. (1951) pp. 287, 290, Negligence, ⇐136(9) a, 136(9) b.)

Huetter v. Andrews, 91 Cal.App.2d 142, 204 P.2d 655, relied on by plaintiff, is not here in point for the reason that in the cited case there were none of the distracting elements that occurred in the instant case; that is, there was no evidence of immediate or sudden emergency blinding the defendant such as that testified to by defendant here.

Second: In submitting to the jury the question of whether plaintiff was contributively negligent.

[3] The trial judge's ruling was correct. Plaintiff contends that as a matter of law he was not contributively negligent. This proposition is not sound. From the evidence the jury could reasonably conclude that in entering upon the bottleneck of the narrow pavement and traversing it without looking back for a period of time sufficient for traffic coming from the east to reach him, plaintiff was negligent in failing to exercise proper care for his own safety. Particularly is this true in view of the evidence that plaintiff was familiar with the portions of the street over which he was traveling and at that hour of the day traffic was generally heavy, even though at that particular moment only one car to his knowledge was using the part of the street which he was traversing.

[4] Pedestrians, as well as every person who travels over the highways by whatever means must exercise reasonable care for their own safety, considering the conditions existing. If they fail in the exercise of such care and thereby contribute proximately to the cause of any injury they may sustain as the result of another who has equal rights using the highway, they are guilty of contributory negligence. It is not the law that a pedestrian has a right to travel anywhere upon a public highway and is therefore not negligent in doing so. (Rangel v. Badolato, 133 Cal. App.2d 254, at page 266, 284 P.2d 138.)

[5] Whenever there is room for an honest difference of opinion between men of average intelligence, the question of whether plaintiff is negligent in failing to look again in the direction from which defendant's car is approaching is a question of fact for the jury, and the finding of the trier of fact is conclusive. (Salomon v. Meyer, 1 Cal.2d 11, at page 15 [2], 32 P.2d 631; McQuigg v. Childs, 213 Cal. 661, at page 664 [4], 3 P.2d 309.)

[6] The law does not set arbitrary standards as to what constitutes due care for one's own concern when a pedestrian is situated as was plaintiff. It does not say he must look back, nor that he need never do so. It requires him to exercise due care, which means that he must use his faculties of sight and hearing for that purpose whenever a reasonably prudent man would do so. He may go upon the street, but whether or not under the circumstances then existing his conduct evinces a proper care for his own safety is generally a question of fact for the determination of the trier of fact. (Gray v. Brinkerhoff, supra; Hendricks v. Pappas, 82 Cal.App.2d 774, at page 778 [3], 187 P.2d 436; Cf. Hamlin v. Pacific Electric Ry. Co., 150 Cal. 776, at page 781, 89 P. 1109.)

Affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

It was prejudicial error for the trial court to submit to the jury the issue of contributory negligence, and the judgment should be reversed on this ground. Under no rational theory can it be said that there was any negligence on the part of plaintiff which in any way contributed to the accident here involved. According to the undisputed evidence, plaintiff was walking along the far right side of a street in a residential district pulling a wagon on which was loaded a bale of hay which he was taking to feed his horses that were pastured on the right-hand side of the street. It was daytime, the street was straight and visibility good. There were no sidewalks nor place for him to travel except where he was. Defendant, driving a car, struck him from the rear. I say there was no contributory negligence because there was nothing he, the pedestrian, could have done.

Inasmuch as the street was in a residential section it was not necessary for him to be travelling along his left side of it as is required by section 564 of the Vehicle Code when a person is walking on a road outside a business or residential district.

The conclusion reached by the majority is contrary to the following authorities: Wilson v. Kestenholz, 113 Cal.App. 13, 297 P. 954; Stealey v. Chessum, 123 Cal.App. 446, 11 P.2d 428; Buchignoni v. DeHaven, 23 Cal.App.2d 76, 72 P.2d 159; Keating v. Zumwalt, 91 Cal.App.2d 845, 206 P.2d 10; Raymond v. Hill, 168 Cal. 473, 143 P. 743; Burk v. Extrafine Bread Bakery, 208 Cal. 105, 280 P. 522; and Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 239 P. 709, 41 A.L.R. 1027. See, also, 93 A.L.R. 551; Keller v. Breneman, 153 Wash. 208, 279 P. 588, 67 A.L.R. 96. These cases either hold or state that where a pedestrian is in the roadway where he is entitled to be and proceeding forward along the road he has no duty to look to the rear. There is nothing for him to do. He may assume that the traffic approaching from his rear will observe him and take proper precautions especially since the view is unobstructed. Even if he looked back there still would be no occasion for him to do anything as he could assume that any car approaching him would see him and avoid hitting him.

While the issue of defendant's negligence may have been one for the jury, the only reasonable conclusion is that plaintiff was not guilty of contributory negligence and the jury should have been instructed accordingly.

The holding of the majority here is in direct conflict with Gray v. Brinkerhoff, 41 Cal.2d 180, 258 P.2d 834, and the very recent case of Weeks v. Raper, 139 Cal. App.2d 737, 294 P.2d 178 (hearing denied by this court on May 2, 1956).

While the evidence here is such that reasonable minds might differ on the issue of defendant's negligence, this cannot be true as to plaintiff's conduct, which was entirely blameless under the law applicable to one in his position.

I would therefore reverse the judgment.

Rehearing denied: CARTER, J., dissenting.



141 Cal.App.2d 854

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Samuel D. BRUCE, Defendant and Appellant.

Crim. 3210.

District Court of Appeal, First District, Division 2, California.

May 28, 1956.

Rehearing Denied June 12, 1956.

Defendant was convicted in the Superior Court, City and County of San Francisco, John B. Molinari, J., on two counts of an information charging robbery in the first degree, and he appealed. The District Court of Appeal, Dooling, J., held

that evidence was sufficient to support convictions.

Judgment affirmed.

1. Robbery ⇐24(1)

Evidence was sufficient to support convictions on two counts of information charging first-degree robbery.

2. Criminal Law ⇐1035(1)

A defendant, going to trial without objection, could not complain, on appeal from convictions, that he was not brought to trial within time provided by statute. West's Ann.Pen.Code, § 1382.

3. Criminal Law ⇐977(3)

One sentenced on convictions of first-degree robbery on same day that his application for probation was denied had no valid ground for complaint of delay in sentencing him, as time of sentence may be extended to consider probation officer's report. West's Ann.Pen.Code, § 1191.

4. Criminal Law ⇐977(3)

The time fixed by statute for imposition of sentence on conviction is not jurisdictional.

5. Criminal Law ⇐995(1)

A sentence on conviction of crime "for the term prescribed by law" is in proper form and furnishes no basis for defendant's claim that he was sentenced for wrong term. West's Ann.Pen.Code, § 1168.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., for respondent.

Samuel D. Bruce, appellant, in pro. per.

DOOLING, Justice.

Defendant Bruce appeals from the judgment convicting him jointly with the defendants Davis and Shrimp on two counts of robbery in the first degree after a trial without a jury. He was charged separately with the robbery of one Yee Wah but after his conviction of the other robberies the information charging the robbery of Yee was dismissed.

[1] Yee testified that about 1 a. m. on April 29, 1955, while he was walking on Stockton Street in San Francisco the appellant Bruce approached him, struck him and took some money from his person. There was another man with Bruce on the sidewalk and a third man in a parked automobile. After robbing him appellant got into the automobile and it was driven away. Yee did not identify the other men.

The witness Ziobro testified that at about 1:30 a. m. of the same morning his wallet and pen and pencil set were taken forcibly from him by two men in the vicinity of Folsom and Third Streets. He could not identify his assailants.

The witness Henderson testified that about 2:15 a. m. on the same day on Hyde Street near O'Farrell a man jumped out of an automobile, threatened him with a pistol and took from him about $4 in silver and his checkbook and a memorandum book. He saw two other persons in the automobile but could not identify them. He identified his assailant as the defendant Shrimp. As Shrimp was leaving in the automobile a sailor arrived and called out the license number of the car.

The testimony of the sailor, Michaels, given at the preliminary hearing was read after proof that he was then in service overseas. Michaels also identified Shrimp as Henderson's assailant and fixed the license number of the automobile as 7B11298. Michaels also saw two other persons in the car whom he could not identify. He walked to the Northern Police Station and reported the robbery, giving the license number of the automobile.

At about 2:35 a. m. Officers Martin and Horan, acting on the information given by Michaels, stopped an automobile bearing license number 7B11298 in which the three defendants were riding. A search of Davis disclosed on his person the wallet taken from Ziobro and a pen and pencil set similar to Ziobro's. A pistol was found in the car which Davis admitted was his.

Appellant testified that he was in his hotel room from 8:30 in the evening of

April 28, 1955, until 2:15 a. m. when he went down to the lobby where he met Davis and Shrimp by chance. The three had just started in Davis' car to go to a restaurant when they were arrested. Davis and Shrimp corroborated this testimony, although one of the officers testified that Davis had told him in appellant's presence that they had met appellant on Geary Street.

While the evidence of appellant's participation in the robberies of Ziobro and Henderson is entirely circumstantial it is sufficient to support the judgment.

Yee identified appellant as the man who robbed him at 1 a. m. He placed him in the company of two others in an automobile. This evidence, if believed, also destroys appellant's alibi that he was in his hotel room until 2:15. Henderson was robbed by Shrimp at 2:15 in the company of two others in the same automobile in which the three defendants were arrested at 2:35, and Davis had on his person the wallet taken from Ziobro by two men at 1:30. From these circumstances the court could reasonably find that the three defendants perpetrated the three robberies.

[2-4] Appellant's complaint that he was not brought to trial within the time provided in Penal Code, § 1382 is not open to him, since he went to trial without objection. People v. O'Leary, 130 Cal.App. 2d 430, 278 P.2d 933. He was sentenced on the same day that his application for probation was denied and time of sentence may be extended to consider the report of the probation officer where probation is applied for. Pen.Code, § 1191. He has no valid ground of complaint of this delay and in any event the time fixed for sentence is not jurisdictional. People v. Williams, 24 Cal.2d 848, 850, 151 P.2d 244.

[5] The court sentenced him "for the term prescribed by law." This is the proper form of sentence, Pen.Code, § 1168, and can furnish no basis for appellant's claim that he was sentenced for the wrong term.

Judgment affirmed.

NOURSE, P. J., and KAUFMAN, J., concur.

141 Cal.App.2d 790

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Charles E. NORTON, Defendant and Appellant.

Cr. 1062.

District Court of Appeal, Fourth District, California.

May 23, 1956.

Hearing Denied June 20, 1956.

Defendant was convicted of committing certain lewd and lascivious acts on 9½ year old child. The Superior Court of San Diego County, L. J. Mouser, Judge assigned, L. N. Turrentine and John A. Hewicker, JJ., entered judgment and denied motion for new trial. Defendant appealed. The District Court of Appeal, Griffin, J., held that evidence was sufficient to support verdict of guilty.

Judgment and order denying new trial affirmed.

1. Courts ⇐50
Criminal Law ⇐1163(1)

The Superior Court, although divided into departments with various judges, is one court, and, in absence of valid objection registered by defendant, no prejudice can be presumed when judge who presided at trial did not hear motion for new trial or pronounce judgment and sentence.

2. Criminal Law ⇐1144(17, 18)

Where defendant, in prosecution for committing certain lewd and lascivious acts on 9½ year old child, did not object that trial judge should hear motion for new trial and pronounce judgment and sentence, defendant must be presumed to have assented to change of judges and to have waived any claimed error. West's Ann.Pen.Code, § 288.

3. Criminal Law ⇐950

A defendant in prosecution for committing certain lewd and lascivious acts on 9½ year old child did not possess statutory right to have member of court who presided at trial hear motion for new trial although such practice is preferable, and

consequently court, presided over by judge other than one who presided at trial, had jurisdiction to act. West's Ann.Pen.Code, § 288.

4. Infants ⇐20

In prosecution for committing certain lewd and lascivious acts on 9½ year old child, evidence was sufficient to sustain verdict of guilty. West's Ann.Pen.Code, § 288.

5. Criminal Law ⇐1119(4)

Where there was no reporter's transcript of certain arguments made a part of record on appeal, the District Court of Appeal was unable to verify statements and should not consider them.

6. Criminal Law ⇐1037(1), 1044

In prosecution for committing certain lewd and lascivious acts on 9½ year old child, statements which were made by prosecutor in answer to accusation of defendant's counsel that witness had been coached, which were to the effect that witness had not been coached, that prosecutor believed defendant was guilty, and that two other girls, who were aged 4 and 5, and who were with 9½ year old child prior to commission of the acts, if capable of being witnesses, would not, at time of trial, remember any facts, could possibly have been error, but where no objection or motion to strike or request to admonish jury to disregard statements was made, defendant could not complain. West's Ann.Pen. Code, § 288.

7. Criminal Law ⇐814(17)

In prosecution for committing certain lewd and lascivious acts on 9½ year old child, failure of trial court to give instruction on circumstantial evidence was not prejudicial error, where conviction was not based entirely on circumstantial evidence and where defendant denied charge in toto and direct evidence of minor child indicated criminal knowledge and intent of defendant. West's Ann.Pen.Code, § 288.

8. Infants ⇐20

In prosecution for committing certain lewd and lascivious acts on 9½ year old child, receiving in evidence of complaint by the child was not error on ground there was unreasonable delay in making of such complaint by the child, where delay was not over 24 hours after incident. West's Ann.Pen.Code, § 288.

9. Infants ⇐20

In prosecution for committing certain lewd and lascivious acts on 9½ year old child, evidence was insufficient to support finding that complaint of child was not voluntarily made. West's Ann.Pen.Code, § 288.

Gladys Towles Root and Eugene V. McPherson, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Joan D. Gross, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant and appellant was tried before Judge Mouser of Imperial County, duly assigned to sit in the San Diego Superior Court. Defendant was convicted by a jury of the crime of violating Section 288 of the Penal Code in committing certain lewd and lascivious acts on a 9½ year old child. Defendant was then represented by his counsel, R. Alston Jones. On July 12, defendant was certified for examination as a sexual psychopath, resulting in a finding that he was not such a psychopath. The motion for new trial and application for probation came on for hearing before Judge Hewicker and no objection was then made by defendant's attorney Gordon E. Von Kalinowski, who represented defendant at such hearing, to such judge presiding over these proceedings. In fact, defendant's attorney stated to the court that he did not represent defendant at the trial and that the judge then presiding did not try the case and conceded both were more or less strangers to it. At the conclusion of the hearing Judge Hewicker denied the motion for new trial and he then pointed out to defendant's counsel that Judge Turrentine, having presided at the sexual psychopath hearing, was in better position to analyze the probation officer's report, and it was set before him without objection. In fact, defendant's counsel as well as the defendant in person, stated that this was

"agreeable". On October 18, the hearing was thus had without any expression of dissatisfaction or objection, and the application for probation was denied. He was then arraigned for judgment and asked if there was any legal cause why judgment should not be pronounced and defendant replied: "No legal cause".

The main contentions of defendant on appeal are first, that the court erred in not allowing the trial judge to handle the motion for new trial and to pronounce judgment and sentence.

[1–3] The Superior Court, although divided into departments with various judges, is one court and, in the absence of valid objection registered by the defendant no prejudice can be presumed when the judge who presided at the trial did not hear the motion for a new trial or pronounce the judgment and sentence. In the absence of any sufficient showing, we must presume that defendant assented to such change of judges, and not having objected, defendant is presumed to have waived any such claimed error. Although it is preferable for the member of the court who presided at the trial to hear the motion for a new trial, this is not a statutory right and the court had jurisdiction to act. People v. Casselman, 10 Cal.App. 234, 101 P. 693. The cases of People v. Hobson, 17 Cal. 424, 429; and People v. Henderson, 28 Cal. 465, relied upon by defendant, furnish authority for holding that the proceedings, although unusual, were free from prejudicial error.

[4] The next claim is that the evidence is insufficient to justify the verdict. The victim's father had a ranch in Oak Grove, where she visited on April 23 and 24, 1955. Defendant was employed there and was painting the water shed with red paint. After several sexual overtures toward the child they repaired to a secluded spot behind some bushes, playing "Hide and Seek" with other girls. Later, about dusk, the two went up to a well, and defendant had the child sit on his lap. He unsnapped her panties, fondled her private parts, exposed his, and had her place her hands on it. She testified it was wet. The next day the child told of defendant's conduct. She further testified that defendant told her not to tell her father or he would get in trouble with him. A colored substance resembling red paint was found on the inside of the child's panties and she said it was not placed there by her. Other witnesses corroborated the absence of the two at the time, and other corroborating circumstances were related by other witnesses. Defendant admitted playing "Hide and Seek" with the girls but denied committing the acts charged. Without setting forth the evidence in further detail, it is sufficient to say that it fully supports the charge.

[5, 6] Defendant next charges the prosecuting attorney with prejudicial misconduct in his argument to the jury. This is predicated on certain claims made on the motion for new trial, as to statements believed to have been made by him. There was no reporter's transcript of the arguments made a part of the record on appeal. Accordingly, we are unable to verify the statements and should not consider them on this appeal. They apparently involved certain statements made by the prosecutor in answer to certain accusations of defendant's counsel in his argument that the witness had been coached, that the testimony was a "figment of her imagination", and if the other girls were called as witnesses by the prosecution they would so indicate. In reply, the prosecutor told the jury she had not been coached, that he believed the defendant was guilty, and that the two other girls, aged four and five, if capable of being witnesses, would not, at the time of trial, remember any of the facts. If true, some of these statements may well have been error. People v. Romero, 143 Cal. 458, 77 P. 163; People v. Edgar, 34 Cal.App. 459, 167 P. 891; People v. Kramer, 117 Cal. 647, 49 P. 842. Since counsel for defendant made no objection at the time and did not move to strike or ask the court to admonish the jury to disregard these statements, and since the truth of their utterance is not established by a competent record, defendant may not now be heard to complain. People v. Lawyer, 1 Cal.App.2d 1, 35 P.2d 1036; 17

West's California Digest, p. 199, ⇐1119 (4); 8 Cal.Jur. p. 508, sec. 521.

[7] Next, it is claimed that the court erred in not giving, on its own motion, further instructions on circumstantial evidence involving criminal knowledge and intent, citing such cases as People v. Yrigoyen, 45 Cal.2d 46, 286 P.2d 1; People v. Koenig, 29 Cal.2d 87, 173 P.2d 1; and cases cited therein. The court did give the general instruction pertaining to direct and circumstantial evidence in the general language of CALJIC No. 24, p. 25. It also gave one on reasonable doubt and stated that a necessary element of the offense is the existence in the mind of defendant of the intent to gratify the lust, passion and sexual desires of defendant or of the child, and unless such intent so exists that crime is not committed. A further instruction was given to the effect that it was not essential to a conviction that the testimony of the prosecuting witness be corroborated by other evidence, provided that from all the evidence the jury was convinced beyond a reasonable doubt and to a moral certainty of the defendant's guilt; that a charge such as that made against the defendant in this case was one which, generally speaking, was easily made, and once made it was difficult to disprove, even if the defendant was innocent; and that the law requires that the jury examine the testimony of the prosecuting witness with caution.

The defendant did not offer and the court did not give an instruction to the effect that to justify a conviction on circumstantial evidence, the facts and circumstances must not only be consistent with the theory of guilt, but must be inconsistent with any other rational conclusion. In People v. Yrigoyen, supra, passing a check without funds with intent to defraud, it was held that this instruction must be given when criminal knowledge is shown only by circumstantial evidence. Here the conviction was not based entirely on circumstantial evidence. It was based principally upon the direct testimony of the victim and the circumstantial evidence was only incidental or corrobative. People v. Jerman, 29 Cal.2d 189, 173 P.2d 805. Since the defendant denied the charge *in toto* and the direct evidence of the minor child clearly indicated the criminal knowledge and intent of defendant and there was no other reasonable conclusion that could be drawn from such evidence except an intent to satisfy the lust, passions and sexual desires of the defendant or the child, the failure to give the further instruction was not prejudicial error. People v. Naumcheff, 114 Cal.App.2d 278, 250 P.2d 8; People v. Candiotto, 128 Cal.App.2d 347, 275 P.2d 500; People v. Savage, 66 Cal.App.2d 237, 152 P.2d 240; People v. Marvich, 44 Cal. App.2d 858, 113 P.2d 223; People v. Pearson, 111 Cal.App.2d 9, 244 P.2d 35.

[8, 9] Lastly, claim is made that the trial court erred in receiving evidence of the complaint by the child on April 25th on the ground it was an unreasonable delay and was not a voluntary complaint. Defendant threatened the child if she told of the affair. The delay was not over 24 hours after the incident and apparently the complaint was made at the first opportunity she had to tell one in whom the prosecutrix had confidence. There is no sufficient evidence justifying a holding that the complaint was not voluntarily made. We see no merit to these claims under the evidence produced. People v. Baldwin, 117 Cal. 244, 49 P. 186; People v. Barney, 114 Cal. 554, 47 P. 41.

Judgment and order denying a new trial affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

141 Cal.App.2d 618

BANK OF AMERICA NATIONAL TRUST and SAVINGS ASSOCIATION, as Executor of the Last Will of Minnie L. Hanssen, Deceased, Plaintiff and Appellant,

v.

LONG BEACH FEDERAL SAVINGS & LOAN ASSOCIATION, a corporation, Respondent.

Eastside Christian Church of Long Beach, a corporation, Cross-Complainant and Appellant.

Civ. 21271.

District Court of Appeal, Second District, Division 2, California.

May 17, 1956.

Executor brought action against trustee and beneficiaries to establish ownership or interest in certain notes and trust deed, and church, which was one of the beneficiaries, filed a cross-complaint. The Superior Court of Los Angeles County, Beach Vasey, J., entered judgment adverse to the executor and the church, and they appealed. The District Court of Appeal, Moore, P. J., held that where deceased, three weeks prior to her death, delivered to savings and loan association 17 notes and trust deeds naming as joint tenants of the trusts her blood sister, niece, and nephew and her charities, and all 17 of the notes and trust deeds were signed by her, and her signature in every instance was acknowledged by a notary, except in one instance where her signature was by accident omitted, a perfected trust was created.

Judgment affirmed.

1. Trusts ⇐34(1)

Where one deposits money in her own name and that of another jointly with intention of enabling the other party to draw money after the death of the depositor, a valid trust is created in favor of the other party as beneficiary, and validity of trust is not negatived because depositor retains power to withdraw deposit during her lifetime. West's Ann.Civ.Code, §§ 683, 1828.

2. Trusts ⇐33

Where deceased, three weeks prior to her death, delivered to savings and loan association 17 notes and trust deeds naming as joint tenants of the trusts her blood sister, niece, and nephew and her charities, and all 17 of the notes and trust deeds were signed by her, and her signature in every instance was acknowledged by a notary, except in one instance where her signature was by accident omitted, a perfected trust was created. West's Ann.Civ.Code, §§ 683, 1828, 2221, 2222.

3. Trusts ⇐10

A trust in joint tenancy can be created for the benefit of a corporation. West's Ann.Civ.Code, §§ 14, 683, 1828, 2132b.

4. Trusts ⇐17(2)

A valid trust of personalty may be created by parol, and an ascertainable intention is all that is necessary.

5. Trusts ⇐44(1)

Where deceased, three weeks prior to her death, delivered to savings and loan association 17 notes and trust deeds naming as joint tenants of the trusts her blood sister, niece and nephew, and her charities, and all 17 of the notes and trust deeds were signed by her, and her signature in every instance was acknowledged by a notary except in one instance where her signature was by accident omitted, evidence sustained finding that deceased set up a valid trust, though one of the assignments was unsigned. West's Ann.Civ.Code, §§ 683, 1828.

6. Trusts ⇐227

A trustee not only has the right, but it is duty, whenever necessary to proper administration, preservation, and execution of trust or to its defense, to employ counsel, and such counsel is entitled to be paid, for the service necessarily rendered, out of the trust estate.

7. Trusts ⇦234

Failure of trustee to take action necessary to the proper administration, preservation, and execution of the trust or to its defense, will impose a liability on such trustee for any loss resulting to the estate from his failure wisely so to act.

8. Trusts ⇦227

A trustee has the right, whenever necessary to the proper administration, preservation, and execution of the trust and the prosecution or defense of an action, to employ counsel and to be reimbursed from the trust estate for whatever sums he has paid for the services of such counsel, even though the cestui que trust employed counsel to represent the same interests, and though, to a certain extent, the private and personal interests of the trustee may also be involved in the litigation.

9. Trusts ⇦227

Where trustee successfully defended action by executor to establish ownership or interest in certain notes and trust deeds, trustee was entitled to an award of attorney's fees out of the trust estate, over objection of one of the beneficiaries, though the beneficiary actively defended its own property. West's Ann.Civ.Code, §§ 2216, 2217.

10. Appeal and Error ⇦1010(1)

The District Court of Appeal will not upset a judgment supported by substantial facts as determined by the trial court.

11. Appeal and Error ⇦607(1)

Trial court properly allowed respondent to counter-designate an adequate record on appellant's "judgment role appeal" in which the appellant made repeated references to the reporter's transcript.

Johnson & Johnson, by Robert A. Wenke, Long Beach, for appellant Bank of America.

Houser & Beam, by J. Everett Houser, Long Beach, for appellant Eastside Christian Church. Also for the Church as respondent.

Charles K. Chapman and Billy D. Williams, by Charles K. Chapman, Long Beach, for respondent Long Beach Federal Savings & Loan Ass'n.

Buchalter, Nemer & Fields, Los Angeles, Murray M. Fields, Los Angeles, of counsel, for respondents Mary Kolb, Elmer Kolb, and Laura Wilson.

MOORE, Presiding Justice.

The Bank of America as executor appeals from a judgment denying its ownership or interest in certain notes and trust deeds, adjudging that Long Beach Federal Savings and Loan Association, a corporation, holds such securities in trust for the individual defendants; that the corporate defendant has properly accounted for the earnings of the securities held by it for the several individual defendants.

Decedent, Minnie L. Hanssen, died on September 12, 1952. In the six weeks preceding her death, she made three wills. No question of her mental capacity, understanding of the transactions, or intent is involved. Her first will was made July 31, 1952. It made bequests to her blood sister, niece and nephew of $18,000 and left to her charities, Sunshine Mission and Eastside Christian Church of Long Beach, bequests totaling $11,000. Her second will of August 16, 1952, revoked all former wills and contains no bequests to her sister, niece or nephew, or to the charities involved in this litigation. Accompanying this holographic document, however, was a letter which read in part:

"I think it is the wisest thing to do to assign some of my trust deeds and my home as joint heirs with whom I wish to be the beneficiarys. This I have done and I en-

close my new and shorter Will. [That of August 16th.]

"Yours Truly

Minnie L. Hanssen (over

P.S. Mr. Johnson will you please return the letter to me that I left at your office for the Bank of America Trust Co. They have no use for the letter as my will now stands. All of my loan papers are at the Long Beach Federal Savings & Loan Association or will be next week. Thank you kindly.

Minnie L. Hanssen."

The third will dated August 30, 1952, was also holographic but did not revoke former wills. It merely directed that "All the rest, residue and remainder of my estate I give devise and bequeath in equal shares to the American Red Cross of Long Beach, Calif. Chapter, The National Benevolent Association of the Christian Churches * * * The Kate Crutcher Workers of the Childrens Hospital * * * and/or the Girl Scouts of Long Beach, Dalif." Said will contained no bequests to her blood relatives; sister, niece or nephew, or to her favorite charities.

Three weeks prior to decedent's passing, she delivered to Long Beach Federal, seventeen notes and deeds of trust, naming as joint tenants of these trusts, her blood sister, niece and nephew and her charities. All seventeen of decedent's notes and deeds of trust were signed by her and her signature in every instance was acknowledged by a notary except in one instance where her signature was by accident omitted. Said notes and trust deeds were delivered to respondent Long Beach Federal about three weeks before her death. The trial court found from the evidence that decedent's will had been admitted to probate and a contest is pending; that decedent as sole owner conveyed to herself and the several defendants sixteen separate notes and trust deeds as joint tenants with herself; that each assignment was in writing, duly acknowledged; that all were by her delivered to respondent Long Beach Federal; that she thereby created a trust, of which each joint tenant is a beneficiary subject to a life estate reserved in herself; that deceased and Long Beach Federal were the trustees; that upon the death of Mrs. Hanssen, respondents as beneficiaries of such trust were entitled to receive the notes and trust deeds and all proceeds paid thereon.

Appellant contends that there was (1) no voluntary intent on the part of the donor to make a gift; (2) no delivery either actual or symbolical amounting to a transfer of title and (3) no complete divestment of control by the donor. For these reasons, it is argued the notes and trust deeds should pass with the estate into the control of the executor.

Appellant contends also that respondents must prove that decedent executed the gifts or assignments during her lifetime. While the executor concedes that there was abundant evidence of decedent's testamentary intent in attempting to make the assignments, yet it contends that respondents obtained no title to such notes and trust deeds during decedent's lifetime or at her death. The findings are supported not only by the three wills of decedent, but also by her letter to her attorney whereby she wished "to assign my trust deeds * * * as joint heirs with whom I wish to be the beneficiarys." By that expression she emphasized both the knowledge and intent that she was creating trusts with herself, her nearest blood relatives and her favorite charities as beneficiaries. Also, she made it clear that the creation of the trusts was an accomplished fact and to make certain that her chosen trustee might not be shelved, she added: "All of my loan papers are at the Long Beach Federal Savings & Loan Association or will be next week." Furthermore, that intent is evidenced by the thirteen endorsements on the notes, the sixteen assignments of trust deeds and the sixteen instructions to Long Beach Federal concerning its duties as depositary of the written instruments, or a total of almost fifty separately signed instruments executed and acknowledged by the trustor at a time when she knew that her life was fast ebbing and that she must so act as to place the corpus of the trust where it would reach the beneficiaries without the expense of probate. During that period, she informed Essie B. West, President of Girls Town and Sunshine Mission that "she was making a trust deed so I

would have immediate possession of some trust deeds and she had put it in my name. * * * She wanted it to go to Sunshine Mission and some to Girls Town * * * wanted it to go both places, and that way I wouldn't have to transfer it."

Also, in a conversation with Elmo R. Jordan, chairman of the official board of the Eastside Christian Church of Long Beach, hereinafter referred to as "the Church," two days prior to her death, she said: "I have made provision for the Eastside Christian Church."

She told Mr. Privett in the presence of Cora Zoeller who helped prepare the assignments that she wished to transfer these deeds of trust to her several relatives and asked him whether "it would be possible to do that and thereby avoid what she felt to be unnecessary expense of probate."

The facts of the case at bar are entirely similar to those in American Bible Society v. Mortgage Guarantee Company, 217 Cal. 9, 17 P.2d 105. There objection was made that (1) a valid joint tenancy had not been created because a corporation was one of the joint tenants; (2) because of retention of power to revoke during the decedent's lifetime; and (3) because of nondelivery of the mortgage certificates. The Court stated in 217 Cal. on page 13, 17 P.2d on page 107: "where funds have been deposited by one person with the intent to pass a present proprietary interest therein to another jointly with himself with right of survivorship, and the purpose fails, that is, the gift is incomplete by reason of some technicality in the law and where the essential elements of a trust are established, the manifest intention of the donor may be sustained through the agency of a trust." It would be difficult to find a decision in which the facts more nearly parallel those at bar. As conceded by appellants, the proper intent was present on the part of the deceased; the court states in American Bible Society, supra, 217 Cal. at page 15, 17 P.2d 105, that such intent must be given effect as the declaration of a trust for the benefit of respondents as to the whole of the assigned notes and trust deeds. Civil Code, section 683,[1] expressly authorizes the method used by decedent in establishing the joint tenancies. Civil Code, section 1828, expressly authorizes the joint deposit in the name of two people making such deposit deliverable to either or to the survivor in due course of business. In addition to the writings of decedent, the quoted testimony of the two witnesses with reference to the aims of the testatrix and authoress of the trust show that some beneficiaries were notified that the trust deeds were being created for their immediate benefit.

[1] Where one deposits money in her own name and that of another jointly with the intention of enabling the other party to draw money after the death of the depositor, a valid trust is created in favor of the other person as beneficiary and the validity of that trust is not negatived by reason of the fact that the depositor retains power to withdraw the deposit during his lifetime. Randall v. Bank of America, 48 Cal.App.2d 249, 253, 119 P.2d 754.

[2] In Drinkhouse v. German Savings & Loan Society, 17 Cal.App. 162, 168, 118 P. 953, the appellant contended that the deceased had never made a formal declaration of trust or parted with control of the property in question and it was further urged that respondent had never formally accepted the trust. The court held that inasmuch as the subject of the trust was personal property, it was not necessary that technical and precise formalities should be used; that any words or acts of the trustor and trustee which indicate with reasonable certainty an intention on the part of the trustor to create a trust, the subject, purpose and beneficiary of the trust and the acceptance of the trust by the trustee are all that is necessary. Civil Code, secs. 2221, 2222. It is obvious from the facts and cir-

1. Civil Code, section 683. "A joint interest is one owned by two or more persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or by transfer from a sole owner to himself and others, or from tenants in common to themselves, or to themselves and others * * *." [Stats.1935, p. 912.]

cumstances of the case that there was intended to be by all parties involved, a perfected trust.

[3] Appellant contends that a corporation cannot hold property in joint tenancy with a natural person because there can be no reciprocity of survivorship between them. Dewitt v. City of San Francisco, 2 Cal. 289. This was recognized as the common law rule in the American Bible Society case, supra, but the court found it unnecessary to decide whether it has been changed in this state, 217 Cal. at page 13, 17 P.2d 105, for it held that a valid trust had been created for the benefit of the donor and the corporation and thereby necessarily held a trust in joint tenancy could be created for the benefit of a corporation. Such is the case at bar.

While the Civil Code defines a joint interest as one owned by two or more persons in equal shares and is declared to be a joint tenancy, Civ.Code, sec. 683, yet it is noted that the section does not exclude a corporation from the category of such "persons" as may hold a joint tenancy while sections 14 and 2132b define person as including a corporation.

[4, 5] Appellant contends that one of the assignments was unsigned and that there was no evidence that the omission of the signature in that instance was accidental; that therefore, that assignment must fail. The court was confronted with sufficient evidence to warrant the conclusion that such omission of signature was accidental. The finding was that "at the same time Minnie L. Hanssen executed, acknowledged and delivered a separate assignment of said deed of trust last above described. Both the endorsement of said note and said deed of trust were signed by the said Minnie L. Hanssen by her personal signature; however, said Minnie L. Hanssen accidentally omitted signing, either the endorsement on the back of the note, or the separate assignment of deed of trust as to Number 1 above." It was not an unreasonable inference that the absence of decedent's signature from the assignment to Eastside Christian Church was accidental. Furthermore, a valid trust of personal property may be created by parol; it need not be in writing; merely the ascertainable intention is all that is necessary. Hardison v. Corbett, 55 Cal.App.2d 310, 317, 130 P.2d 226; Booth v. Oakland Bank of Savings, 122 Cal. 19, 24, 54 P. 370; Drinkhouse v. German Savings and Loan Society, supra, 17 Cal.App. 162, 168, 118 P. 953. It must therefore be concluded that decedent properly set up a trust and that there was ample evidence to support the findings of the trial court.

The Church appeals the award of attorney's fees to Long Beach Federal Savings as the trustee, contending in effect that (1) Eastside Christian Church actively defended its own property; (2) that this was not an express trust and that an involuntary trustee has no right or claim to compensation or expenses, and (3) Long Beach Federal rendered a disservice to the Church rather than a benefit

[6, 7] The law governing the administration of trusts is that a trustee not only has the right, but it is his duty, whenever necessary to the proper administration, preservation and execution of the trust or to its defense, to employ counsel and that such counsel be paid for the service necessarily rendered out of the trust estate. Failure of the trustee to take such action without justification would impose a liability upon such trustee for any loss resulting to the estate from his failure wisely so to act. Estate of Duffill, 188 Cal. 536, 555, 206 P. 42; Metzenbaum v. Metzenbaum, 115 Cal.App.2d 395, 402, 252 P.2d 31, 996.

If such is the rule for the trustee who has actively participated in the creation of the trust and the naming of himself as trustee, then how much more should it apply to a person or corporation that has been "conscripted" to serve as trustee. The execution of her several wills and the numerous conveyances and instructions, made controversy almost a certainty. Responsibility for the exercise of alertness and good judgment was cast upon respondent Long Beach Federal in order to guard the wealth entrusted to it. Consequently, it cannot with reason be denied that some one was obliged

to act for the preservation of the estate and that one was the respondent Long Beach Federal. Dingwell v. Seymour, 91 Cal.App. 483, 513, 515, 267 P. 327. Deceased selected respondent corporation "as trustee, to hold her property in trust."

[8] The " 'trustee has a right, whenever necessary to the proper administration, preservation, and execution of the trust and the prosecution or defense of action, to employ counsel and to be reimbursed from the trust estate for whatever sums he has paid for the services of such counsel. The rule is applicable even though the *cestui que trust* employed counsel to represent the same interests, and although, to a certain extent, the private and personal interests of the trustee may also be involved in the litigation.' " Estate of Duffill, 188 Cal. 536, 555, 206 P. 42, 50; Metzenbaum v. Metzenbaum, 115 Cal.App.2d 395, 399, 252 P.2d 31, 966; Dingwell v. Seymour, supra, 91 Cal. App. at page 513, 267 P. 327.

[9] The mere fact that the beneficiaries also employ counsel in no way relieves or mitigates the duty of the trustee to hire counsel, and because of this duty, to "be compensated for the entire service." The court found that this was a voluntary trust "arising out of a personal confidence reposed in, and voluntarily accepted by, one for the benefit of another", Civil Code, section 2216, and not an involuntary trust created by operation of law as defined by Civil Code, section 2217. Further, Eastside Christian Church, in its verified cross-complaint, stated that "Minnie L. Hanssen * * * selected and appointed cross-defendant, Long Beach Federal Savings & Loan Association, a corporation, as trustee, to hold said property in trust." The Church cannot now come before this court and for the sake of $181.99 state that the trust was created by law and not Minnie L. Hanssen.

[10] Finally, the Church presented to the trial court the issue upon conflicting evidence as to whether it was harmed by Long Beach Federal, and the trial court found in favor of the latter. This court will not upset a judgment supported by substantial facts as determined by the trial court.

[11] The trial court correctly held that the Church must pay its share of the trustee's attorney fees and correctly allowed Long Beach Federal to counter-designate an adequate record on the Church's "judgment role appeal" in which the Church makes repeated references to the reporter's transcript.

The final judgment is affirmed.

FOX and ASHBURN, JJ., concur.



141 Cal.App.2d 768

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Johnnie Lee FITE, Defendant and Appellant.

Cr. 5530.

District Court of Appeal, Second District, Division 3, California.

May 23, 1956.

Defendant was convicted of assault with intent to commit great bodily injury. The Superior Court of Los Angeles County, Thomas L. Ambrose, J., rendered judgment, and defendant appealed. The District Court of Appeal, Parker Wood, J., held that there was sufficient evidence to support the conviction.

Judgment affirmed.

1. Criminal Law ⇐742(1)

Credibility of witnesses is matter for determination by the trier of fact.

2. Criminal Law ⇐1159(3)

Resolution of conflict in the evidence is for the trier of fact.

3. Criminal Law ⇐260(11)

Where there is substantial evidence to support a finding of fact and no abuse of discretion by the court, reviewing court will not disturb fact finding of the lower court.

4. Assault and Battery ⇐92

Evidence was sufficient to sustain conviction for assault with intent to commit great bodily injury.

Herbert W. Simmons, Jr., Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Patrick T. McCormick, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant was charged with assault with a deadly weapon. Trial by jury was waived. She was convicted of assault with intent to commit great bodily injury, a lesser offense necessarily included in the offense charged.

Presumably, the contention of appellant is that the evidence was insufficient to support the judgment. A part of her argument is that the testimony of the victim of the alleged assault was "unworthy of believe" and was in conflict with testimony of appellant; and that when "we arrive at the conclusion that the testimony of the complaining witness, Annie Rae Hicks, is destroyed, it is a simple matter to proceed upon the testimony of the appellant."

Mrs. Hicks testified that on February 22, 1955, defendant came to her home, sat on a couch therein, and said that she was Grady Fite's wife and she had come to make trouble; she asked Mrs. Hicks if she had a child by Grady Fite; after they had argued about 15 minutes, Mrs. Hicks told her to "get out"; then defendant stood up and said "I come over to kill you"; when she said that she (defendant) took a gun out of her purse and was getting the gun out of the holster; Mrs. Hicks grabbed defendant and they struggled over the gun; while so struggling they went onto the porch and the lawn; a man came by and took the gun from defendant; the gun was not fired. On cross-examination Mrs. Hicks said that defendant got the gun out of the holster, and it was about out of the holster when they started struggling; defendant had the gun in her right hand and the holster in her left hand; she never called defendant by telephone; she told the Department of Public Assistance that Grady Fite was the father of one of her children.

Mr. Raymond testified that on said February 22, about noon, he saw defendant and Mrs. Hicks wrestling and fighting; he pried the gun out of their hands, and put it in the glove compartment (of defendant's automobile).

A police officer testified that, on February 23, he asked defendant where the gun was; she replied that it was in the glove compartment; he removed a .25 automatic from the compartment, opened the holster and removed the clip in which there were six cartridges; there was no cartridge in the chamber of the gun; defendant told him she had been receiving telephone calls for two years from Mrs. Hicks, who claimed that defendant's husband was the father of one of Mrs. Hicks' children; defendant said that she went to Mrs. Hicks' house with a gun in her purse, that while she was in the house she opened her purse and the gun and the holster were in view "on top of her purse," and then defendant and Mrs. Hicks struggled over the gun until a man took the gun from them.

Defendant testified that Mrs. Hicks telethat she (Mrs. Hicks) had been going with that she (Mrs.Hicks) had been going with defendant's husband about eight years; defendant and Mrs. Hicks had about five telephone conversations wherein they threatened one another; she went to Mrs. Hicks' house and told her that she came to talk about a letter her husband received from the county, which stated that defendant's husband was the father of Mrs. Hicks' son; after some discussion defendant said, "I won't fool with you"; then defendant looked in her purse to get her gun, and then they both grabbed the gun and struggled outside the door, and a man took the gun from their hands; the gun belonged to her brother-in-law and she had had it a few months; there were no "bullets" in it when she got it, but she bought some and loaded the gun just before she went to Mrs. Hicks' house.

[1–4] The credibility of witnesses is a matter for the determination of the trier

of fact. People v. Cannon, 77 Cal.App.2d 678, 688, 176 P.2d 409. The resolution of a conflict in the evidence is for the trier of fact. People v. Shivers, 139 Cal.App.2d 275, 293 P.2d 479. Where there is substantial evidence in support of a finding of fact, and there is no abuse of discretion on the part of the court, a reviewing court is not empowered to disturb the finding of fact. See People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778. There is no merit in the appeal.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



141 Cal.App.2d 639

Myrtle WESSON, Plaintiff and Respondent,

v.

Nathaniel WESSON, Defendant and Appellant.

Civ. 21199.

District Court of Appeal, Second District, Division 1, California.

May 18, 1956.

Wife's action, for divorce on ground of cruel and inhuman treatment, wherein husband did not appear at trial and findings of fact and conclusions of law were waived. The Superior Court of Los Angeles County, A. A. Scott, J., entered interlocutory decree of divorce, and defendant appealed. The District Court of Appeal, Nourse, J. pro tem., held that evidence was sufficient to support implied finding that allegations of complaint were true.

Decree affirmed.

Divorce ⚿130

In wife's action, for divorce on ground of cruel and inhuman treatment, wherein husband did not appear at trial and findings of fact and conclusions of law were waived, evidence was sufficient to support implied finding that allegations of complaint were true.

Grossman & Rosen, Los Angeles, for appellant.

Curtis C. Taylor, Los Angeles, for respondent.

NOURSE, Justice pro tem.

Appellant appeals from an interlocutory decree of divorce awarded to respondent.

Appellant has been ordered by the superior court to pay respondent certain sums for costs and attorney's fees on this appeal. He has failed to comply with that order. Consequently no brief has been filed by respondent. We have nevertheless examined appellant's brief and the entire record, and find no merit in this appeal.

Respondent, by her complaint, charged that appellant had by means of cruel and inhuman treatment caused her grievous mental pain, anguish, and suffering. Appellant filed a cross-complaint making like charges against respondent. Appellant did not appear at the trial, and his counsel offered no evidence in support of the allegations of the cross-complaint or of appellant's denials of the allegations of the complaint; nor did he cross-examine respondent or her corroborating witness. Findings of fact and conclusions of law were waived.

The evidence produced by the respondent, while weak, is sufficient to support the implied finding of the trial court that the allegations of the complaint were true. Inasmuch as the only question raised by appellant is the insufficiency of the evidence to support the above-mentioned implied finding, the decree of the trial court must be affirmed.

Decree affirmed.

WHITE, P. J., and FOURT, J., concur.

141 Cal.App.2d 499

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Jeremiah K. DENNE, Defendant and Appellant.

Cr. 5455.

District Court of Appeal, Second District, Division 2, California.

May 14, 1956.

Defendant was convicted of unlawful possession of marijuana. From a judgment of the Superior Court, Los Angeles County and from an order denying motion for new trial, Joseph M. Maltby, J., the defendant appealed. The District Court of Appeal, Fox, J., held, inter alia, that where parole officers possessed information that parolee who had been convicted of possessing marijuana was associating with a felon who was currently engaged as a narcotic peddler, and that parolee thereby had broken his faith with prison authorities, search by parole officers of parolee's apartment in his absence was not unreasonable, and marijuana found therein was properly admitted in prosecution for unlawful possession of marijuana.

Judgment and order affirmed.

1. Searches and Seizures ⇐7(1)

The constitutional immunity embodied in Fourth Amendment of federal Constitution is granted not against all searches and seizures but only against those which are "unreasonable". U.S.C.A.Const. Amend. 4; West's Ann.Const. art. 1, § 19.

2. Searches and Seizures ⇐7(1)

What constitutes a reasonable search cannot be encapsuled in any rigid formula, nor determined by any fixed standard or single touchstone, but depends upon facts and circumstances of each case. U.S.C.A. Const. Amend. 4; West's Ann.Const. art. 1, § 19.

3. Pardon ⇐7

In determining whether privilege of parole shall be granted a prisoner, Adult Authority is not guided solely by good conduct of prisoner while incarcerated, but nature of his offense, his age, his prior associations, his habits, inclinations and traits of character, the probability of his reformation and interests of public security are all taken into consideration. West's Ann.Pen. Code, §§ 3052, 3056.

4. Pardon ⇐9

A prisoner on parole is not free from legal restraint by penal authorities but is constructively a prisoner of the state in legal custody and under control of state board of prison directors. West's Ann. Pen.Code, §§ 2600, 3052, 3054, 3056.

5. Pardon ⇐1

The parole system, while humanitarian in character, is reformatory in purpose, and its object is to mitigate rigor of former penitentiary system by allowing prisoner to re-enter society by replacing continued incarceration with a conditional freedom controlled by prison regulations so that in legal contemplation parolee remains a prisoner, although out on parole. West's Ann. Pen.Code, §§ 2600, 3052, 3054, 3056.

6. Pardon ⇐9

The liberty accorded a parolee is partial and restricted, and granting of parole does not change his status as a prisoner, since he is not discharged but merely serves remainder of a sentence outside rather than within the prison walls, and while parole system, as an enlightened penological technique, enables him to pay his debt to society in a prison without bars, he continues at all times to remain in penal custody. West's Ann.Pen.Code, §§ 2600, 3052, 3054, 3056.

7. Pardon ⇐14.3

The additional liberty conferred on parolee is the result of a decision of Adult Authority, an administrative agency which is a component part of the Department of Corrections, and rules and regulations for conduct of paroled convicts are rules and regulations for control of prisoners, and enforcement of such rules while parolee is at large is the responsibility of parole officer, a functionary of administrative agency charged with supervising conduct and charting the social progress of the pa

rolee. West's Ann.Pen.Code, §§ 2600, 3052, 3054, 3056, 4810, 5000–5003, 5075.

8. Pardon ⇐14.4

By accepting privilege of parole a prisoner consents to the broad supervisory and visitatorial powers which his parole officer must exercise over his person and property until term of his sentence shall have expired or been terminated. West's Ann.Pen. Code, §§ 2600, 3052, 3054, 3056, 4810, 5000–5003, 5075.

9. Pardon ⇐14.17

A parole officer's physical apprehension of his prisoner for suspected violation of parole is not an "arrest" in sense that a peace officer arrests a private individual suspected of a crime but a mere transfer of the subject from constructive custody into actual or physical custody. West's Ann. Pen.Code, §§ 2600, 3052, 3054, 3056, 4810, 5000–5075.

See publication Words and Phrases, for other judicial constructions and definitions of "Arrest".

10. Criminal Law ⇐395

Searches and Seizures ⇐7(10)

Where parole officers' information that parolee who had been convicted of possession of marijuana was associating with a felon who was currently engaged as narcotic peddler, and had thereby broken his faith with prison authorities, search of parolee's apartment in his absence was not unreasonable, and marijuana found in apartment was properly admitted in prosecution for possession of marijuana. West's Ann.Pen.Code, §§ 2600, 3052, 3054, 3056, 4810, 5000–5003, 5075; West's Ann.Health & Safety Code, § 11500; West's Ann.Const. art. 1, § 19; U.S.C.A.Const. Amend. 4.

11. Poisons ⇐4, 9

It is essential to crime of possession of narcotics that defendant have physical or constructive possession coupled with knowledge of presence and narcotic character of substance possessed, and to show such knowing possession conduct of parties, admissions or contradictory statements and explanations are frequently sufficient. West's Ann.Health & Safety Code, § 11500.

12. Criminal Law ⇐370

Evidence of other acts of similar nature is admissible when not too remote in order to show guilty knowledge of possession of marijuana by defendant. West's Ann.Health & Safety Code, § 11500.

13. Criminal Law ⇐1144(13)

On appeal from conviction, facts must be considered in light most favorable to the prosecution.

14. Poisons ⇐9

Evidence including showing that defendant had been convicted of possession of narcotics and was on parole from his sentence for that offense, that defendant admitted that he had used narcotics while on parole, that defendant had recently associated with a person who was trafficking in narcotics, and that marijuana was found in apartment under defendant's exclusive control, sustained jury's finding that defendant had knowledge of presence of marijuana found by parole officers in his apartment and was therefore guilty of possession. West's Ann.Health & Safety Code, § 11500.

15. Criminal Law ⇐742(1)

The credibility of witness was for jury.

16. Criminal Law ⇐1159(2)

Where evidence reasonably justifies inference of guilt and jury so finds, no question of law reviewable in appellate court is presented by fact that same evidence also justifies inference of innocence.

17. Criminal Law ⇐361(1)

In prosecution for unlawful possession of marijuana by parolee who had been convicted of possessing marijuana, articles of parole which provided that parolee was not to use or possess marijuana nor associate with former inmates of state prison, and photograph of parolee taken from felon engaged as narcotic peddler were properly admitted for limited purpose of showing parole officer's probable cause to suspect parolee of violating his parole. West's Ann. Health & Safety Code, § 11500.

18. Criminal Law ⇐1043(2)

In prosecution for unlawful possession of marijuana by parolee who had been convicted of possessing marijuana, wherein

parolee's only objection to admission of his letter to parole officer was that "it is incompetent, irrelevant and immaterial; outside issues of this case", that was a general objection and no complaint of ruling admitting such letter could be maintained on appeal unless it was inadmissible for any purpose. West's Ann.Health & Safety Code, § 11500.

19. Criminal Law ⇐406(1)

In prosecution for unlawful possession of marijuana by parolee who had been convicted of possessing marijuana, a letter written by parolee to parole officer was admissible as containing expression suggestive of parolee's guilt. West's Ann.Health & Safety Code, § 11500.

20. Witnesses ⇐216

In prosecution for unlawful possession of marijuana by parolee who had been convicted of possessing marijuana, a letter written by parolee to parole officer was not inadmissible as privileged communication under Code of Civil Procedure. West's Ann.Health & Safety Code, § 11500; West's Ann.Code Civ.Proc. § 1881.

21. Witnesses ⇐337(6)

In prosecution for unlawful possession of marijuana by parolee who had been convicted of possessing marijuana, questions propounded to parolee regarding prior convictions of car theft and of possession of marijuana did not constitute prejudicial misconduct since a defendant may be impeached by showing that he has been convicted of a felony. West's Ann.Health & Safety Code, § 11500; West's Ann.Code Civ.Proc. § 2051.

22. Witnesses ⇐337(4)

In prosecution for unlawful possession of marijuana by parolee who had been convicted of possessing marijuana, wherein subject of defendant's use of marijuana while on parole was brought up by defendant's own counsel, defendant's use of marijuana while on parole was within legitimate scope of cross-examination. West's Ann.Health & Safety Code, § 11500; West's Ann.Code Civ.Proc. § 2048.

23. Criminal Law ⇐1036(2)

A defendant could not object for first time on appeal to questions propounded on cross-examination.

24. Criminal Law ⇐1119(4), 1122(5)

Where defendant made no request that prosecutor's opening and closing statements or instructions given and refused be included in record, and such material did not appear in the record, alleged errors complained of could not be reviewed since an appellant must produce a record which discloses that an error relied upon has in fact occurred. West's Ann.Rules on Appeal, rule 33(a, b).

Jeremiah K. Denne, in Propria Persona, and Kindel & Anderson and David E. Agnew,* Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

FOX, Justice.

Defendant was charged, in an amended information, with violation of section 11500 of the Health and Safety Code in that he unlawfully had marijuana in his possession. He pleaded not guilty. He was also charged with two prior felony convictions, to wit, a violation of section 503 of the Vehicle Code and a violation of section 11500 of the Health and Safety Code, both of which he admitted. A trial by jury resulted in a verdict finding defendant guilty of the offense charged. His motion for a new trial was denied and defendant was sentenced to a term in the state prison. He appeals from the judgment of conviction and the order denying his motion for a new trial.

Defendant's principal contention is that prejudicial error was committed by the trial court in permitting the introduction of evidence seized in the course of an unreasonable search of his premises of the character condemned in People v. Cahan, 44 Cal.2d 434, 282 P.2d 905. However, an examination of the particular and peculiar

* Upon defendant's request, the court appointed Mr. Agnew, of Kindel & Anderson, to represent him on this appeal.

circumstances of the case at bar makes manifest the inapplicability of the exclusionary rule enunciated in the Cahan case.

In July, 1951, defendant was convicted on two counts of violating section 11500 of the Health and Safety Code (possession of marijuana and heroin) and was sent to the state prison.[1] On about April 12, 1954, defendant was released on parole. The Adult Authority made the continuance of his parole subject to certain conditions, these providing, in part, that defendant "may not possess, use or sell any narcotics in violation of law," and that he must avoid "former inmates of penal institutions and individuals of bad reputations." Provision 12 of the articles of parole informed defendant that "Your civil rights have been suspended. Therefore you may not enter into any contract, marry, engage in business or execute a contract without the restoration of such civil rights by the Adult Authority."[2]

Following his admission to parole, defendant obtained employment. In October, 1954, parole officer Haydis took over the supervision of defendant's activities as a parolee and in the next six months he had about fifteen personal visits with defendant. As the result of these contacts, parole officer Haydis entertained the view that defendant was making satisfactory progress in his pattern of readjustment to society. In March, 1955, defendant secured swing-shift employment (4:00 p. m. to midnight) on the assembly line of an automobile plant in South Gate, California. Shortly thereafter disquieting information about defendant reached Haydis.

Late in the afternoon of March 25, 1955, Haydis met with another parole officer named Lyons, with whom he planned to work on official business that night. Lyons had under his supervision a parolee named Martin Leonard, whom he had transported to the Los Angeles County Jail earlier that month. Leonard had admitted to Lyons that he was trafficking in narcotics. Among Leonard's personal effects was found a picture of defendant. Leonard told Lyons that he knew defendant, that he was aware that defendant was a parolee, and had several times attended parties at defendant's apartment. Lyons recounted these facts to Haydis while they were having dinner together and showed him the picture of defendant which had been taken from Leonard's possession. Haydis thereupon requested Lyons to accompany him to defendant's home for the purpose of taking him into physical custody for violation of the conditions of parole.

The parole officers arrived at the apartment building in which defendant resided between 8:30 and 9:00 p. m. His quarters were dark when the officers rang his doorbell and received no response. They then inquired of the building manager, Jack Williams, about whether defendant was at home. Mr. Williams stated he wasn't sure, though he understood defendant was ill and did not go to work that day. The officers again tried to gain admission by knocking on the door but failing, returned to Williams' apartment and asked permission to enter defendant's apartment. Williams stated he would get the key to the apartment but then discovered he could not locate it. Accompanied by the officers, he went to a window at the rear of the apartment. Standing first on a garbage pail and then on a tool shed, Williams inserted a screw driver under the sill to raise the unfastened window and then climbed into the apartment. Haydis and Lyons returned to the front door where they were admitted by Williams.

The officers first inspected the apartment looking for defendant and ascertained he was not present. In the presence of Williams, they then undertook a search of each room of the apartment. In a cabinet draw-

1. He had previously served time in the state prison following conviction for violating section 503 Vehicle Code (Grand Theft-auto).

2. The following civil rights were restored to defendant:
 a) To rent a habitation and to make such purchases of food, clothing, transportation and tools necessary for his maintenance and holding a job.
 b) His rights under Workmen's Compensation, Unemployment Insurance Laws, Social Security Laws and other statutes relating to employees.

er in the kitchen Lyons found a package whose contents he examined and recognized as marijuana.[3] After completing their search, they went to defendant's place of employment and at about midnight took him into custody. He was subsequently transferred to the county jail.

When defendant was awaiting trial he wrote a letter to Parole Officer Haydis stating he had just been informed that the girl with whom he was keeping company had been made pregnant by him. The letter, received in evidence over defendant's general objection, continued: "You see, now I don't know what to do about my case. I had intentions of having a jury trial and take a chance. But now I've [sic] thinking of having a court trial and take a chance of getting county jail time and hope I get put back on parole and get married. Like I said, it was found in my possession and possession is nine tenths of the law. But I was wondering if there's anything you can do to help me. Mr. Haydis, as of now I have just made up my mind. On May 13, I am going to change my plea to guilty and leave the rest up to the judge. And if there's any way you can help me get county jail time, I would appreciate it very much * * *" Haydis visited defendant at the jail a week later and advised him not to plead guilty to anything he did not do.

At the trial, the marijuana found in defendant's apartment was admitted over his objection that it was illegally seized pursuant to an unconstitutional search. He admitted that he had used marijuana subsequent to his admission to parole but stated he had discontinued the practice because of his intention to marry. He explained his letter to Haydis was written after he learned of his girl friend's pregnancy. He testified, "I figured I would throw myself on the mercy of the court and pray that I would get county jail, and I was hoping that I would get out in about six months before the baby was born and get a job and save a few dollars and then get married." Martin Leonard, called as a witness by defendant, testified that he had originally met defendant when they were prison inmates. He stated that it was he who placed the marijuana found in defendant's apartment in the kitchen drawer. He testified he did so on March 10, 1955, when he broke into defendant's apartment by way of the rear window when no one was at home. He never told defendant what he had done. He stated that he had been to defendant's apartment previously on five or six occasions when one Robert Miller was sharing the flat with defendant. His visits were for the purpose of seeing Miller.

[1, 2] Relying on People v. Cahan, 44 Cal.2d 434, 282 P.2d 905, defendant predicates his main argument for reversal upon the premise that the marijuana found in his apartment was legally inadmissible evidence, being the product of an unreasonable search and seizure in violation of his rights under the Fourth Amendment of the United States Constitution. We need not express our views on, nor here decide, whether the protection of the Fourth Amendment, born of the jealous regard of a *free people* to preserve their civil liberties and rights of privacy against invasions effectuated under color of police or governmental authority, extends to a convict serving the unexpired portion of his sentence on parole from a penal institution. Anomalous as it may appear, we will assume, arguendo, that the guarantees of the Fourth Amendment apply to such a person. (See Martin v. United States, 4 Cir., 183 F.2d 436.) But the constitutional immunity embodied therein is granted not against all searches and seizures but only against those which are "unreasonable." U.S.Const. Amend. IV; California Constitution, Art. I, § 19; People v. Winston, 46 Cal.2d 151, 293 P.2d 40; People v. Coleman, 134 Cal.App.2d 594, 599, 286 P.2d 582. Thus the crucial question presented is whether the search and seizure conducted by the parole officers was unreasonable and therefore an infringement of defendant's right to be secure against such a search. What consti-

3. It was stipulated at the trial that if called to testify Ralph Simonds, a forensic chemist, would give as his opinion that the substance discovered by the officers in defendant's room was marijuana.

tutes a reasonable search cannot be encapsuled in any rigid formula, nor determined by any fixed standard or single touchstone. In declining to formulate any one test of the reasonableness of a search, the United States Supreme Court remarked, in United States v. Rabinowitz, 339 U.S. 56, 63, 70 S.Ct. 430, 434, 94 L.Ed. 653: "The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case." Commenting further on the ultimate legality of any particular search, the court said, 339 U. S. at page 66, 70 S.Ct. at page 435: "The mandate of the Fourth Amendment is that the people shall be secure against unreasonable searches. * * * The relevant test is * * * whether the search was reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case." It is to the atmosphere of this case that we now address ourselves.

[3–5] The situation in the instant matter differs significantly from that involved in the Cahan case, and all others decided since the adoption of the exclusionary rule, since the problem confronting the court in those cases was either the propriety of the arrest of a *private person,* with which the complained of search and seizure was conjoined, or whether the search incidental to the arrest of the private individual was reasonable, or whether in the particular case the suspected person had apparently given his voluntary assent to the search.[4] The vital distinction here is that on the occasion of the search defendant was not an ordinary individual merely suspected of a crime but a convict on parole. A prisoner released on parole is not a free man. Section 3052 of the Penal Code provides that the Adult Authority shall have power to establish and enforce rules under which prisoners in state prisons, if found eligible, may be allowed to leave the prison enclosure on parole. In determining whether the privilege of parole shall be granted a prisoner, that Authority is not guided solely by the good conduct of the prisoner while incarcerated. The nature of his offense, his age, his prior associations, his habits, inclinations and traits of character, the probability of his reformation and the interests of public security are all taken into consideration. Roberts v. Duffy, 167 Cal. 629, 640, 140 P. 260; In re Harris, 80 Cal.App.2d 173, 178, 181 P.2d 433. Section 3056 of the Penal Code provides that prisoners on parole shall remain under the legal custody of the State Board of Prison Directors and shall be subject *at any time* to be taken back within the enclosure of the prison. A prisoner on parole is not free from legal restraint by the penal authorities, In re Marzec, 25 Cal.2d 794, 797, 154 P. 2d 873, but "is constructively a prisoner of the state in the legal custody and under the control of the state board of prison directors." In re Taylor, 216 Cal. 113, 115, 13 P.2d 906, 907; In re Heckman, 90 Cal.App. 700, 706, 266 P. 585.[5] The parole system, while humanitarian in character, is reformatory in purpose. Its object is to mitigate the rigor of the former penitentiary system by allowing the prisoner to reenter society by replacing continued incarceration with a conditional freedom controlled by prison regulations. Matter of Stanton, 169 Cal. 607, 610, 147 P. 264; Roberts v. Duffy, supra, 167 Cal. at page 634, 140 P. at pages 261, 262. As stated in Matter of Stanton, supra [169 Cal. 607, 147 P. 265], "In legal contemplation, therefore, he remains a prisoner, although out on parole. He is in the control of the board and subject to its rules, although otherwise at liberty."

4. Of the many cases decided by the Supreme Court since Cahan illustrative are: People v. Brown, 45 Cal.2d 640, 290 P.2d 528; People v. Boyles, 45 Cal. 2d 652, 290 P.2d 535; People v. Simon, 45 Cal.2d 645, 290 P.2d 531; People v. Michael, 45 Cal.2d 751, 290 P.2d 852; People v. Martin, 45 Cal.2d 755, 290 P.2d 855; People v. Gorg, 45 Cal.2d 776, 291 P.2d 469.

5. Having the civil status of a prisoner, a parolee is under the civil rights disabilities prescribed in section 2600 of the Penal Code. In re Sanders, 47 Cal.App. 368, 190 P. 647. During the term of his parole the Adult Authority may restore certain civil rights to him if it deems proper. Pen.Code, § 3054.

[6, 7] From the statutes and cases last discussed, it is clear that the liberty accorded a parolee is partial and restricted. The granting of parole does not change his status as a prisoner. The parolee is not discharged but merely serves the remainder of his sentence outside rather than within the prison walls. The parole system, as an enlightened penological technique, enables him to pay his debt to society in a prison without bars. But he continues at all times to remain in penal custody, the same as the prisoner allowed the privilege of working on the prison's "honor farm." Parole has simply pushed back the prison walls for him, allowing him wider mobility and greater personal opportunity while serving his sentence. The additional liberty conferred on the parolee is the result of a decision of the Adult Authority, an administrative agency which is a component part of the Department of Corrections. Pen.Code, §§ 5000–5003, 5075, 4810. Rules and regulations for the conduct of paroled convicts are rules and regulations for the control of prisoners. Matter of Stanton, supra. The enforcement of these rules while the parolee is at large is the responsibility of the parole officer, a functionary of the administrative agency charged with supervising the conduct and charting the social progress of the parolee.

Because the public is entitled to maximum protection in the administration of the parole system, the process of rehabilitation takes place under the vigilant and tutelary eye of the parole officer. Unfortunately, recidivism on the part of the parolees is not an uncommon occurrence. Many a vicious crime is committed by a parolee, shocking the faith of the public in the efficacy and desirability of parole. The parole officer, therefore, occupies a ubiquitous role in the life of the parolee. To him the parolee must report his movements and engagements, with him he must share his problems and from him he receives guidance to forestall backsliding into anti-social behavior. Since the parolee constitutes a calculated risk to the security of the community, and since a breach of the faith reposed in him may subject him to summary return to the prison confines, the parole officer, in the nature of things, is accorded broad visitatorial powers over his prisoner. He must keep himself informed of the activities of the parolee and must guard against possible lapses that might jeopardize not only the uninterrupted freedom of the parolee and the interests of society but also the public acceptance and support of the parole system. His supervision of the parolee is of necessity a close one, since it bears strong analogy to that of a jailer to his prisoner, though the area of operations has been vastly extended.

[8–10] These being the controlling factors, it cannot be said that the search of defendant's apartment by the parole officers was an unreasonable one. Having accepted a grant of parole, after conviction for possession of narcotics, defendant was by its express terms required to refrain from the use of marijuana and from association with former inmates of a state prison. The officers had received information that defendant was associating with a former felon named Leonard, who, by his own admission, was trafficking in narcotics. Haydis was specifically charged with keeping a surveillance over defendant, who in legal effect, was at all times in his custody as a prisoner and was subject at any time to be taken back to the prison, Pen.Code, § 3056. Having reasonable cause to believe defendant had breached his conditions of parole by associating with a felon engaged in the narcotics traffic, the propriety of the search by the parole officers of their prisoner's quarters cannot be gainsaid. The basic reason which compelled our Supreme Court to adopt the exclusionary rule in the Cahan case—namely, to deter and discourage official circumvention of constitutional guarantees by refusing judicial sanction to the fruits of such conduct—has not been contravened in this context. By virtue of the status of the parolee as a prisoner of the state and in its constructive custody, and because of the unique relationship between a parole officer and his prisoner, under which the former must maintain a constant surveillance over his charge to assure himself that the conditions of the parole are being observed, the validity of the search in the instant case, resting as it did upon a

reasonable belief that the prisoner had violated his parole, cannot be doubted. By accepting the privilege of parole a prisoner consents to the broad supervisory and visitatorial powers which his parole officer must exercise over his person and property until the term of his sentence shall have expired or been terminated. To argue, therefore, as does defendant, that the search was unreasonable because it preceded his physical "arrest," that the "arrest" was without warrant and that the "arrest" occurred at a place other than at the place searched, is mere sophistry in the circumstances of his particular status. It is unnecessary for a parole officer to apply for a warrant to "arrest" a parolee who is already his prisoner and who is at all times in *custodia legis*. The administration of the parole system must be realistic, and not strangled in technical niceties. A parole officer's physical apprehension of his prisoner for suspected violation of parole is not an "arrest" in the sense that a peace officer arrests a private individual suspected of a crime but a mere transfer of the subject from constructive custody into actual or physical custody. Having constructive custody of his prisoner at all times, there is nothing unreasonable in a parole officer's search of the prisoner's premises where, as here, he has reasonable cause to believe the parole has been breached. The Supreme Court of the United States has characterized the violation of a condition of parole as being, in legal effect, on the same plane as an escape from the custody of the prison warden. "His status and rights were analogous to those of an escaped convict." Anderson v. Corall, 263 U.S. 193, 44 S.Ct. 43, 45, 68 L.Ed. 247. It is our conclusion, therefore, that the search being a reasonable one because of the information possessed by the parole officers that defendant was associating with Leonard, who was both a felon and currently engaged as a narcotic peddler, and had thereby broken his faith with the prison authorities, there is no foundation for the contention that defendant's constitutional rights were violated. Martin v. United States, 4 Cir., 183 F. 2d 436, 439–440.

[11–16] The claim is also made that the evidence is insufficient to show that defendant had knowledge of the presence of marijuana in his apartment. This is without merit. Undoubtedly it is essential to the crime of possession of narcotics that defendant have physical or constructive possession coupled with knowledge of the presence and narcotic character of the substance possessed. People v. Winston, 46 Cal.2d 151, 293 P.2d 40. "To show such knowing possession the conduct of the parties, admissions or contradictory statements and explanations are frequently sufficient." People v. Foster, 115 Cal.App. 2d 866, 868, 253 P.2d 50, 51; People v. Brickman, 119 Cal.App.2d 253, 263, 259 P.2d 917. Furthermore, evidence of other acts of similar nature are admissible when not too remote in order to show *guilty knowledge* of the possession of marijuana by defendant. People v. Torres, 98 Cal. App.2d 189, 192, 219 P.2d 480. In the instant case, the evidence showed that defendant had been convicted of possession of narcotics in 1951 and was on parole from his sentence for that offense. Defendant himself admitted that he had used narcotics while on parole. There was also evidence that he had recently associated with a person who was trafficking in narcotics. The marijuana was found in an apartment under his exclusive control. When all these facts are considered together in the light most favorable to the prosecution, as we must on appeal, People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778; People v. Kristy, 111 Cal.App.2d 695, 698, 245 P.2d 547, it is clear that there was ample support for the factual determination by the jury that defendant had knowledge of the presence of marijuana found by the officers in his apartment and was therefore guilty of possession. People v. Bagley, 133 Cal. App.2d 481, 484, 284 P.2d 36; People v. Torres, supra; People v. Brickman, supra. We cannot say that the jury was not entitled to conclude that Leonard's testimony that he broke into defendant's apartment and cached the marijuana there was merely a clumsy attempt to manufacture a defense to disprove defendant's guilty knowledge.

People v. Foster, 115 Cal.App.2d 866, 869, 253 P.2d 50. As was said in People v. Torres, supra, 98 Cal.App.2d at page 193, 219 P.2d at page 482: "Where the circumstances in evidence are such as would reasonably justify an inference of guilt, and the court so found, the fact that an inference of innocence might also just as reasonably have been predicated on such circumstances does not present a question of law reviewable by an appellate court. [Citations.]"

[17–20] Defendant argues that the admission into evidence of the articles of parole, the photograph of himself found in Leonard's possession and the letter he wrote to Mr. Haydis constituted prejudicial error denying him a fair trial. The record shows that Haydis testified he was defendant's parole officer and knew him in his official capacity. No objection was made to such testimony. Subsequently defendant objected to the introduction of the articles of parole, which provided, among the conditions of parole, that defendant was not to use or possess marijuana nor associate with former inmates of state prisons. The court admitted this evidence for the limited purpose of showing the officer's probable cause to suspect defendant of violating his parole. The photograph taken from Leonard was admitted for the same limited purpose. This was clearly correct. As has been stated, it was the officer's reasonable cause to believe defendant was violating his parole which justified their search of his apartment and their retaking of him into physical custody. As stated in People v. Boyles, 45 Cal.2d 652, 290 P.2d 535: "Since the court and not the officer must make the determination whether the officer's belief is based upon reasonable cause, the officer must testify to the facts or information known to him on which his belief is based." 45 Cal.2d at page 656, 290 P.2d at page 537. These two documents bore directly on this question. Defendant's only objection to the admission of his letter to Haydis was that "it is incompetent, irrelevant and immaterial; outside the issues of this case." This was a general objection and no complaint of the ruling admitting such evidence may be maintained on appeal unless it was inadmissible for any purpose. People v. Stanley, 78 Cal.App.2d 358, 360, 177 P.2d 968. While only of slight probative value, the letter was admissible as containing expressions suggestive of defendant's guilt. For the first time on appeal, defendant also urges that his letter to the parole officer was a privileged communication under section 1881 of the Code of Civil Procedure.[6] A similar contention was rejected in People v. Curry, 97 Cal.App.2d 537, 548, 218 P. 2d 153, 160, the court stating: "Section 1881, subdivision 5, merely limits the disclosure to situations where the public interest would suffer by the disclosure. Actually the public interest would suffer by the failure to disclose statements made to the probation officer which are inconsistent with defendant's later sworn testimony." See, also, Stroud v. United States, 251 U. S. 15, 21, 40 S.Ct. 50, 64 L.Ed. 103.

[21–23] Defendant contends that two lines of questions asked of him by the prosecuting attorney constituted prejudicial misconduct. One colloquy is as follows: "Q. On or about the 5th of August, 1949, you were convicted of the felony of car theft and served a term of imprisonment for it, did you not? A. Yes.

"Q. And on or about the 10th day of July, 1951, you were convicted of the possession of marijuana and sent to prison on that charge? A. Yes.

"Q. And there was another count in the same information, possession of marijuana, that you were sent to prison on, two separate counts in other words. Is that right? A. I was sent up for two counts.

"Q. And those two counts were possession of marijuana? A. No.

6. Section 1881 reads: "There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person can not be examined as a witness in the following cases: * * * 5. A public officer can not be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure."

"Q. Possession of narcotics? A. Yes.

"Q. What kind of narcotics? A. One was heroin and one was marijuana.

"Q. One was marijuana and one was heroin? A. Yes." No objections were interposed by defendant's counsel, and rightly so, since it would have been fruitless. As stated in People v. Tabb, 137 Cal.App.2d 167, 171, 289 P.2d 858, 860: "There is, of course, no question of the propriety of impeaching a defendant by showing that he has been convicted of a felony. § 2051, Code Civ.Proc. Furthermore, questions are permitted to ascertain the nature of the offenses involved in the previous convictions [citations]." Defendant was also interrogated by his own counsel as follows:

"Q. Since on or about April, 1954, [the date of defendant's admission to parole] have you used, purchased, dealt with or handled marijuana or any other narcotic? A. Yes.

"Q. When was that? A. Oh, up to about two months after I got out.

"Q. In that period of time did you use it? A. Yes.

"Q. Did you quit? A. Yes." Thereafter on cross-examination the prosecutor asked: "Q. By Mr. Cochran. What was the narcotic that you used after you were placed on parole? A. Marijuana.

"Q. You knew when you were placed on parole that it would be a violation of your parole then, didn't you? A. Yes.

"Q. But you still used it? A. Yes.

"Q. So that still didn't stop you, did it, the fact that you were forbidden on parole to use marijuana. That didn't prevent you from using it after you were placed on parole, did it? A. No." No objection was made to these questions. Defendant now asserts they were prejudicial. As clearly appears, the subject of defendant's use of marijuana while on parole was brought up by defendant's own counsel and was therefore within the legitimate scope of cross-examination. Code Civ.Proc. § 2048. Furthermore, if defendant believed the questions were improper, he should have objected at the time they were asked. He cannot object for the first time on appeal. People v. Murray, 135 Cal.App.2d 600, 287 P.2d 775; People v. Beal, 108 Cal.App.2d 200, 239 P.2d 84.

[24] Lastly, defendant contends that upon his motion for a new trial he assigned as errors of law the misconduct of the prosecution during its opening and closing remarks to the jury and the giving of certain instructions. He asserts he cannot direct attention to these errors because he "did not receive the records as required under Rules on Appeal, Rule 33a and b." His contention is without foundation. The entire "normal record" as required by Rule 33(a) is before us. If defendant desired any "additional record" under Rule 33(b), it was incumbent upon him to request that it be included in the record by filing "with his notice of appeal an application describing the material which he desires to have included and the points on which he intends to rely which make it proper to include it." We find no request that the prosecutor's opening and closing statements or the instructions given and refused be included in the record, nor does this material appear in the record. Under such circumstances the alleged errors complained of cannot be reviewed for, as stated in People v. Lopez, 93 Cal.App.2d 664, 668, 209 P.2d 439, 441: "It is well settled that an appellant must produce a record which discloses that an error relied upon has, in fact, occurred. People v. Ramirez, 139 Cal.App. 380, 382, 33 P.2d 848; Rule 33(b) of the Rules on Appeal."

The judgment and order appealed from are, and each is, affirmed.

MOORE, P. J., and ASHBURN, J., concur.

141 Cal.App.2d 643

Elma B. JONES, Administratrix of the Estate of Sidney W. Jones, Deceased, Plaintiff, Appellant and Respondent,

v.

Jack Henry MAYNARD, Permanente Cement Company, a California Corporation, et al., Defendants, Respondents and Appellants.

Civ. 5000.

District Court of Appeal, Fourth District, California.

May 18, 1956.

Hearing Denied July 11, 1956.

Action by administratrix of employee of cement company's customer against company and company's truck driver for injuries received when run over by truck being moved by driver who knew of employee's presence near truck but who did not see employee at time of accident. The Superior Court, Fresno County, Milo Popovich, J., granted employee's motion for new trial, and defendants appealed. Administratrix cross-appealed from judgment rendered in favor of employer and driver. The District Court of Appeal, Griffin, J., held that evidence, in second trial, was sufficient to sustain verdict for employer and driver.

Order granting new trial affirmed, and cross-appeal dismissed.

1. Automobiles ⇐245(39), 246(19)

In action by administratrix of employee of cement company's customer against company and company's truck driver for injuries received when run over by truck being moved by driver, who knew of employee's presence near truck but who did not see employee at time of accident, question whether starting of diesel engine of truck was sufficient warning to employee was for jury, and therefore refusal to give proffered instruction pertaining to motorist's duty to give audible warning with horn when reasonably necessary to insure safe operation of motor vehicle was error. West's Ann.Vehicle Code, § 671(b).

2. Appeal and Error ⇐1015(1)

Upon appeal from order granting new trial in action by administratrix of employee of cement company's customer against company and company's truck driver for injuries received when run over by truck being moved by driver, who knew of employee's presence near truck but who did not see employee at time of accident, the District Court of Appeal was not authorized to disbelieve fact or inference that truck driver did not look in mirror before starting truck, even though jury was and trial judge might have been justified in not believing such fact or inference. West's Ann.Vehicle Code, § 543.

3. Automobiles ⇐245(72)

In action by administratrix of employee of cement company's customer against company and company's truck driver for injuries received when run over by truck being moved by driver, who knew of employee's presence near truck but who did not see employee at time of accident, question of employee's alleged contributory negligence was one of fact, not law.

4. Automobiles ⇐246(58)

In action by administratrix of employee of cement company's customer against company and company's truck driver for injuries received when run over by truck being moved by driver, who knew of employee's presence near truck but who did not see employee at time of accident, evidence, which supported theory that employee had been endeavoring to ride on some portion of truck not intended for use of passengers was sufficient to warrant giving of instruction relating to unlawful riding. West's Ann.Vehicle Code, § 596.5.

5. Automobiles ⇐244(6)

In action by administratrix of employee of cement company's customer against company and company's truck driver for injuries received when run over by truck being moved by driver, who knew of employee's presence near truck but who did not see employee at time of accident, in first trial, trial court was justified in holding that the evidence was not sufficient to sustain verdict for employee. West's Ann.Code Civ.Proc. § 658.

6. Automobiles ⇐244(6)

In action by administratrix of employee of cement company's customer against

company and company's truck driver for injuries received when run over by truck being moved by driver, who knew of employee's presence near truck but who did not see employee at time of accident, evidence in second trial was sufficient to sustain verdict for employer and driver.

7. Trial ⇐139(1)

Rule of law as to power of trial court to weigh evidence is different from power of District Court of Appeal in ruling on an order granting a new trial.

Thelen, Marrin, Johnson & Bridges, Boyd, Taylor & Reynolds, Dubsick & Whalen, Fresno, Bronson, Bronson & McKinnon, San Francisco, for appellants Jack Henry Maynard and Permanente Cement Co.

C. Ray Robinson, San Francisco, Thompson & Thompson, Eckhart A. Thompson, Fresno, for appellant Jones.

GRIFFIN, Justice.

This is an action originally commenced by Sidney W. Jones, plaintiff and respondent (hereinafter referred to as plaintiff), against defendants and appellants Jack Henry Maynard, a truck driver of 33 years experience, and Permanente Cement Company (hereinafter referred to as the company), his employer, for injuries claimed as a result of being crushed by the wheels of defendants' tractor-trailer Diesel engine cement truck. A former trial by jury resulted in a verdict for plaintiff. The judge there presiding granted a new trial on the ground of insufficiency of the evidence. This action was justified on the conflicting evidence there produced.

After a second trial before another jury and judge a verdict was rendered in favor of defendants. The court granted plaintiff's motion for a new trial on three separate grounds: (1) Insufficiency of the evidence; (2) Irregularity in the proceedings; and (3) Errors in law. Defendants appeal from the order and plaintiff cross-appeals from the judgment under Rule 3(a) of the Rules on Appeal. Subsequent to the trial Sidney W. Jones died and Elma B. Jones was appointed administratrix of his estate, and substituted as plaintiff herein.

About 7:23 a. m. on January 25, 1952, defendant truck driver arrived in Fresno with defendant company's truck which weighed approximately 68,000 pounds loaded with sacks of cement on a flat bed. It was about 48 feet long and the load was about 3½ feet high above the bed and covered with a canvas.

The truck had rear view mirrors 4 inches by 14 inches on each side of the cab. The Parrish Company's plant, to which the cement was being delivered, was fenced and located near the intersection of Maple Avenue and Thomas Street in Fresno. Thomas Street was about 100 feet wide, and an unimproved dirt public road running in an east-west direction passing by the company's buildings located on the south side of the roadway. There were no sidewalks or curbs. Although the weather was then clear it had rained the night before and the street was quite soft, muddy and full of chuckholes. The property buildings consisted of a frame building and a separate cement storage building sitting back on the company's property. A gate was provided in the fence where the passageway enters into the company yard. Plaintiff Jones had been employed by the Parrish Company for two days before the accident. His duties were to assist other men in unloading cement at the cement storage house. He arrived at the office before 7 a. m. and then left it and was awaiting the arrival of defendants' truck. In a few minutes the truck arrived and it was stopped on Thomas Street opposite the company shop about 18 feet out from a telephone pole which was located about 16 feet north of the fence and shop. The testimony as to the exact position of the truck was in dispute. Maynard was awaiting the opening of the gate by an authorized dispatcher of the Parrish Company whose duty it was to open it. This was no part of plaintiff's duties. In the meantime, Maynard was untieing the ropes on the canvas covering the cement and Jones came out of the yard and watched this operation. According to Maynard (called as an adverse witness), plaintiff followed him around the truck like "a puppy follows

a child" and acted "in a sort of a daze * * * strangely", looking underneath the truck and in the cab and not saying a word or touching anything. He testified he knew there was something wrong with plaintiff. It was no part of plaintiff's duty to assist in this operation. Other trucks and employees' cars were subsequently parked nearby and to the rear of defendants' truck. Maynard further testified that about this time he and plaintiff were about 15 feet (this distance is in dispute) to the rear of the cement truck when plaintiff started walking in a westerly direction toward one of the parked trucks to the rear, and that Maynard left to go around the north side of his truck to start it because the dispatcher had given him the signal that the gate was open; that Jones had disappeared from his sight when he got in the cab; that he started the motor and it took 10 to 20 seconds to "build up" air in his Diesel engine, which causes considerable noise, and looked in both rear-view mirrrors, saw nothing that would interfere with his operations, put the truck in the lowest of its 15 gears and started forward at about one-half mile per hour; that he continued to look in the mirror; that after the truck had traveled about 70 feet and had started to turn into the gate he heard someone holler "Back up quick"; that he looked into his right rear-view mirror and Jones appeared to be holding onto his truck with his left hand underneath, his body lying "along the wheels", his "head, from his hips or shoulder up was in front of the front dual wheels of the right" front axle; and that when he stopped the truck and commenced to back up plaintiff let go. Plaintiff was found in the tracks of those wheels, badly crushed. His hat was found a few inches from these wheels. Apparently there were no other eyewitnesses to the actual cause of the accident.

Jackson, another truck driver who had parked his truck to the rear of defendants' truck, testified he saw Jones in the office (shop) and later saw Maynard untieing the ropes, and three or four men, including Jones, were standing between the shop and the cement truck; that he went into the office and as he was walking out of the shop, the next time he saw Jones the cement truck was moving and Jones was under the wheel of the semi-trailer; and that he hollered for Maynard to stop and back up.

Another truck driver, Eichelberger, who was in the shop, testified he did not see Jones but saw his hat in the position indicated, just as the truck started to move. Another driver, Ham, testified he parked his truck about eight feet to the south or to the rear of defendants' truck; that defendants' truck was about eight feet north of the pole; that he went to the office waiting for defendants' cement truck to pull out; that just as he was coming out he noticed Maynard getting into the cement truck; that he got in his tank truck and he saw Jones dragging under the right front wheel of defendants' truck and it appeared to him that Jones was trying to keep his body in a north-south angle "to keep it up with the wheel" in a "rolling type of motion". He noticed drag marks on the mud but did not hear the motor of defendants' truck start up.

An officer testified as to conditions there existing shortly after the accident and stated that Maynard signed a written statement (in evidence). It recites:

> "* * * I started to untie the tarp cover. The victim was at the scene then but not helping. He was wandering around, acting like he was in a daze. I finished untying, doubled my ropes up and went to see if the gate to the shed was open. I came back and got into my truck, I didn't see the victim at all at this time. I shifted into low gear and started forward, approx. ½ m.p.h. Somebody hollered and I put on my brakes and looked in my mirror and saw a person lying under the right front wheels on the Semi-trailer. Someone hollered 'Back up quick' so I did about 3 feet. I believe someone of the employees saw him fall but they would not tell me. I just don't know what happened."

The witness Ham signed a similar statement and said Jones was standing approximately 15 feet south of the cement truck when he walked out to get into his truck, and the cement truck started to pull forward and later he saw Jones struggling "to

get from underneath the wheel * * *"; that he didn't "see Jones from the time he was standing 15 feet from the truck until he was under the wheel". Other witnesses added nothing respecting defendants' negligence and the claimed contributory negligence of plaintiff. Portions of this testimony, taken at the former trial, was allowed in evidence as impeaching their testimony. We perceive little, if any, material variance in the stories. Plaintiff endeavored to testify but it was apparent from his testimony that he did not remember any of the facts surrounding his injury.

Defendants' motion for a nonsuit was denied. It is their claim that under no reasonable or rational theory was it shown that they were negligent; and that it did not show how Jones got under the wheel or that any negligence of Maynard put him there. From the evidence the jury was quite justified in finding in favor of defendants, and had the trial court denied the motion for a new trial it might well have been sustained on appeal. Tuttle v. Crawford, 8 Cal.2d 126, 63 P.2d 1128; Stuart v. Harper, 133 Cal.App.2d 550, 284 P.2d 505; Tuderios v. Hertz Drivurself Stations, 70 Cal.App.2d 192, 160 P.2d 554; Rogers v. Interstate Transit Co., 212 Cal. 36, 297 P. 884; Speck v. Sarver, 20 Cal.2d 585, 128 P.2d 16. However, this is not the question before us. The trial court, apparently with some reluctance, granted a new trial believing that there was some substantial evidence upon which the jury could return a verdict in favor of plaintiff and that the jury was erroneously instructed as to the law, which error may have been the turning point which led the jury to believe that negligence of defendants had not been established.

At defendants' request the court gave an instruction (No. 48) in the language of B.A.J.I. No. 135, reciting:

> "At the outset of this trial, each party was entitled to the presumptions of law that every person takes ordinary care of his own concerns and that he obeys the law. These presumptions are a form of prima facie evidence and will support findings in accordance therewith, in the absence of evidence to the contrary. When there is other evidence that conflicts with such a presumption, it is the jury's duty to weigh that evidence against the presumption and any evidence that may support the presumption, to determine which, if either, preponderates. Such deliberations, of course, shall be related to, and in accordance with, my instructions on the burden of proof."

It is admitted that this instruction may have been applicable to the plaintiff, at the outset, because of his loss of memory of the facts, but plaintiff contends it was not applicable to defendants who were present and testified to the surrounding facts, citing Rozzen v. Blumenfeld, 117 Cal.App.2d 285, 287, 255 P.2d 850; Ford v. Chesley Transportation Company, 101 Cal.App.2d 548, 552, 225 P.2d 997; Jones v. Scurlock, 96 Cal. App.2d 201, 203, 214 P.2d 599; and Keller v. Key System Transit Lines, 129 Cal.App. 2d 593, 600, 277 P.2d 869, 872. In the latter case the trial court granted a new trial, holding it to be prejudicial error to give the same instruction where the party to the action is living and all circumstances of the action are proved. It was there held, where plaintiff had no recollection of the happening of the accident it was proper to instruct the jury in the light of this presumption where there is nothing in plaintiff's testimony that is irreconcilable with such presumption. And quoting from Ford v. Chesley Transportation Company, supra, said, "'the presumption may not be relied on by a party who can and does produce complete and explicit evidence as to his conduct in the premises.'" See also Paulsen v. McDuffie, 4 Cal.2d 111, 47 P.2d 709; Tuttle v. Crawford, 8 Cal.2d 126, 63 P.2d 1128.

In support of the instruction given see B.A.J.I. Inst. No. 135, page 314, Footnote H; Indices to Probability, Palmer, p. 160, chap. 10; and Stanford Law Review, Vol. 2, p. 559.

Assuming, therefore, from the authorities cited, including Tuderios v. Hertz Drivurself Stations, 70 Cal.App.2d 192, 198, 160 P.2d 554, that it was error to give such an instruction as applicable to defendants, and that a reversal was justified on this ground alone, we must then determine whether the facts and allowable inferences to be deduced therefrom justify the court's conclusion that there was sufficient evidence to again sub-

mit that issue for another trial. The question is a close one.

The main evidence of defendants' negligence comes from the testimony of the defendant truck driver, called as a witness for plaintiff. If we accept his testimony, as given at the trial, it might well appear that he was not negligent in failing to look and to take adequate precaution in the operation of his truck, under the circumstances related. Opposed to that testimony are certain facts and inferences which the jury might be entitled to draw from the evidence. Thomas Street was a public roadway and was extensively used by the employees and vehicles of the Parrish Company. On the day indicated it was wet, muddy and slippery. It might well appear that Maynard knew that plaintiff had been in and around the cement truck and had exhibited an unusual curiosity about it; that he was acting strangely and was not in full possession of his faculties immediately preceding the time when he entered the truck to start it; and that he knew plaintiff was in the vicinity of the right rear of the truck. The circumstances indicate that plaintiff must have been alongside, had a hold on or under the truck when it started, and was either knocked down by it or plaintiff slipped and fell and was dragged about 18 to 30 feet; that Maynard could not see over or around his truck except by the use of mirrors; that had he so looked before starting the truck he would or could have seen plaintiff in a dangerous position; that he did not look, or if he did he did not see that which was apparently in his vision. It is conceded that no horn was sounded by the truck driver. Section 671(b) of the Vehicle Code provides: "The driver of a motor vehicle when reasonably necessary to insure safe operation shall give audible warning with his horn. Such horn shall not otherwise be used."

[1] The trial court erroneously refused this proffered instruction, with the statement to the effect that it was because the starting of the Diesel motor was sufficient warning. This was a question of fact for the jury to determine. Hilyar v. Union Ice Company, 45 Cal.2d 30, 37, 286 P.2d 21.

Notwithstanding defendants' testimony, plaintiff offered in evidence Maynard's statement made to the highway patrolman which might indicate that he did not look in the mirror before starting the truck but did so later when his attention was called to the fact of plaintiff's presence in the vicinity of the rear wheels of the truck. Section 543 of the Vehicle Code provides:

> "No person shall start a vehicle stopped, standing or parked on a highway nor shall any person back a vehicle on a highway unless and until such movement can be made with reasonable safety."

[2] See also Withey v. Hammond Lumber Co., 140 Cal.App. 587, 35 P.2d 1080; Frederiksen v. Costner, 99 Cal.App.2d 453, 458, 221 P.2d 1008; Rednall v. Thompson, 108 Cal.App.2d 662, 667, 239 P.2d 693; Boots v. Potter, 122 Cal.App.2d 927, 935, 266 P.2d 176, 39 A.L.R.2d 1; Lebkicher v. Crosby, 123 Cal.App.2d 631, 635, 267 P.2d 361; and Soda v. Marriott, 118 Cal.App. 635, 640, 5 P.2d 675. While the jury was, and the trial judge might well have been justified in not believing this fact or inference, this court, on appeal, is not so authorized. Brinkerhoff v. Ferguson, 107 Cal. App.2d 175, 176, 236 P.2d 588; Mazzotta v. Los Angeles Railway Corp., 25 Cal.2d 165, 169, 153 P.2d 338; Richardson v. Ham, 44 Cal.2d 772, 285 P.2d 269; Armenta v. Churchill, 42 Cal.2d 448, 455, 267 P.2d 303.

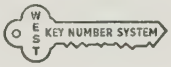
[3, 4] The question of plaintiff's claimed contributory negligence, although somewhat convincing to us and might well have justified a denial of a motion for new trial, was one of fact and not of law. Hoppe v. Bradshaw, 42 Cal.App.2d 334, 108 P.2d 947. In this connection the trial court properly gave defendants' instruction in the language of section 596.5 of the Vehicle Code relating to unlawful riding. The theory that plaintiff was endeavoring to ride on some portion of the truck, which was not intended for use of passengers, to the cement storage room is fully supported by the evidence. Other given instructions about which plaintiff complains were proper in substance. Those of plaintiff's which were refused were sufficiently covered by other instructions. There was a sufficient compliance with section 658 of the Code of Civil Procedure conferring jurisdiction on the court to hear and determine the motion for new trial on the

grounds here indicated. The photographs received in evidence were properly admitted. However, the trial court improperly refused to admit certain photographs offered by defendants in evidence upon the showing made. No error appears in the court's ruling in relation to plaintiff endeavoring to impeach his own witness Ham.

[5–7] It appears to us that the trial judge in the first trial properly held that he was justified in granting a new trial on the grounds of insufficiency of the evidence. It further appears to us that there was convincing evidence of contributory negligence on the part of plaintiff which justified the jury in the second trial in returning a verdict in favor of the defendants and that it was not misled, to plaintiff's prejudice, by any erroneous instructions given by the trial court. However, the rule of law as to the power of the trial court to weigh the evidence is different from the power of this court on appeal, in ruling on an order granting a new trial. 20 Cal.Jur. p. 117, sec. 75. If a new trial is had, it should be presented under proper instructions.

The order granting a new trial is affirmed. Plaintiff's cross-appeal from the judgment is dismissed.

BARNARD, P. J., and MUSSELL, J., concur.



In the Matter of the ESTATE of Charlie Ella FRAYSHER, Deceased.

Georgia REYNOLDS, Objector and Appellant,

v.

David N. FRAYSHER, Executor and Respondent.*

Civ. 5276.

District Court of Appeal, Fourth District, California.

May 17, 1956.

Rehearing Denied June 12, 1956.

Hearing Granted July 11, 1956.

Proceeding on objections to first account current and report of executor and petition for allowances upon commissions of executor and attorneys' fees and confirmation of sale of personalty. From portions of order in probate of the Superior Court of San Bernardino County, Martin J. Coughlin, J., approving account and report, including allowances, and confirming sale of personalty, and from order denying motion for an order requiring executor to produce for inspection bank account, checks and diary of testatrix, the objector appealed. The District Court of Appeal, Conley, J. pro tem., held that since proceeding involved numerous contested questions of fact, error of trial court in basing its decision on affidavits in lieu of oral evidence required a reversal of order approving account and report and confirming sale of personalty as to all matters specified in notice of appeal.

Appeal from order denying motion for an order requiring production of bank account, etc. for inspection dismissed, and order approving account and report and confirming sale of personalty reversed with instructions.

1. Executors and Administrators ⇐510(2)

Order denying motion for an order requiring executor to produce for inspection bank account, checks and diary of testatrix was not an appealable order. West's Ann.Prob.Code, § 1240.

2. Courts ⇐202(5)

Where an appeal is taken on questions of fact from an order in probate, a record of the evidence must be brought before reviewing court.

3. Affidavits ⇐18

Use of affidavits in lieu of oral evidence in a contested probate proceeding was not authorized by statute. West's Ann. Code Civ.Proc. § 2009; West's Ann.Prob. Code, § 1233.

4. Affidavits ⇐18

Affidavits may not be used in evidence except where permitted by statute. West's Ann.Code Civ.Proc. § 2009; West's Ann. Prob.Code, § 1233.

5. Executors and Administrators ⇐510(8)

Objections to first account current and report of executor and to petition for con-

* Opinion vacated 301 P.2d 848.

firmation of sale of personalty and allowances upon commissions of executor and attorneys' fees involved numerous contested questions of fact, and error of trial court in basing its decision on affidavits without taking any oral evidence required a reversal of order approving account and report, including allowances, and confirming sale of personalty, particularly where the evidence, even if such affidavits were accepted, was insufficient to support order with respect to some contested items. West's Ann.Code Civ.Proc. § 2009; West's Ann.Prob.Code, § 1233.

C. E. Crowley, Ontario, for appellant.

Edgar C. Keller, San Bernardino, for respondent.

CONLEY, Justice pro tem.

The holographic will of Charlie Ella Fraysher, a widow, left $1 to each of her children, except the appellant herein, Georgia Reynolds, to whom she devised and bequeathed "the Place & all Households *artic*ulurs." No one questions that she meant thereby that her daughter, Georgia, was to receive her little home (appraised at $2,500) and the furnishings therein (appraised at $100). Because of the specification in the will: "Nelse Fraysher Gardian to see these plans are carried out", her son David N. Fraysher (also known as Nelse) was appointed executor.

The record indicates that the probate of this small estate has furnished the occasion for one of those unfortunate family feuds in which brother and sister, forgetting the Biblical injunction to "love one another", have shown a reciprocal distrust and vindictiveness, that would scarcely occur between strangers. This has made the duties of the probate judge in the administration of the estate particularly onerous.

The appeal is taken by Georgia Reynolds from certain portions of an "Order Approving First Account Current and Report of Executor, Including Allowance upon Commissions of Executor, Attorney Fees and Extraordinary Attorney Fees; Confirming Sale of Personal Property; and Instructing Executor", said portions being specified as follows:

"(a) From that part of said order approving the claim of David N. Fraysher, in the sum of $461.67.

"(b) From that portion of said order approving 'all items of expenses listed in Schedule A of said account excepting the certain items enumerated.'

"(c) From that part of said order approving the claim of $200.00 for extraordinary attorney's fees, and allowing statutory fees for executor and attorneys.

"(d) From that part of said order confirming the sale of the household furnishings set forth as Exhibit 'A', sold to a son of the executor, at least six months before appraisement, without notice.

"(e) From the blanket portion of said order approving said account current 'in all other respects, other than as otherwise herein set forth', thereby overruling the objections to said report made by this appellant."

[1] An appeal is also attempted from "the order of said Court dated and entered September 2nd, 1955, overruling and denying appellant's motion for an order requiring the executor to produce for inspection, the bank account and checks and diary of the deceased" but as there is no authority for such an appeal, Section 1240, Probate Code, it must be dismissed.

[2] Turning again to the order settling the account, we find that the record on appeal is not in good shape. There is no reporter's transcript; and no oral testimony was received by the court. Appellant says in her brief: "The affidavits of Shirley Smith [P. 58–62] and Georgia Reynolds [P. 63–67] and the counter affidavit of respondent [P. 49–55] and the objections of appellant [P. 35–45], without taking of testimony, were all submitted to the Court for ruling," and respondent states in his brief that the matter was submitted "after argument." Normally, in the contest of an account the respective sides produce witnesses to be examined in open court.

And when an appeal is taken on questions of fact it is necessary to bring a record of the evidence before the appellate court. 34 C.J.S., Executors and Administrators, § 931 Record, pp. 1145–1147; Estate of Reed, 9 Cal.App.2d 94, 96, 48 P.2d 177. As it appears, however, from the briefs and the recitals in the order appealed from that no evidence was taken, but that unspecified affidavits "filed on behalf of both the executor and the objector" were "read and considered by the court" it must be asked whether in a contested probate matter our codes authorize the reception in evidence of affidavits in lieu of oral testimony, particularly in the absence of specific stipulations of counsel relative thereto.

[3, 4] Section 1233 of the Probate Code authorizes the use of affidavits or verified petitions as evidence "* * * in any uncontested will proceedings." And Section 2009 of the Code of Civil Procedure permits the use of an affidavit "to verify a pleading or a paper in a special proceeding, to prove the service of a summons, notice, or other paper in an action or special proceeding, to obtain a provisional remedy, the examination of a witness, or a stay of proceedings, and in uncontested proceedings to establish a record of birth, or upon a motion, and in any other case expressly permitted by some other provision of this code." But nowhere in our codes or statutes is there an authorization for the substitution of affidavits for moral evidence in a contested probate proceeding such as this. "Affidavits may not be used in evidence except where permitted by statute." Reidy v. Collins, 134 Cal.App. 713, 722, 26 P.2d 712, 715. See also: Moon v. Moon, 62 Cal.App.2d 185, 188, 144 P.2d 596; Lacrabere v. Wise, 141 Cal. 554, 556, 75 P. 185; Estate of Paulsen, 35 Cal.App. 654, 656, 170 P. 855.

[5] As there are numerous contested questions of fact involved, and as the trial court erroneously based its decision on affidavits and without taking any oral evidence, a reversal must follow. Moreover, with respect to some of the items in question, the evidence would not be sufficient, if the affidavits were accepted, to support the orders made.

It is ordered: that the attempted appeal from the order of September 2, 1955 overruling and denying appellant's motion for an order requiring the executor to produce for inspection the bank account and checks and diary of the deceased is dismissed, and that the order of July 11, 1955 approving the first account current and the report of executor, including the allowance upon commissions of executor, attorney fees and extraordinary attorney fees; confirming sale of personal property and instructing the executor, is reversed as to all matters specified in the Notice of Appeal on file herein, with instructions to the trial court, upon the filing of the remittitur below, to proceed expeditiously to a hearing on the said issues as made by the "First Account Current and Report of Executor and Petition for Confirmation of Sale of Personal Property and Allowance upon Commissions of Executor and Fees of Attorneys and for Instructions" and the "Objections to Current Report of Executor", in conformity herewith. Each party shall bear his own costs on this appeal.

BARNARD, P. J., and MUSSELL, J., concur.



141 Cal.App.2d 749

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Howard N. GILLIAM, Defendant and Appellant.

Cr. 5543.

District Court of Appeal, Second District, Division 2, California.

May 23, 1956.

Defendant was convicted of six counts of grand theft by false pretenses and by trick and device. The Superior Court of Los Angeles County, Charles W. Fricke, J., entered judgment, and defendant appealed.

The District Court of Appeal, Ashburn, J., held that evidence sustained conviction.

Judgment affirmed.

1. False Pretenses ⇐22

Fact that victims of false pretenses of defendant were incredibly credulous and greedy did not absolve defendant from guilt in prosecution for grand theft. West's Ann. Pen.Code, §§ 484, 487, subd. 1.

2. Criminal Law ⇐3

One who is guilty of grand theft by false pretenses and trick and device, is prosecuted in the interest of the People of the State and not in the interest of the party defrauded. West's Ann.Pen.Code, §§ 484, 487, subd. 1.

3. Criminal Law ⇐1160

Before jury's verdict, which has been approved by trial court, can be set aside on appeal on ground of insufficiency of the evidence, it must be made clearly to appear that on no hypothesis whatever is there sufficient substantial evidence to support conclusion reached in trial court.

4. Criminal Law ⇐1144(13)

Reviewing court must assume in favor of verdict of guilty the existence of every fact which jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.

5. Criminal Law ⇐1159(6)

If circumstances reasonably justify verdict of jury, opinion of reviewing court that those circumstances might also reasonably be reconciled with the innocence of defendant will not warrant interference with determination of jury.

6. False Pretenses ⇐49(1)

Evidence sustained conviction of six counts of grand theft by false pretenses and by trick and device. West's Ann.Pen. Code, §§ 484, 487, subd. 1.

Harrison M. Dunham, Los Angeles, Harold J. Ackerman, Los Angeles, of counsel, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Emmet Seawell, Deputy Atty. Gen., for respondent.

ASHBURN, Justice.

Convicted of six counts of grand theft, Pen.Code, § 484; § 487, subd. 1, defendant appeals from the judgment and relies upon the sole claim of insufficiency of the evidence to support the verdict.

[1, 2] The victims of defendant's false pretenses were incredibly credulous and greedy but that does not absolve defendant from guilt. On the civil side of the law of fraud it is said: "If the conduct of the plaintiff in the light of his own intelligence and information was manifestly unreasonable, however, he will be denied a recovery. * * * 'He may not put faith in representations which are preposterous, or which are shown by facts within his observation to be so patently and obviously false that he must have closed his eyes to avoid discovery of the truth * * *.' Prosser Torts, 749." Seeger v. Odell, 18 Cal.2d 409, 415, 115 P.2d 977, 981, 136 A.L.R. 1291. This rule (seldom applied) is tempered by the further consideration that: "Exceptionally gullible or ignorant people have been permitted to recover from defendants who took advantage of them in circumstances where persons of normal intelligence would not have been misled. * * * 'No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool.'" Seeger v. Odell, supra. On the criminal side it is recognized that "[t]he guilty party is prosecuted in the interest of the people of the state, and not in the interest of the party defrauded." People v. Skidmore, 123 Cal. 267, 268, 55 P. 984, 985. Foolish reliance by the victim of a preposterous fraud does not require that one who has violated the statute should go free on that account. "In determining in cases like the present whether the defrauded party really believed and acted upon the representations of the accused, it is proper to consider whether they were of a character to probably induce belief in his mind, or in the mind of any person of ordinary intelligence; but the law, as it is at this day understood, [does not make it essential

to conviction that the pretenses must have been such as would probably deceive such a person]. The guilt of the accused does not depend on the degree of folly or credulity of the person defrauded. The rule invoked affords no defense against a criminal charge." People v. Cummings, 123 Cal. 269, 272, 55 P. 898, 899. To the same effect are People v. Smith, 3 Cal.App. 62, 65–66, 84 P. 449; People v. Bellew, 90 Cal.App.2d 801, 802, 203 P.2d 822; 22 Am.Jur. § 27, p. 459; 35 C.J.S., False Pretenses, § 15, p. 652; 25 C.J. § 26, p. 598.

[3–5] Review of the evidence must be governed by the rule laid down in People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 780: "'* * * before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground' of insufficiency of the evidence, 'it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. * * * We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.' If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury."

[6] On August 19, 1954, defendant caused to be published in the Los Angeles Times, a metropolitan newspaper, the following advertisement: "Investors Wanted, Inactive, for Nevada gambling enterprise. Will assure by contract 30% monthly profit on your investment from $300 to $300,000. P. O. Box 561, Glendale 5, California." He received responses from four people, Michael V. Barton, Larry E. Robinson, J. B. Furman, and one Garber. All of them "invested" in defendant's "enterprise" and all but Garber were prosecution witnesses. Defendant's mode of approach and his subsequent procedure were substantially the same in each case. Following initial inquiry by a prospect defendant under an assumed name, Vincent Surrocco,[1] sent him a letter, bearing no street address, merely a Glendale post office box, typified by the one addressed to Barton. It reads: "Citrus 3–5991. Post Office Box 561, Glendale 5, California. August 30, 1954. Mr. M. V. Barton, 1771 Griffith Park Boulevard, Los Angeles 26, California. Dear Mr. Barton: I appreciate your interest in my advertisement in the Los Angeles Times. Since this operation is highly profitable to the investor, I don't feel it necessary to disclose the methods or details of operation other than to tell you that it is a Nevada gambling venture. As stated in the advertisement, I am preparing to give you as an investor a contract assuring you a 30% profit monthly on your investment. I realize that to the cautious investor this may not seem to be enough security, but one must remember that a highly profitable investment cannot be secured as the low-profit type. Thus it is up to you to decide whether you prefer a 360% profit annually with the security mentioned or 6 to 8% annually with more security. As you can see, we all stand to gain more by pooling our investments to make the large profits available only on investments of huge sums of money.

"I am cooperating fully with those who have already invested in the venture. I have given several of them 60-day options in their contracts. If they are not satisfied with the profits at that time, I will return their investments in full. As you know, Nevada gambling is the most profitable business in operation, but it takes large sums of money to finance it. It is seldom that you will be offered an opportunity to invest in a venture that is as sound and still as profitable as this one.

"If after consideration, you are still interested in investing with us, please let me know as quickly as possible, giving me definite details as to the amount you wish

1. He had filed a fictitious firm name certificate showing that he was doing business under the name "Surrocco Enterprises" but he had done nothing to formalize or publicize the use of the name "V. Surrocco" or "Vincent Surrocco."

to invest, and whether or not you wish the 60-day option. I will have your contract drawn up and will then contact you. Sincerely yours, V. Surrocco." When the money was forthcoming a contract, drawn by defendant, was forwarded to the "investor." These contracts differed somewhat, but in the main followed the form furnished to Barton; so far as pertinent it reads: "This agreement made the 3rd day of September, 1954, between Surrocco Enterprises * * * the party of the first part, and M. V. Barton * * * the party of the second part, witnesseth: That the said party of the first part, * * * hereby covenants with the said party of the second part that the said party of the first part will deliver to the said party of the second part at his home in said City and County of Los Angeles, monthly, beginning with the 3rd day of October, 1954, an amount equal to 30% of $300.00. * *

"It is further agreed that this contract may be cancelled by either the said party of the second part or by the said party of the first part upon 30 days notice to the other interested party, at which time the said party of the first part will deliver to the said party of the second part the balance due as agreed upon in this contract.

"Included also in this contract is an option to be exercised on the 60th day after the signing of this contract. If the said party of the second part so desires he may request and receive from the said party of the first part the entire amount invested. However, should said party of the second part desire to leave his investment with said party of the first part, then after the sixtieth day it shall automatically revert to the first, second and third paragraphs of this contract. * * *"

It is claimed that these documents, being promissory in form, could not constitute a basis for a charge of false pretenses. It is settled, however, that a promise made with an existing intent not to perform may constitute a false pretense within the grand theft statute. People v. Ashley, 42 Cal.2d 246, 262–265, 267 P.2d 271; People v. Weitz, 42 Cal.2d 338, 343, 267 P.2d 295. The jurors in this case were justified in inferring that defendant at the time of making them intended not to perform his promises.

He operated under an assumed name and through a post office box without disclosure of his true name or his business or residential address. His advertisement offered to "assure by contract 30% monthly profit on your investment from $300 to $300,000." Thirty per cent of $300,000 is $90,000. The promise was to pay that much each month. Defendant had not the capacity to do this and hence it is an inevitable inference that he did not intend to do so. If that is true of the maximum amount, it would seem also true of the lesser sums, such as Barton's $300 investment.

Defendant's plan, so he testified, was to use the investors' money to play roulette in Las Vegas, not to run a gambling establishment but to play against the house. He claimed to have a tried system that would yield the promised return. Barton was told that the investment would be returned in case the venture failed. His contract contained both a 30-day cancellation clause and a like 60-day termination option. On cross-examination defendant testified that in each instance he intended to perform "if the money were not lost, all funds were not lost." Also that he *meant* that the investors would get their money on exercise of either option *if* the money was not lost. Of course the promise was individual and absolute. Obviously he did not intend to make good out of his own pocket and his promise was just as good as his prospect of winning the guaranteed 30% a month. He had no reasonable basis for expecting to do that. He knew that the odds of his type of play were more than 50% against the player and that a 30% profit was "pure speculation." "I had a pretty fair idea that the outcome would be profitable. Of course, not being a profit (sic) I had no way of knowing exactly what the outcome would be, of course, similar to what you would find in any other venture."

The second victim was Robinson, who turned over to defendant $1,200 on the strength of the advertisement, letter and contract. He had no personal interview with defendant. All of the transactions

under discussion followed the same general pattern and thus each shed light upon the others.

That defendant did not intend to make good on his promises is further evidenced by the fact that he continued to obtain money from Furman after he had notified Barton and Robinson that their contracts were cancelled because "[d]ue to circumstances beyond our control we are forced to discontinue operation of the Nevada project in which you were interested." On the witness stand he claimed that all the money then had been lost. Assuming that he was using the various investors' funds in Las Vegas gambling as he claimed, it was not true that all the moneys had been lost because he was in possession of funds received from Furman. He told Barton that "[y]ou will recieve from us the balence due as also agreed upon in the contract with reference to this cancellation." But instead of keeping his promise he appropriated all the funds to his own exclusive use. Neither Barton nor Robinson ever heard from defendant again. Their letters and telephone calls were unanswered until Robinson notified defendant that he would contact the police, whereupon he received an unsigned letter reading as follows: "Your recent letter to Vincent Surrocco Enterprises was forwarded to them at their new mailing address. All further correspondence should be mailed to them at General Delivery, Las Vegas, Nevada."

The Furman dealings cast a revealing light upon the whole series of transactions and upon defendant's underlying intent. The first investment followed the same lines as Barton's and Robinson's. Furman was living in Centralia, Washington (later, Portland, Oregon). He, a professional musician, had the misfortune to see the advertisement in the Los Angeles Times of August 19, 1954. In response to an inquiry from him defendant sent a form of contract with a request that he, Furman, fill in the blanks, sign the instrument and forward his check. Furman dated the contract September 8, 1954, filled in the amount of $560 and inserted the words "per year," making the pertinent portion read: "[T]he said party of the first part will deliver to the said party of the second part, at his address in said city and county, monthly, beginning with the ——— day of ———, 19—, an amount equal to 30 percent of $560.—, per year." In transmitting the contract and check Furman advised defendant that he "expected to have a few thousand available for further investment in a short time." Under that same date of September 8,[2] Furman received from defendant a letter reading as follows: "Please find enclosed a money order to the amount of $14.-00. This is the first of your returns on your investment of Sept. 8, 1954. It is indeed a pleasure to forward this to you. Having your previous coorespondence before me I see that you planned to invest further with us, on October 5, and November 5, and upon receipt of your returns from a trust deed. Please feel free to forward to the writer any amount you wish to invest, at the same rate of interest as the original contract." In a follow-up letter of September 14, defendant made further reference to future investments by Furman. On November 10th defendant forwarded a proposed contract covering an additional investment of $1,640 (later increased to $2,-440); the letter contained this postscript: "Also please find enclosed a money order to the amount of $14.00 which is your November dividend due Nov. 8, and again may I apolagise for the delay." Enclosed was a second $14 check. Defendant testified that prior to sending these two "dividend" checks he had notified Barton and Robinson and Garber that the enterprise had "folded" but he never did advise Furman to that effect, and he testified on cross-examination: "Q. Now, isn't it true that at this time Mr. Furman's money had gone down the drain on the gambling tables in Las Vegas? A. Yes, it had. Q. And it had been gone for two months, isn't that right? A. Yes, it had."

Each letter that Furman wrote to defendant spoke of a desire and an intention to make further investments with defendant and in fact, with one exception, each of his

2. At the trial it was suggested that this letter should have been dated October 8, 1954.

four investments was larger than the one preceding, $560, $2,440, $2,000 and $5,000. In discussing a proposed new investment of $7,000 (represented by the $2,000 and $5,000 items) Furman expressed satisfaction with investment in Las Vegas gambling, sought and received assurance that his money would be so invested; he was also promised that it would be secured by an interest in a Hollywood night club located on Sunset Strip. At the time this assurance was given defendant, according to his own testimony, had lost all funds previously forwarded by Furman but had not disclosed the fact to him. After defendant received the $2,000 and before the $5,000 came through he sent to Furman two checks for $55 and $20, respectively, which appeared to be dividend checks. He told investigating officer Knowles that they were dividend checks but he could not say on what amount. Furman's $2,000 and $5,000 remittances were both deposited in defendant's personal bank account and he never sent to Furman a contract covering either sum.

Defendant claimed in his talk with Knowles that Furman's money had been lost in Nevada gambling. At the trial he gave a different version. He there testified that the $2,000 and the $5,000 were used in purchase of a restaurant known as "La Madelon;" that that deal was rescinded and Furman's money switched to the purchase of a Santa Monica restaurant known as "Adam's Rib"; also that that restaurant was owned by a new corporation named "Gilliam Enterprises" and that Furman was owner of 50% of the stock. Furman never heard of "La Madelon" by name. He thought at all times that his money was invested in part-ownership of a Nevada gambling establishment. He never heard of "Adam's Rib" or of "Gilliam Enterprises."

On February 8, 1955, defendant advised Furman that "[d]ue to unforseen circumstances in Nevada our gambling enterprise has run into extreme financial difficulties" and that "otherwise unnecessary risks" would have to be taken. This was followed by a communication of the 22nd to the effect that "our Nevada gambling venture has been forced to a financial halt due to extreme financial setbacks recently as I explained to you earlier." On the 11th of February Furman had written to defendant but that letter was returned by the post office department. Numerous subsequent letters were sent to defendant demanding the return of Furman's money; same were not returned but he did not hear from Gilliam until June, 1955. On that day he came to Furman's home in Portland, Oregon, and spent most of the day trying to effect a fabrication of evidence in the shape of a statement signed by Furman, one designed to exonerate defendant of the charge of grand theft that had been filed against him on May 25, 1955.

The conclusion that defendant deliberately and consistently defrauded Furman and that he never had any intention of performing any of the promises made to him or to the other victims is well fortified by the evidence.

The proof also sustains a finding of larceny by trick and device. People v. Bartges, 126 Cal.App.2d 763, 770, 273 P.2d 49; People v. Mason, 86 Cal.App.2d 445, 450, 195 P.2d 60; People v. Owens, 117 Cal.App.2d 121, 123, 255 P.2d 114; People v. Sears, 124 Cal.App.2d 839, 853, 269 P.2d 683; People v. Chamberlain, 96 Cal.App.2d 178, 182, 214 P.2d 600.

Defendant's attempted explanations of the matters above mentioned, and others equally damaging, were rejected by the jury and by the trial judge who denied defendant's application for probation.

The judgment is affirmed.

MOORE, P. J., and FOX, J., concur.

141 Cal.App.2d 667

Ralph A. JONES, Plaintiff, Respondent and Cross-Appellant,

v.

Clydia A. GORE, Defendant, Appellant and Cross-Respondent.

Civ. 21235.

District Court of Appeal, Second District, Division 1, California.

May 21, 1956.

Action against plaintiff's deceased wife's daughter to impress real estate, title to which had been taken in names of wife and daughter as joint tenants, with resulting trust to extent that wife had paid purchase price from community assets of husband and wife, and for other relief. The Superior Court of Los Angeles County, Herbert V. Walker, J., entered the judgment impressing property with resulting trust, and both parties appealed. The District Court of Appeal, Fourt, J., held that evidence sustained imposing trust, and that finding plaintiff was entitled to reimbursement for amounts he had paid to satisfy deed of trust to property.

Judgment affirmed as modified.

1. Appeal and Error ⇐193(1)

Objection that complaint does not state a cause of action may be raised for first time on appeal.

2. Pleading ⇐34(6)

In absence of demurrer and after judgment, complaint must be construed most favorably to pleader's case and all legitimate inferences from facts alleged must be drawn in his favor.

3. Trusts ⇐359(1)

Where there has been no written contract, and party sues to impress a purchase price resulting trust upon property, the suit is on statutory presumption of resulting trust and not upon oral contract or antecedent oral negotiations. West's Ann.Civ. Code, § 853.

4. Trusts ⇐62

A resulting trust is implied from facts, and neither written evidence of agreement nor fraud on part of alleged trustee is essential to its existence. West's Ann.Civ. Code, § 853.

5. Trusts ⇐62

A resulting trust arises where title to property is vested in trustee and consideration is paid by beneficiary. West's Ann. Civ.Code, § 853.

6. Trusts ⇐371(2)

Complaint, in action against plaintiff's deceased wife's daughter to impress real estate, title to which had been taken in names of wife and daughter as joint tenants, with resulting trust to extent that wife had paid purchase price from community assets of husband and wife, sufficiently alleged cause for resulting trust. West's Ann.Civ.Code, § 853.

7. Trusts ⇐88

Parol evidence is admissible to prove existence of resulting trust. West's Ann. Civ.Code, § 853.

8. Trusts ⇐63½

Statute of frauds has no application in action for resulting trust. West's Ann.Civ. Code, §§ 853, 2922; West's Ann.Code Civ. Proc. § 1971.

9. Witnesses ⇐133

The dead man's statute does not prohibit receiving of testimony of oral statements of decedent to plaintiff in action to establish resulting trust. West's Ann.Civ.Code, § 853; West's Ann.Code Civ.Proc. § 1880, subd. 3.

10. Appeal and Error ⇐1009(2)

Whether evidence to prove existence of trust is clear, satisfactory and convincing is primarily question for trial court to determine, and if there is substantial evidence to support its conclusion, determination is not open to review on appeal. West's Ann.Civ.Code, § 853.

11. Appeal and Error ⇐994(3), 1012(1)

In action to establish trust, credibility and weight of evidence are exclusively for trial court. West's Ann.Civ.Code, § 853.

12. Trusts ⇐89(2)

In action against plaintiff's deceased wife's daughter by former marriage to establish resulting trust in real estate held by

wife and daughter as joint tenants to extent that wife had paid purchase price from community assets of husband and wife, evidence supported trial court's finding of resulting trust. West's Ann.Civ.Code, § 853.

13. Joint Tenancy ⇐6

Legal title to realty held in joint tenancy vested in survivor at death of other joint owner.

14. Joint Tenancy ⇐14

In action against surviving joint tenant to establish resulting trust in property, deceased joint tenant's estate was neither necessary nor proper party. West's Ann. Civ.Code, § 853.

15. Trusts ⇐112

Trust lien on property recognized by judgment related back to time it was created by conduct of parties.

16. Liens ⇐23

Subrogation ⇐17

Junior lienholder had right to redeem property subject to lien and, by so redeeming it, became subrogated to rights of senior lienholder and was entitled to be reimbursed for payments made with interest. West's Ann.Civ.Code, § 2903.

Henry Grivi, Los Angeles, for appellant and cross-respondent.

Thomas W. Hughes, Los Angeles, for respondent and cross-appellant.

FOURT, Justice.

This is an action to establish a resulting trust in certain real property, and for an accounting. The action for an accounting was abandoned and after a trial before the court without a jury, judgment was rendered decreeing that defendant held the property in question in trust for plaintiff in the following particulars: That plaintiff recover from defendant the sum of $4,000, plus interest, and a trust lien be impressed upon the property for such amount; that plaintiff recover the further sum of $157.58, plus interest, for taxes paid by plaintiff on the property and a trust lien be impressed thereon for that amount; that such liens are prior to any liens except the first deed of trust and taxes. The judgment further provided for the sale of the property in the event the liens were not paid within ten days from entry of judgment. Defendant has appealed from the entire judgment and plaintiff has appealed from that portion of the judgment denying him recovery for the amounts advanced by him as monthly installments on the first deed of trust lien.

Facts: In September, 1935, plaintiff married Evalyn H. Jones, who had been previously married and by such former marriage had a child, Clydia Gore, the defendant herein. For three and a half years plaintiff and his wife lived in San Francisco and from there they moved to Atascadero, where they bought an unimproved lot. At the time of the purchase title was taken in their names in joint tenancy, with the understanding that it was in fact community property. They built a home on the lot and resided there about three years. In about 1943, plaintiff decided to go to Southern California, and at that time gave his wife a quitclaim deed in her favor to the property. She sold the property in his absence and banked the proceeds as community property. In 1947, plaintiff and his wife, with their community funds, bought a home in Los Angeles county for $11,500.00, taking title as joint tenants, and paying all but $2,000.00 from their savings. In this transaction defendant, the adult married daughter of plaintiff's wife, lent her mother and plaintiff $2,000.00 evidenced by an unsecured note, and the amount was repaid to her.

In 1951, plaintiff and his wife decided to sell their property and as before, plaintiff executed a quitclaim deed in his wife's favor in order that she could handle the sale. The property was sold for $11,500 and the proceeds were placed by plaintiff's wife in their joint bank account as community property. After this sale, plaintiff and his wife lived in a trailer for some time. About December, 1951, plaintiff's wife was operated on for cancer of the throat and lost her voice. From that time until her death on January 20, 1953, she was unable to talk and used a slate to write on to convey her thoughts.

One Sunday in April, 1952, while plaintiff and his wife were on a drive, she noticed the house involved in this case. She caused plaintiff to stop and wrote on the slate, "Let's look at it." A real estate salesman advised them that the owners wanted $15,000 for the property, which they stated was more than they desired to pay. They went in and around the place and talked with the salesman again, who indicated that the owners might sell for $13,900, if the furnishings were a separate transaction. Plaintiff and his wife went back to their place of abode and exchanged views about the property. Mrs. Jones indicated that she was going to have her daughter (defendant) look at the place and ascertain what she thought of it. Mr. and Mrs. Jones conferred about the price of $13,900. Mrs. Jones later advised plaintiff that she had agreed to buy at that price and that they would have to assume a first mortgage already on the property. She also stated that she did not want to deplete their bank account and that her daughter had offered to loan them $2,000. Plaintiff and his wife conferred about the financing of the purchase, as $6,000 was required as a down payment. It was contemplated and talked of that $4,000 could be taken from their savings and the balance of $2,000 could be secured from defendant as a loan. At that time it was agreed that the property was to be in joint tenancy ownership of plaintiff and his wife.

Within a day or so after plaintiff delivered a $4,000 cashier's check to his wife for the property she inquired of him whether he would have any objection to her and her daughter taking title as joint tenants. Plaintiff stated, in substance, that he had no objections if he were protected. Mrs. Jones wrote on her slate, in essence, that he would be protected by either a mortgage or a trust deed.

Plaintiff and his wife moved into the house before the close of the escrow. The day before the closing of the escrow defendant asked plaintiff if the arrangement with reference to the title was agreeable to him and he replied that it was satisfactory provided he was protected. During the escrow period, Mrs. Jones brought plaintiff a deed and asked him to sign it, which he did. At the time, she explained by writing on the slate that this was a formality as the husbands of women were required to sign to close the escrow. She further wrote, in essence, that he was not to worry, that he would be fully protected—that it was just a form. After the escrow was closed, plaintiff's wife wrote several times that he would be protected and that everything was cared for. Plaintiff had complete confidence in his wife during the entire marriage.

During the period of occupancy of the property plaintiff paid ten installments of $64 each on the first encumbrance, and taxes of $157.58, on the property.

In February, 1953, after the death of plaintiff's wife, plaintiff discussed with defendant the sale of the property, at which time she was agreeable to selling it for $15,000. The sale at that price did not materialize. Plaintiff then suggested selling for $13,900, and defendant refused stating that if they waited until September, the market would pick up and there would be no difficulty in selling it. The day following his wife's death, plaintiff found a holographic will of hers, dated December 10, 1952, in which she directed that her husband was to have her interest in the property.

Plaintiff remained in the house until about the end of March, 1953, at which time defendant took out most of the furniture, stating that the decedent wanted her to have it.

On October 6, 1953, plaintiff instituted the instant action, first to impress a trust on the property for a 40/139 interest therein, and for an accounting, and secondly under a common count for money received in the sum of $4,797.58. At the time of trial plaintiff was about 73 years of age.

Defendant denied that plaintiff had any interest in the property and alleged that it was purchased by Evalyn H. Jones and defendant as joint tenants and that the interest of each of them was as their sole and separate property.

Defendant's Appeal

Defendant contends that (1) the complaint failed to state a cause of action to establish a resulting trust and that it did not allege facts sufficient to constitute a cause of action for fraud; (2) there was no clear and convincing evidence to establish a trust and no evidence introduced to prove any fraud; (3) that the alleged agreement not being in writing, the cause of action is barred by the provisions of section 1971 of the Code of Civil Procedure and section 2922 of the Civil Code, and (4) that the Estate of Evalyn H. Jones was a necessary party.

[1, 2] There is no merit in these contentions. Defendant did not demur to the complaint. Although the objection that a complaint does not state a cause of action may be raised for the first time on appeal, in the absence of a demurrer and after judgment, the complaint must be construed most favorably to respondent's case and all legitimate inferences from the facts alleged must be drawn in favor of the respondent. Parrott v. Bank of America, 97 Cal.App.2d 14, 22, 217 P.2d 89, 35 A.L.R.2d 263; American Marine Paint Co. v. Tooley, 53 Cal.App.2d 530, 539, 127 P.2d 960; Newmire v. Chapman, 18 Cal.App.2d 360, 362, 64 P.2d 734.

It is alleged in the complaint that plaintiff, his wife, Evalyn H. Jones and defendant orally entered into an agreement to purchase certain described property for the sum of $13,900, the sum of $6,000 to be paid down in cash and the balance of the purchase price to be paid by a loan secured by a first trust deed; that said parties agreed that plaintiff should contribute $4,000 and defendant should contribute $2,000 in cash for the down payment; that it was further agreed that title to the property should be taken in the names of Evalyn H. Jones and defendant, Clydia A. Gore, as joint tenants and that plaintiff should be given a second mortgage or trust deed upon the property executed by said Evalyn H. Jones and Clydia A. Gore in the amount of his contribution, as security, and that plaintiff should own an interest in said property in proportion to his contribution and that said Evalyn H. Jones and Clydia A. Gore should own as joint tenants an interest in proportion to their contribution; that plaintiff and defendant did contribute and pay said sums of money and did purchase said property and a deed was taken in the name of Evalyn H. Jones and Clydia A. Gore as joint tenants; that the second mortgage or deed of trust was never recorded or delivered to plaintiff; that upon the death of Evalyn H. Jones on January 20, 1953, defendant became and was the record owner of the property as the surviving joint tenant; that defendant now claims to own the whole of said property and denies that plaintiff has any interest therein.

Section 853 of the Civil Code provides: "When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the persons by or for whom such payment is made."

[3–5] Where there is no written contract, and a party sues to impress a purchase price resulting trust upon real property, the suit is on the presumption found in Section 853 of the Civil Code, and not upon the oral contract or antecedent oral negotiations. Juranek v. Juranek, 29 Cal. App.2d 276, 280, 84 P.2d 195. "A resulting trust is implied from the facts, and neither written evidence of an agreement nor a fraud on the part of an alleged trustee is essential to its existence. It arises where title of a property is vested in the trustee while the consideration therefor is paid by the beneficiary." Bradley v. Duty, 73 Cal. App.2d 522, 526, 166 P.2d 914, 916.

[6] The complaint does not purport to state a cause of action for fraud. Plaintiff has brought his action to establish a resulting trust and while the complaint may not be a model pleading, viewed as a whole, the allegations contained therein are sufficient to state a cause of action for the relief sought. Pavlovich v. Pavlovich, 22 Cal.App. 500, 504, 135 P. 303.

[7–9] In contending that there was no clear and convincing evidence to establish a trust, defendant urges that plaintiff's testimony was inadmissible because it violated the parol evidence rule and further that even if it were admissible, it should be

given no weight because it was the uncorroborated testimony of a party in interest. These contentions are without merit. Parol evidence is admissible to prove the existence of a resulting trust, Nishi v. Downing, 21 Cal.App.2d 1, 3, 67 P.2d 1057, and where a resulting trust exists the statute of frauds has no application. Walton v. Karnes, 67 Cal. 255, 256, 7 P. 676. As stated in Melickian v. Halstead, 121 Cal.App.2d 469, at page 472, 263 P.2d 652, at page 654: "In reference to the Statute of Frauds, it may be said that if such a defense could prevail in a case of this nature, then no trust could ever be established if its provisions were contrary to the terms of a writing. Such a doctrine, which would do away with resulting and constructive trusts, is not the law. Nor does the so-called 'dead man's statute' prohibit receiving testimony of the oral statements of plaintiff and decedent in an action to establish a trust. Humes v. Humes, 56 Cal.App. 2d 126, 133 P.2d 39."

[10–12] "Whether the evidence to prove the existence of the trust is clear, satisfactory and convincing 'is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal.' [Citing cases.] Likewise, in such cases the credibility and weight of the evidence are exclusively for the trial court. [Citing cases.]" Viner v. Untrecht, 26 Cal.2d 261, 267, 158 P.2d 3, 6; Rowland v. Clark, 91 Cal.App.2d 880, 882–883, 206 P.2d 59.

[13, 14] With respect to defendant's final contention, the estate of Evalyn H. Jones was neither a necessary nor a proper party to the action since the legal title to the property vested in defendant upon the death of Evalyn H. Jones and her estate had no interest in it.

Plaintiff's Appeal

In paragraph VIII of his complaint plaintiff alleged that from the date of the purchase of the property in May, 1952, he paid out and advanced for the benefit and use of defendant ten monthly payments of $64 upon the first deed of trust. In her answer defendant admitted that the payments were made, alleging that they were in lieu of rent. The court found that all the allegations in paragraph VIII were true and correct.

[15, 16] There was no agreement to pay rent and no arrangements were made therefor and none was requested. The trial court having found that plaintiff was entitled to a trust lien upon the property, such lien relates back to the time it was created by the conduct of the parties. Hise v. Superior Court, 21 Cal.2d 614, 627, 134 P.2d 748. Plaintiff, having an interest in the property subject to a lien had the right to redeem it from such lien and he thereby became subrogated to the rights of the senior lienholder. Civil Code, § 2903; Stein v. Simpson, 37 Cal.2d 79, 83–84, 230 P.2d 816. Accordingly, plaintiff was entitled to be reimbursed for the ten installments which he paid, plus interest.

Plaintiff has proposed that this court make findings of fact as hereinafter set forth. Gore has not seen fit to file any opposition thereto.

Pursuant to the provisions of section 956a, Code of Civil Procedure, and Rule 23(a) of the Rules on Appeal, the following finding of fact is herewith made:

"The allegations of paragraph VIII of plaintiff's complaint are true and said installments, in addition to said taxes, were paid by plaintiff on the prior first trust deed on said premises, as the owner and holder of a secondary lien on said property and in order to protect and preserve his own said lien thereon."

As a conclusion of law from such finding of fact, the following conclusion of law is made:

"That plaintiff and cross-appellant is entitled to have judgment for and to have a lien therefor impressed upon said real estate and improvements, in the sum of $640.00 for the ten installments of $64.00 each paid by him on the prior first trust deed on said premises to protect and preserve his own lien thereon as aforesaid, with interest at the rate of seven per centum per annum from April 1, 1953, until paid."

The judgment is modified by adding the following paragraph:

3(a). That plaintiff have and recover from defendant, Clydia A. Gore, the further sum of $640.00, with interest thereon from the 1st day of April, 1953, at the rate of seven per centum (7%) per annum, and a trust lien is hereby impressed upon said real estate and improvements in favor of plaintiff for said further sum of money.

Paragraph 4 of the judgment is modified to read as follows:

That said sum of $4,797.58, with the interest aforesaid, is hereby impressed as a lien upon said property prior to any and all liens of every kind except the First Deed of Trust upon said property and taxes.

As modified, the judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.



141 Cal.App.2d 528

Allrad C. VAN HORN, Plaintiff and Appellant,

v.

SOUTHERN PACIFIC COMPANY, a corporation, Defendant and Respondent,

Standard Oil Company of California, a corporation, Defendant.

No. 16668.

District Court of Appeal, First District, Division 1, California.

May 15, 1956.

Action against railroad for injuries suffered by yard clerk when he stepped on loose manhole cover. The Superior Court, City and County of San Francisco, William T. Sweigert, J., entered judgment for defendant on defendant's motion after jury was unable to agree upon verdict and was discharged, and plaintiff appealed. The District Court of Appeals, Agee, J. pro tem., held that it was error to so enter judgment where evidence as to whether employer had actual or constructive knowledge of dangerous condition which caused employee to fall and as to whether prior knowledge placed upon employer duty to warn employee of dangerous condition and to take such steps as were reasonably necessary to correct the condition was sufficient to present questions for jury.

Judgment reversed.

1. Judgment ⇐197

Defendant's motion for judgment under statute may be properly granted when, and only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff. West's Ann.Code Civ.Proc. § 630.

2. Master and Servant ⇐90

Under Federal Employers' Liability Act, railroad was not an insurer of employee's safety. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

3. Master and Servant ⇐265(3)

In action under Federal Employers' Liability Act, employee had burden of showing railroad's negligence which was proximate cause of injury. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

4. Master and Servant ⇐101(9), 106(1)

Under Federal Employers' Liability Act, railroad was required to exercise reasonable and ordinary care to provide employee with safe place in which to work, and such obligation extended to premises or objects owned by customer serviced by railroad. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

5. Master and Servant ⇐106(1)

Under Federal Employers' Liability Act, fact that an employee is sent to premises not belonging to or under control of railroad does not absolve railroad from lia-

bility for injuries employee may sustain because of unsafe condition. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

6. Master and Servant ⇐124(1), 125(6), 150(3)

Where yard clerk at time of accident was in place where his assigned duties required him to be, railroad was chargeable with knowledge of conditions which existed there from time to time which in exercise of reasonable care railroad could have ascertained, and thus railroad had duty to inspect pathway upon which clerk walked and to warn clerk of any dangerous condition thereon of which railroad had knowledge, either actual or constructive. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

7. Evidence ⇐244(15)

In yard clerk's action under Federal Employers' Liability Act, wherein clerk attempted to prove that railroad had actual knowledge of defective condition prior to injury, testimony that chief clerk of railroad said "Don't tell me that thing has flowed over again", which statement referred to manhole cover which caused accident, was admissible to show railroad representative's knowledge of dangerous condition and thus it was not necessary that clerk make it clear he was relying upon res gestae rule, when in fact he was not. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

8. Principal and Agent ⇐178(1)

A principal is chargeable with and is bound by knowledge of or notice to his agent received while agent is acting within scope of his authority and which is in reference to matter over which his authority extends.

9. Witnesses ⇐248(3)

Fact that answer of witness is not responsive to question does not render it inadmissible when the answer includes relevant and material facts.

10. Witnesses ⇐248(3)

In action under Federal Employers' Liability Act for injuries suffered by railroad yard clerk who fell when he stepped on manhole cover, where clerk was asked what he told chief clerk and his answer was that chief clerk said "Don't tell me that thing has flowed over again," the answer was admissible in evidence even though not strictly responsive to question, since chief clerk's statement indicated his prior knowledge of dangerous condition and so was relevant and material. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

11. Trial ⇐45(1)

When a trial court states or otherwise indicates that it will not receive evidence, a specific offer of proof is not necessary.

12. Master and Servant ⇐286(25, 28, 40)

In action under Federal Employers' Liability Act for injuries suffered by railroad yard clerk who fell into hole when he stepped on manhole cover, evidence as to whether railroad had actual or constructive knowledge of dangerous condition prior to accident and whether railroad should have warned clerk and should have corrected the condition raised questions for jury. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

William T. Belcher, Jr., Oakland, for appellant.

Dunne, Dunne & Phelps, R. Mitchell S. Boyd, San Francisco, for respondent.

AGEE, Justice pro tem.

This is an action for damages brought by an injured employee against his employer, Southern Pacific Company, under the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq. Plaintiff was a yard clerk whose duties required him to go into the railroad yards, walk beside the trains and take the numbers from incoming and outgoing cars. Although he had worked for Southern Pacific as a yard clerk for about seven months, the day of the accident, January 8, 1953, was the first day that he had been assigned to work in Richmond. His previous work had been in Oakland.

As part of his duties on the day of the accident, plaintiff was required to enter the premises of the Standard Oil Company to check the numbers on tank cars on sidings in its refinery. These sidings connected with Southern Pacific's tracks. The track

along which plaintiff was walking at the time of the accident was owned and maintained by Standard Oil Company. Beside this track was a foot path on which plaintiff was walking, which was customarily used by Southern Pacific switchmen and clerks. In the center of the pathway was a wooden "manhole" cover, measuring approximately 24" x 30" and being constructed of 2" rough lumber. Its purpose was to cover a wooden box in which there was a valve attached to an underground pipe which carried salt water. This manhole cover sat in a depression on the surface of the ground, which was several inches deep and which was surrounded at the time by a pool of rain water. The cover was not nailed down or otherwise secured. It had been raining on and off for the previous two or three weeks and, although not raining at the time of the accident, it had been raining that day. As plaintiff was walking along he stepped on the cover. He testified that it "looked safe enough" to him. Actually, it was floating on the rain water which had seeped into the box. This box just encased a square hole in the ground which had been dug for the purpose of gaining access to the valve. The hole was about one or one and a half feet deep. There was no bottom to the box and there was no means of drainage other than the natural drainage into the ground. When plaintiff stepped on the cover, it shot out from under him, causing him to fall with one leg in the hole and one out and striking his back on the edge of the hole.

Defendant's motion for a directed verdict was denied. The jury was unable to agree upon a verdict and was discharged. Defendant's motion for judgment under the provisions of section 630 of the Code of Civil Procedure [1] was granted and plaintiff has appealed from the judgment which followed.

[1] The rule as to motions under section 630 is the same as that applicable to nonsuits and directed verdicts. "Such motions may be properly granted 'when and only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff.'" Carpenter v. Atchison, T. & S. F. Ry. Co., 109 Cal. App.2d 18, 23, 240 P.2d 5, 8.

The same rule is also expressed in Thompson v. Atchison, T. & S. F. Ry. Co., 96 Cal.App.2d 974, 976, 217 P.2d 45, 46, as follows: "The only question to be determined is whether there was in the record any evidence of negligence which should have been submitted to a jury." This case likewise involved a motion under section 630.

[2, 3] Appellant agrees that respondent is not an insurer of appellant's safety and that appellant has the burden of showing negligence on respondent's part which was a proximate cause of his injury.

[4–6] On the other hand, it is equally well settled that it was the respondent's duty to exercise ordinary care to furnish appellant with a safe place to work. This duty extends to premises of a third party where the employee is sent by the employer to work. "Under the Federal Employers' Liability Act, the railroad employer is required to exercise reasonable or ordinary care to provide its employees with a safe place in which to work. [Citations.] And this obligation extends to premises or objects owned by a customer serviced by the railroad. [Citations.]" Chesapeake & O. Ry. Co. v. Thomas, 4 Cir., 198 F.2d 783, 786. As was said in Beattie v. Elgin, J. & E. Ry. Co., 7 Cir., 217 F.2d 863, 865, 866: "The fact that an employee is sent to premises not belonging to or under the control of his employer does not absolve the employer from liability for injuries he may sustain because of their unsafe condition. * * * Inasmuch as plaintiff at the time of the accident was in a place where his assigned duties required him to be, defendant on the issue of negligence

1. This section provides: "When a motion for a directed verdict, which should have been granted, has been denied or for any reason not granted, and the jury for any reason, has been discharged without having rendered a verdict * * * the court * * * may order judgment to be entered in accordance with the motion for a directed verdict."

was chargeable with knowledge of the conditions which existed there from time to time which in the exercise of reasonable care it could have ascertained. See S. S. Kresge Co. v. Holland, 6 Cir., 158 F.2d 495, at page 498. In Pacific American Fisheries v. Hoof, 9 Cir., 291 F. 306, at page 308, the court said: 'As already stated, the duty (to furnish an employee with a working place and appliances which are safe) is a continuing one, and notice of defects and dangers will be imputed to the master where they could have been discovered by reasonable inspection and by the exercise of reasonable care.'" In Kaminski v. Chicago River & Ind. R. Co., 200 F.2d 1, 4, the court said: "Before defendant [railroad] can be charged with negligence in failing to remedy the condition which caused plaintiff's injury, or failed to warn plaintiff of the existence of such a condition, it is necessary to establish that the defendant had actual knowledge of the condition, or, in the exercise of ordinary care, should have known of its existence."

Thus, it is clear that respondent had the duty to inspect the pathway and to warn appellant of any dangerous condition thereon of which respondent had knowledge, either actual or constructive.

The only evidence on the question of inspection is the following testimony of respondent's roadmaster: "Q. And is there, with respect to the Standard Oil tracks on that picture, is there any inspection, regular inspection of the track or walkway or the footing adjacent to that track made by Southern Pacific employees? A. No, no definite inspection." Although not entirely clear, because of the equivocal answer, it appears reasonable to infer that respondent did not make any inspection of the pathway whatsoever.

Respondent contends that an inspection would not have disclosed the danger and stresses the appellant's testimony that the cover "looked safe enough" and "appeared very solid." However, anyone inspecting the pathway for the purpose of ascertaining whether it afforded safe footing would undoubtedly have discovered the instability of the cover *if* such inspection was made immediately prior to appellant's accident. There is no evidence as to when the water in the box rose to a height sufficient to float the cover. Appellant testified that the cover was in place directly over the hole and it seems logical to conclude that it had not been floating for very long. Otherwise, it would have floated out of position. As was said in the Kaminski case, supra, 200 F.2d at page 4: "The only inference that can reasonably be drawn from this record is that the condition which caused the accident had been created within a short time before plaintiff's injury. It may have been a matter of minutes or of hours, hence defendant cannot on this record be charged with constructive knowledge of the condition." In the cited case, one of the railroad's customers owned and maintained a track inside of its plant. As a part of his duties, the employee was walking along a pathway beside the track checking cars. He suddenly fell through a hole and was injured. This hole was about two or two and a half feet square and was covered with some material (either wood or cardboard) about three-eighths of an inch thick. The appellate court held that the trial court erred in refusing to grant the railroad's motion for a directed verdict. The basis of the decision is indicated by the two portions of the opinion quoted above.

Appellant points out, however, that the condition which caused the danger was of long standing. The ground surrounding the box was depressed, thus allowing the rain water to collect in a pool and then drain into the box. This depression had obviously existed for a considerable period of time and was clearly visible, as shown by the photographs admitted in evidence. The box in question had been there for "several years." A witness employed by the Standard Oil Company testified that he had seen water in similar boxes located in the yard. He stated: "I have seen water fairly close to the top but I never remember seeing it over the top of the box. * * * I have seen water in them, yes. * * * Pretty well to the top, yes." The same witness stated: "Box covers are sometimes nailed down. * * * I have known of them to be nailed down in some cases." There was no testimony as to why the box cover in question was not nailed down or otherwise secured.

In its brief, respondent says the water line running through the box was a fire line and immediate access to the valve in the box was necessary. Assuming this to be so, it does not appear whether the other covers referred to by the witness were or were not on a fire line. Moreover, nailing the cover in place with one or two nails would not make the valve inaccessible in the event of an emergency.

The question on the issue of constructive knowledge is whether or not respondent, in the exercise of ordinary care, should have foreseen the dangerous condition which caused appellant's accident. If reasonable minds could differ, then the question is one in the first instance for the jury and the action of the trial court in granting the motion under section 630 was erroneous. The physical situation, i. e., the depressed area around the box and the wooden cover placed on top without being secured in any way might well have warned anyone making a reasonable inspection that such cover would become unstable and unsafe to walk upon if, during the rainy season, water collected in the box and rose to a height sufficient to cause the cover to float. We conclude that it was a question of fact as to whether respondent had constructive knowledge of the dangerous condition and that it was therefore error to grant respondent's motion for judgment.

[7] Appellant attempted to prove also that respondent had actual knowledge of this condition prior to his injury. Appellant was injured on his first day of work at Richmond and on his first assignment. He had been specifically directed by his superior, the chief clerk, where to go and what cars to check. After the accident, appellant reported back to the chief clerk and described what had happened. The chief clerk said: "'Don't tell me that thing has flowed over again.'" This testimony was stricken out by the trial court. The ground of the ruling does not appear. Respondent's attorney merely said: "* * * we will object and move to strike that out," and the court replied: "Strike it out, disregard it." The testimony was clearly an admission that the chief clerk knew that the box had overflowed on at least one prior occasion. His duties required him to direct the yard clerks under him where to go in the performance of their work. He had a duty to warn such yard clerks of any dangers known to him and with which their duties would cause them to come into contact. Had he done so in this instance, appellant could easily have averted the danger by merely stepping around or over the box as he went along the pathway.

Respondent argues that the chief clerk's statement is not admissible under the res gestae theory. Respondent also says that if appellant was relying upon the res gestae rule, his counsel should have made this clear to the trial court. The record shows, however, that appellant was proceeding on the theory that knowledge of the chief clerk (of the dangerous condition) was imputable to his employer, the respondent herein. Appellant's attorney made this clear when he said, before the testimony in question was given: "What his employer said if there were any *admissions.*" (Emphasis added.) And after this testimony was given and stricken out, he said: "Your Honor, I believe that the entire conversation, if there were *admissions* concerning—" (Emphasis added.) By the dash after the word "concerning," the transcript indicates that the court interrupted counsel and said: "I have rule."

[8] Under the factual situation of this case, the language of the court in Westman v. Clifton's Brookdale, Inc., 89 Cal.App.2d 307, at pages 310–311, 200 P.2d 814, at page 816, is applicable: "It is not necessary for us to pass upon the question of whether the declarations of Darda were a part of the res gestae. See Showalter v. Western Pacific R. R. Co., 16 Cal.2d 460, 106 P.2d 895; Lane v. Pacific Greyhound Lines, 26 Cal.2d 575, 160 P.2d 21. We are of the opinion that they were admissible for the purpose of showing knowledge of the dangerous condition on the part of defendant's representative in charge of the floors of the cafeteria. Respondent's objection, and its contention here, misses the theory upon which this evidence was offered. As stated in Dressel v. Parr Cement Co., 80 Cal.App.2d 536, 540, 181 P.2d 962, 964: '* * * it is a well-established rule "that the principal is charge-

able with, and is bound by the knowledge of, or notice to, his agent received while the agent is acting within the scope of his authority and which is in reference to a matter over which his authority extends.'" The Westman case was an action for injuries sustained by a patron when she fell down a cafeteria stairway. Testimony as to a purported statement by the cafeteria's floor manager (Darda), shortly after the accident, that there were poor lights on the stairs and that others had fallen there was excluded. A judgment in favor of the cafeteria was reversed. In Diller v. Northern Cal. Power Co., 162 Cal. 531, at page 538, 123 P. 359, at page 362, where plaintiffs' decedent was electrocuted upon contacting a sagging power line owned by defendant corporation, the court said: "Evidence of statements made to Mr. Thomas concerning the condition of the pins on the buck-arm of the angle pole was proper to show the defendant's knowledge of the unsafe condition of its line. Thomas was its agent in general charge of its power system, and notice to him of a defective construction had a direct bearing on the issue of negligence in maintenance. Similarly it was proper to show what he had said in response to such statements."

[9, 10] Respondent also justifies the striking out of the testimony on the ground that the latter portion of the appellant's answer was not responsive to the question. The record is as follows:

"Q. What did you tell him [chief clerk]? A. I told him that I had fallen in the hole there and that this here cover was up along the track and I had fallen in there and he said, shook his head and said, 'Don't tell me that thing has flowed over again.'

"Mr. Boyd [respondent's attorney]: If Your Honor please, we will object and move to strike that out.

"The Court: Strike it out, disregard it."

However, as was said in the Westman case, supra, 89 Cal.App.2d at page 314, 200 P.2d at page 818: "The fact that an answer is not responsive to a question does not render it inadmissible. [Citing authorities.] When the answer includes relevant and material facts it should be permitted to stand, although not strictly responsive." Here, that part of the chief clerk's reply which indicated his prior knowledge of the dangerous condition was relevant and material, and, as the court continued in the Westman case, "it was error for the court to strike it and preclude the jury from considering it."

[11] Lastly, respondent contends that appellant should have made an offer of proof as to this line of testimony. However, when a trial court states or otherwise indicates that it will not receive evidence, a specific offer of proof is not necessary. Tomaier v. Tomaier, 23 Cal.2d 754, 760, 146 P.2d 905; Caminetti v. Pacific Mut. Life Ins. Co., 23 Cal.2d 94, 100, 142 P.2d 741. Here, after the trial court struck out the entire answer in question, the following occurred:

"Mr. Belcher [appellant's attorney]: Your Honor, I believe that the entire conversation, if there were admissions concerning—

"The Court: I have ruled. All right.

"Mr. Belcher: I'm sorry, Your Honor.

"The Court: I made the ruling."

[12] It is our conclusion that the trial court erred in striking out and refusing to allow the jury to consider the testimony as to the chief clerk's statement to appellant. In our opinion this testimony, had it been admitted, would have been sufficient to justify the jury in concluding that respondent, through its chief clerk, had actual knowledge of the dangerous condition which caused appellant's accident prior to the occurrence thereof; and that this prior knowledge placed upon respondent, acting through said chief clerk, the duty to warn appellant of the dangerous condition and to take such steps as were reasonably necessary to correct this condition. How easily such correction could be made (by leveling the area around the box) is demonstrated by a photograph (exhibit 5) taken after the condition was corrected. This photograph was admitted in evidence without objection.

The judgment is reversed.

PETERS, P. J., and BRAY, J., concur.

141 Cal.App.2d 520

Merle Glen SNYDER, Lawrence Arthur Eyler, Patricia Ann Eyler and Lillian Delphine Faran, Minors, by and through their Guardian ad litem, Ida McGuire, Plaintiffs and Appellants,

v.

William HOLLINGBERY, R. Shephard, Frank Cascellini, individually and doing business as Bay Meadows Hotel, V. H. Montgomery, individually and doing business as Montgomery Pest Control Co., et al., Defendants and Respondents.

Civ. 16620.

District Court of Appeal, First District, Division 1, California.

May 15, 1956.

Action for death of resident in hotel fire. The Superior Court, City and County of San Francisco, Preston Devine, J., entered judgment on verdict for defendants and plaintiffs appealed. The District Court of Appeal, Fred B. Wood, J., held that under the circumstances it was not error to refuse res ipsa loquitur instructions.

Affirmed.

1. Trial ⇐28(2)

In action for death of resident in hotel fire, failure of trial court to order view of premises by jury was not abuse of discretion vested in court by statute, especially in view of change of condition of hotel since fire and lapse of some 14 months since fire. West's Ann.Code Civ.Proc. § 610.

2. Evidence ⇐328

In action for death of resident in hotel fire, Health and Safety Code provisions relating to fire alarm system and to height above floor of sill of door or window to fire escape balcony presented matters of law for instruction of jury by court and not items of fact to be presented to jury in form of evidence, insofar as such provisions may have furnished standards of conduct for defendants. West's Ann.Health & Safety Code, §§ 16560, 16710.

3. Health ⇐32

The provisions of the Building Code in the State Housing Act are applicable to new construction or alterations. West's Ann.Health & Safety Code, §§ 15154–15157, 15351, 15356.

4. Health ⇐32

The deletion, prior to passage of section of Health and Safety Code relating to fire alarm system, of quoted words from Assembly Bill which provided that section would apply to every apartment house "heretofore or hereafter constructed" disclosed specific legislative intent not to apply section to building already constructed, particularly in view of retention of phrase in other sections of Code. West's Ann. Health & Safety Code, §§ 16602, 16710, 17830.

5. Health ⇐32

Health and Safety Code provisions relating to fire alarm system and to height above floor of sill of door or window to fire escape balcony were inapplicable to hotel which was erected prior to enactment of provisions and in which no minor or major structural changes had been made. West's Ann.Health & Safety Code, §§ 16560, 16710.

6. Innkeepers ⇐10.11

In action for death of resident in hotel fire, denial of offer to prove certain city fire department report of July 3, 1951, which recommended that steps be placed at window which led to fire escape after inspection of premises, was proper, where lessee at time of fire did not become lessee until June 1, 1952, and where there was no evidence connecting person to whom such recommendations were given, with any of the defendants. West's Ann.Health & Safety Code, § 16560.

7. Evidence ⇐536
Innkeepers ⇐10.11

In action for death of resident in hotel fire, refusal to grant plaintiffs' offer to prove by expert testimony that exit to fire escape was at higher distance from floor than was customary in buildings in community, was proper, where proposed witness had not made sufficiently adequate observations to enable him to speak as expert and offer was not confined to buildings constructed prior to enactment of statute relating to height above sill of door or window

to fire escape. West's Ann.Health & Safety Code, § 16560.

8. Innkeepers ⇐10.8

In action for death of resident in hotel fire which was of unknown origin but which defendants allegedly caused to spread and intensify, where there was evidence of disastrous effect of draft created by opening of door and window in resident's room, it was not error to refuse res ipsa loquitur instructions which required jury to indulge inference of defendants' negligence, notwithstanding that some of defendants may have had exclusive control and management of hotel.

9. Negligence ⇐121(2)

The doctrine of res ipsa loquitur raises inference of negligence and not presumption of negligence.

10. Innkeepers ⇐10.8

In action for death of resident in hotel fire, where there was no evidence that defendant-owner of hotel had exclusive or any right of control of hotel which was in possession of defendant-lessee, it was not error to refuse res ipsa loquitur instruction which applied to each defendant.

11. Negligence ⇐121(2)

To warrant application of doctrine of res ipsa loquitur, there must be a basis of experience, either common to community or brought out in evidence, from which it may reasonably be concluded that accident is of kind which does not normally occur unless some one has been negligent, it must be caused by an agency or instrumentality within exclusive control of defendant, and it must not have been due to any voluntary action or contribution on part of the plaintiff.

Emmet F. Hagerty, Richard C. Shortall, San Francisco, for appellants.

Keith, Creede & Sedgwick, San Francisco, for respondent Hollingbery.

Barfield & Barfield, San Francisco, for respondents Shephard & Cascellini.

FRED B. WOOD, Justice.

Robin Dumont died from asphyxiation in a fire at the hotel where she lived. Her children brought this action for damages against William Hollingbery (owner of the hotel) R. Shephard (lessee-operator of the hotel), Frank Cascellini (husband of the manager of the hotel and in charge of it at the time of the fire) and V. H. Montgomery (a pest control operator who had used chemicals at the hotel shortly before the fire).

Verdict and judgment went for the defendants and the plaintiffs have appealed. They make no claim that the evidence was insufficient to support the verdict. They do claim that errors were committed in the exclusion of certain evidence and in the refusal of certain instructions offered by them.

[1] (1) *The failure of the court to order a view of the premises by the jury furnishes no basis for a reversal.*

During defendant's case in chief the court asked whether a view of the premises should be taken but plaintiffs' counsel said he thought not because of some changes in the structure of the building and that he expected to bring in some photographs, and did introduce some 30 photographs which showed conditions as they existed right after the fire. Later, he suggested that a view would be desirable "because we have no adequate map of the place." Defense counsel objected because of changes that had been made during the 14 months that had elapsed since the fire (particularly the building of steps from the floor to the fire escape exit window, which was 43 inches from the floor) and agreed to have a map made. Thereupon the court denied the motion. A map drawn to scale was later put in evidence.

We find in this no abuse of the discretion vested in the trial court by section 610 of the Code of Civil Procedure, especially in view of the changed conditions and lapse of time. McDonald v. Cantley, 214 Cal. 40, 45–46, 3 P.2d 552; Parsell v. San Diego Consol. G. & E. Co., 46 Cal.App.2d 212, 217, 115 P.2d 539.

[2] (2) *It was not error for the court to refuse instructions that were based upon the provisions of sections 16560 and 16710 of the Health and Safety Code.*[1]

One of these instructions would have informed the jury that section 16560 declares that the level of the sill of a door or window giving access to a fire escape balcony shall not be more than 30 inches above the adjoining floor in the building.[2] This provision, the proof demonstrates and plaintiffs concede, was enacted after this building was constructed.[3]

The other instruction would have given the jury the text of section 16710, which requires a building of the nature and size of that here involved to have an approved automatic or manually operated fire alarm system, so designed that all occupants may be warned simultaneously. This also was refused as a nonretroactive requirement enacted after the construction of the building here involved.

[3] The basic interpretative clauses of the State Housing Act are furnished by sections 15154–15157 of the Health and Safety Code, which declare that in any "structural addition or * * * alteration, repair, installation, or change in * * * or reconstruction of, any building, such new work shall meet all the requirements of this part", [the State Housing Act] § 15154; a building not erected for use as an apartment house, hotel, or dwelling, "which is converted to or altered for such use, shall conform to all the provisions of this part affecting an apartment house, hotel, or dwelling, as the case may be" § 15155; any apartment house, hotel, or dwelling "which is moved" shall "conform to all the provisions of this part affecting any such building pertaining to" percentage of unoccupied areas, heights, and size of courts and yards § 15156; a building which is damaged by fire or the elements to an extent in excess of 60 per cent of its physical properties shall "[i]f it is reconstructed" conform "to all the provisions of this part." § 15157.

These provisions are implemented by section 15351 which requires a permit before a person may "erect, construct, reconstruct, move, convert, or alter a building within any city", and by section 15356 which requires the appropriate building department to examine the plans and specifications and to issue the permit if it appears the proposed work will not result in a violation. These provisions are followed by others which provide for a certificate of final completion and an occupancy permit. "The result of this rather elaborate procedure is to make the numerous provisions of the Building Code [State Housing Act] applicable to new construction or alterations, and the statute as a whole is, and has been interpreted, as applying to, and enforceable as to new or reconstructed buildings." 10 Op.Attys.Gen. 143, 144: opinion rendered October 6, 1947. See also Lee v. Dawson, 44 Cal.App.2d 362, 367, and People v. Neff, 117 Cal.App.2d 772, 779–780.

[4] With reference particularly to section 16710, added to the code by chapter 1493 of the Statutes of 1947, page 3081 at page 3087, we observe that upon introduction Assembly Bill No. 753 (which upon passage became Chapter 1493 of 1947) expressly provided that section 16710 would apply to every "apartment house * * * heretofore or hereafter constructed" but was amended on June 11, 1947, by deleting the words "heretofore or hereafter constructed" Assembly Journal, regular ses-

1. Plaintiffs also predicate error upon the asserted refusal of the court to allow these code sections to be introduced into evidence.

 They do not cite, nor have we found, a passage in the transcript which shows the making or refusal of any such offer.

 Moreover, these statutes, to the extent that they may have furnished standards of conduct for the defendants or any of them, presented matters of law for the instruction of the jury by the court, not items of fact to be presented to the jury in the form of evidence.

2. The window sill in question was 43 inches above the floor.

3. All parties agree that the building here involved was erected not later than 1909 and that no major structural changes in the building were subsequently made. There is no evidence that any minor structural changes have been made.

sion of 1947, page 4393, Amendment No. 51, at page 4395. This we deem a clear indication of a specific legislative intent not to apply this section to a building already constructed, particularly in view of the fact that in respect to certain code sections (such as 16602 and 17830) the words "heretofore or hereafter constructed" remained in Assembly Bill No. 753 throughout the course of its passage.

[5] We conclude, therefore, that the trial court correctly ruled that neither section 16560 nor section 16710 applied to the building here involved.

[6] (3) *We find no error in the denial of an offer to prove a certain city fire department report which recommended that steps be placed at the window which led to the fire escape.*

Testimony that after an inspection of the hotel by a representative of the fire department certain recommendations concerning the height were made on July 3, 1951, to a Mrs. Kerchek was stricken as not communicated to and thus not binding upon any of the defendants. Shephard did not become a lessee until June 1, 1952, and there was no evidence connecting Mrs. Kerchek with any of the defendants.

The report itself, which was in writing, does not appear to have been offered in evidence.

[7] (4) *It was not error to refuse plaintiffs' offers to prove that the exit to the fire escape here involved was at a higher distance from the floor than customarily provided in similar buildings in the community.*

Plaintiffs complain of the asserted refusal of the trial court to admit evidence to the effect that in buildings of the type here involved, it is standard practise to place openings to fire escape balconies nearer the floor level than the 43 inches in the instant case.

Plaintiffs' proposal in this regard came in the form of an offer of proof, plaintiffs' counsel saying that he wished to ask Chief Kruger of the Fire Department "what the fair and reasonable standard is in this community from a standpoint of fire prevention as to the height of a window sill." Later, counsel explained: "My offer of proof would be to bring in Chief Kruger, who is the head of the Fire Prevention Bureau of the city, who makes the regular inspections and recommendations for the safe and reasonable standard of maintenance of buildings, and the fire exits of such buildings, and I will ask him the question which I did before, from his position based upon his experience and knowledge, what his recommendation, if any, would be upon the discovery in a hotel of a window sill 43 inches in height from the floor level, which go off onto a fire escape." This offer was refused upon the ground that an "expert cannot be asked if a thing is safe or not,"—a correct ruling.

Subsequently plaintiffs' counsel revised his offer of proof, as follows: "We would like to make an offer of proof that if we call one of the experts from the fire department that they would be able to testify that as a fact they have observed in the older buildings and in the modern ones that the majority of them follow a common rule of safety requirements, wherein the windows going out to the fire escape are less than 43 inches in height from the floor. Most of them approximately two feet and a half in height." The court informed counsel he would have to be more specific; whereupon, counsel said: "they would testify that as a matter of safety that the average standard of conduct in this area is to maintain fire escape windows with sills—" and the court responded: "That isn't specific enough. What do you mean by the average standard of conduct?" to which counsel replied: "Height of windows in hotels." The court then asked: "How many have they seen?" Counsel, apparently, had no answer to the last question. The court added: "I think the fact that there is a majority doesn't mean it is the standard," and that "it would be totally immaterial as to hotels constructed since the statute went into effect," and denied the offer.

We see no impropriety in this denial. Plaintiffs failed to convince the trial court that their proposed witness had made sufficiently adequate observations to enable him to speak as an expert on this subject, and the offer was not confined to buildings

constructed prior to the enactment of the statute which requires the inside sill of a window giving access to a fire escape balcony to be not more than 30 inches above the adjoining floor. Stats.1917, ch. 736, page 1422, § 53, at page 1450, and ch. 738, page 1473, § 57, at page 1503; now Health and Safety Code, § 16560. The hotel here involved was built not later than 1909.

[8] (5) *It was not error to refuse the instructions which plaintiffs requested on the subject of res ipsa loquitur.*

Plaintiffs have not directed our attention to any of their instructions which they claim presented the doctrine of res ipsa loquitur. Defendants have brought to our attention three of plaintiffs' proposed instructions which bear upon the subject.[4]

The first sentence of plaintiffs' proposed instruction No. 1 and the second sentence of their No. 2B erroneously assumed that the accident occurred in the manner claimed by plaintiffs[5] and required the jury to indulge in the inference that defendants were negligent. Yet, there was substantial evidence that the fire (which started on the first floor from some unknown cause) spread rapidly upward through the stairways and elevator shafts to the fourth floor (where decedent resided) and that the fumes which asphyxiated her found vent through the door to her room, which she or her roommate, Mary Austin, presumably opened, and to the outside through a window in her room which she or her roommate did open; that a room across the hall (the door to which remained closed) received no visible damage, and other rooms where the doors remained closed received no visible damage; with the door and window of decedent's room open it "was like the chimney in a fireplace"; if the door had remained closed her room would have been in substantially the same condition as the room across the hall, the door to which remained closed. In these circumstances it would have been error to *require* the jury to indulge in the inference that the defendants were negligent and to cast upon them

4. These instructions read, respectively, as follows:

Plaintiffs' No. 1: "From the happening of the death involved in this case, as established by the evidence, there arises an inference that the proximate cause of the occurrence was some negligent conduct on the part of the defendants. That inference is a form of evidence, and that [if] there is no other tending to overthrow it, or if the inference preponderates over contrary evidence, it warrants a verdict for the plaintiffs. Therefore, you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendants to rebut the inference by showing that they did, in fact, exercise ordinary care and diligence or that the death occurred without being proximatly caused by any failure of duty on their part."

Plaintiffs' No. 2: "I instruct you that when a thing which causes death is under control and management of a defendant, and the death of [is] such as in the ordinary course of things does not happen if those who have the management use ordinary care, it affords a reasonable evidence in the absence of explanation by the defendant that the death arose from want of ordinary care. Therefore, if you find that the defendant or defendants had exclusive control and management of the Bay Meadows Hotel, then I instruct you that the death caused by the fire in said hotel, in the absence of explanations, arose from a want of ordinary care on the part of said defendant or defendants in the control and management of said Bay Meadows Hotel."

Plaintiffs' No. 2B: "I instruct you that in this case the burden of proof is on the plaintiffs to show by preponderance of evidence that the death was caused by the negligence of defendants.

"But from the occurrence of the death in this case, a presumption of negligence arises, which throws upon the defendants the burden of proving that the injury was not due to their negligence."

5. Plaintiffs did not allege that any of the defendants negligently or otherwise caused the fire.

They did allege that defendants negligently (1) caused the fire to spread and intensify, (2) failed to provide a safe means of egress, (3) failed to notify decedent of the fire escape, (4) permitted inflammable materials to be placed on the premises, (5) caused numerous coats of paint to be placed over all available means of exit, (6) failed to notify decedent of the fire, and (7) failed to notify arriving firemen of decedent's presence in the hotel.

the burden of proving they were not. Hardin v. San Jose City Lines, Inc., 41 Cal.2d 432, 435, 260 P.2d 63.

[9] These two instructions were additionally erroneous in that they informed the jury that a presumption instead of an inference arose. Instruction 2B did so expressly; instruction No. 1, by implication. See Hardin v. San Jose City Lines, Inc., supra, 41 Cal.2d 432, 436, 260 P.2d 63.

[10] Each of the proposed instructions by its terms applied to all of the defendants and thus was too broad in its coverage. There was no evidence that defendant Hollingbery had exclusive or any right of control over the premises. Plaintiffs, in their opening brief, state that at the time of the fire "Mr. R. Shephard was the lessee in possession of the * * * hotel." They direct our attention to no evidence and none has come to our attention that would warrant either a presumption or an inference that Hollingbery had any element of control over the premises. Plaintiffs' proposed instructions No. 1 and No. 2B would erroneously have cast upon Hollingbery the burden of proving that he was not negligent. Plaintiffs' instruction No. 2 although predicated upon a finding by the jury "that the defendant or defendants had exclusive control and management of the * * * hotel" was potentially confusing to the jury as concerned Hollingbery and as to him had no foundation in the evidence. Even if these instructions had been proper if limited so as to apply only to the other defendants, it was the duty of the plaintiffs, not of the court, to make such a limitation.

[11] Furthermore, instruction No. 2 is inapplicable to the situation presented by the issues and the evidence, particularly the second sentence which would have told the jury that if it found that "the defendant or defendants had exclusive control and management of the Bay Meadows Hotel" then "the death caused by the fire in said hotel" in the absence of explanation "arose from a want of ordinary care on the part of" such defendant or defendants. When none of the defendants is charged with having caused the fire (which the evidence shows was of unknown origin) and one of the charges is that they caused it to spread and intensify, coupled with the evidence tending to show the disastrous effect of the draft created by the opening of the door and window in decedent's room (over which decedent and her roommate had control), the mere element of control and management of the hotel would seem to furnish an illogical, inapt and insufficient basis for bringing the doctrine of res ipsa loquitur into play. This does not meet the three requirements for the application of the doctrine, which are "(a) There is a basis of experience, either common to the community or brought out in evidence, from which it may reasonably be concluded that the accident is of a kind which does not normally occur unless someone has been negligent. (b) It must be caused by an agency or instrumentality within the exclusive control of the defendant. (c) It must not have been due to any voluntary action or contribution on the part of the plaintiff." Bauer v. Otis, 133 Cal.App.2d 439, 443, 284 P.2d 133, 136.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.



141 Cal.App.2d 838

Amil DWYER, Plaintiff and Respondent,

Argonaut Insurance Exchange, an Inter-Insurance Exchange, Plaintiff in Intervention and Respondent,

v.

LANAN & SNOW LUMBER COMPANY et al., Defendants,

Charles W. Lannin, Defendant and Appellant.

Civ. 8767.

District Court of Appeal. Third District. California.

May 24, 1956.

Action for personal injuries sustained as result of truck striking a mooring cable

which had fallen across a highway. From an adverse judgment of the Superior Court, Mendocino County, Lilburn Gibson, J., one of the defendants appealed. The District Court of Appeal, Peek, J., held that evidence sustained findings that the manager had informed the appealing defendant, who was acting president of corporation, that the cable had previously fallen across the road, that it was secondhand, had not been inspected, and had no safety factor and the findings justified imposition of individual liability.

Judgment affirmed.

1. **Automobiles** ⇐306(5)

In action by truck driver against sawmill operators who had allegedly negligently allowed a mooring cable to fall across highway injuring driver, evidence sustained findings that sawmill manager had informed corporation's president that the cable might fall across highway as it had previously, that the manager informed president that the cable should not cross the road, that it had been purchased secondhand and had not been inspected since installation and that there was no safety factor to prevent the cable if broken from falling across road.

2. **Corporations** ⇐306

Where sawmill manager had informed president of corporate owner that cable might fall across road as it had previously, that cable should not cross road, that it had been purchased secondhand and had not been inspected since installation and there was no safety factor to prevent cable if broken from falling across road, the president could not escape personal liability for injuries sustained when cable fell across road and truck collided with cable and injured driver.

3. **Negligence** ⇐142

Where negligence is shown by the probate facts found by trial court, negligence need not be expressly found as an ultimate fact.

4. **Trial** ⇐397(4)

Failure to find upon an issue of contributory negligence by a trial court does not constitute error when record is devoid of any evidence of contributory negligence.

5. **Corporations** ⇐306

Director and officer of a corporation, is individually liable, as well as the corporation, for all its torts in which he participates.

Lange & Rockwell, San Francisco, for plaintiff-respondent.

Burke & Rawles, Ukiah, for defendant Snow.

James A. Ersted, San Jose, for defendant-appellant.

Partridge, O'Connell & Whitney, San Francisco, for plaintiff in intervention.

PEEK, Justice.

Defendant Charles W. Lannin, sued as Doe Lanan, alone appeals from a judgment in favor of plaintiff Dwyer and plaintiff in intervention Argonaut Insurance Exchange in an action for personal injuries.

Plaintiff alleged he was seriously injured when defendants negligently and carelessly permitted a steel cable to fall across a county road in Mendocino County, with the result that the truck he was operating collided with the cable. Lannin & Snow Company, sued as Lanan & Snow Lumber Company, answered denying generally plaintiff's allegation and affirmatively alleging that the injuries were the result of plaintiff's contributory negligence. Lannin, by separate defense, alleged that he was merely an employee of the lumber company and hence was neither personally responsible nor liable for plaintiff's alleged injuries. On the issues so joined the cause proceeded to trial before the court sitting without a jury and resulted in the judgment previously mentioned.

The record shows that at the time of the accident, the company was the sublessee of certain land on which was located an operating sawmill owned by the defendant Snow. He likewise was the owner and in possession of the land immediately across the county road from the sawmill. Lannin and one Sullivan had hired Snow as manager of the mill operation. These three were

the actual operators of the mill and its business. In connection with the operation of the mill there was the usual highline which in this case was attached to a backline, one end of which extended across the road and was secured to a tree located on the Snow property. The other end was secured to a redwood stump on the leased premises. Snow knew the location and condition of the backline and the possibility that it might fall as it had previously, but he took no action to remedy the situation. However, he did inform Lannin, who was the acting president of the company, of the condition of the line, but he likewise failed to take any precaution. The block by which the line was attached to the tree was old, having been purchased secondhand and had not been inspected since its purchase. Furthermore, there was no safety factor to prevent the cable from falling on the road in case of accident. On the date of the accident, plaintiff was driving his logging truck along said road. As he approached the point where the backline crossed the same, one of the blocks holding the line broke, allowing the cable to fall across the hood of his truck in such a fashion that he was pinned in the driver's cab and suffered serious injuries. Following the accident, the line was changed so that it did not cross the road.

Some time prior to the date of the accident, articles of incorporation of Lannin & Snow Company were filed with the Secretary of State. Several directors were named, among whom were Lannin and Snow. Nothing further appears to have been done to complete the incorporation; that is, no permit to issue stock was ever granted and no stock was ever issued.

[1, 2] The evidence introduced by plaintiff, although not as sufficient as it might well be, cannot be said to be insufficient to support the findings of the trial court holding Lannin individually liable. The record shows activities of a small corporation under the direct management and control of three individuals—Lannin, Sullivan and Snow, at least two of whom (Lannin and Snow), knew of the backline and of its condition.

Appellant's attack is directed first at certain findings which he contends are not supported by the evidence, and secondly at the failure of the court to find upon the issues of negligence and contributory negligence which he contends was prejudicial error. Since only Lannin appeals, we will concern ourselves solely with the findings as they relate to him. The court specifically found that the mill was being operated under a sublease by the Lannin & Snow Company; that the individuals, Lannin, Snow and Sullivan, were the actual operators of the mill and of its business; that Lannin was the president of the corporation; that Snow, who had been hired as manager, was concerned that the backline might fall across the county road as it had previously; that Snow informed Lannin that the line should not cross the road; that the block was purchased secondhand and had not been internally inspected since its installation; that it was not unusual for a highline to break; and that there was no safety factor to prevent the line, if broken, from falling across the road as it did. In other words a dangerous instrumentality was knowingly being used under circumstances likely to produce injury. Been v. Lummus Co., 76 Cal.App.2d 288, 173 P.2d 34.

[3] It cannot be denied that negligence is shown by the probative facts so found by the trial court. It has long been the rule that under such circumstances negligence "need not be expressly found as an ultimate fact." Stanford v. City & County of San Francisco, 111 Cal. 198, 205, 43 P. 605, 607; see also McCray v. Burr, 125 Cal. 636, 638, 58 P. 203, and Robinson v. San Diego County, 115 Cal.App. 153, 156, 300 P. 971.

[4] We likewise find no merit in appellant's contention that the trial court erred in failing to find upon the issue of contributory negligence. Here the record is wholly devoid of any evidence upon which the trial court could have found that plaintiff was guilty of contributory negligence. As the court held in Stone v. Lobsien, 112 Cal.App.2d 750, 758, 247 P.2d 357, if a finding had been made on this

issue, it would necessarily have been adverse. This being so, it was not error to fail to find on this issue.

[5] Whether or not the corporation was qualified to do business as such would be immaterial as regards the question of the individual liability of Lannin. If he was acting in his individual capacity, of course there could be no question. But, even assuming the corporation was qualified, he could not thereby escape all liability since he, as a director and an officer, would be equally liable with the corporation for its torts in which he participated. 13 Cal.Jur. 2d, Sec. 353, p. 125; see also Thomsen v. Culver City Motor Co., Inc., 4 Cal.App.2d 639, 644, 41 P.2d 597; Mears v. Crocker First Nat. Bank, 84 Cal.App.2d 637, 643, 191 P.2d 501.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



141 Cal.App.2d 659

Constance M. UHL, Plaintiff and Appellant,

v.

Eleanor JOHNSON, Helen B. Uhl, First Doe, Second Doe, Third Doe, "X" Co-Partnership and "Y" Corporation, Defendants and Respondents.

Helen B. UHL, Plaintiff and Respondent,

v.

AMERICAN TRUST COMPANY, a corporation, Bank of Montreal, a corporation, Constance M. Uhl, Alma Morris, First Doe Bank, a corporation, and Second Doe Bank, a corporation, Defendants and Appellants.

Civ. 16704, 16705.

District Court of Appeal, First District, Division 2, California.

May 21, 1956.

Actions, consolidated on appeal, to determine rights in certain securities and realty. The Superior Court, San Mateo County, A. R. Cotton, J., entered orders adverse to plaintiff in one action and defendants in other action, and such parties appealed. The District Court of Appeal, Dooling, J., held that nunc pro tunc order, which amended prior judgment, in action to determine ownership of and rights to certain securities and realty, by inserting phrase "in trust", was invalid because it constituted a judicial, rather than a clerical, correction of the judgment, and, therefore, such order was not res judicata of issues presented in subsequent action to determine claims against the same securities and realty, and denial of right of plaintiff in subsequent action to produce evidence in support of the complaint was error.

Orders reversed.

1. Judgment ⇐316, 323, 326

Generally, court may, at any time, and with or without notice, or on its own motion, correct a judgment by a nunc pro tunc order so as to make the judgment as entered conform to the judicial decision actually made.

2. Judgment ⇐304, 306

Trial court has jurisdiction to correct mistakes in its orders and records, if such mistakes are not actually result of exercise of judgment, but, where the error is inherently judicial, rather than clerical or inadvertent, the court has no power to amend its decision.

3. Judgment ⇐304, 331

Nunc pro tunc order, which amended prior judgment, in action to determine ownership of and rights to certain securities and realty, by inserting phrase "in trust", was invalid because it constituted a judicial, rather than a clerical, correction of the judgment, and, therefore, such order was not res judicata of issues presented in subsequent action to determine claims against the same securities and realty, and denial of right of plaintiff in subsequent action to produce evidence in support of the complaint was error.

Jonathan H. Rowell, Louis S. Katz, Redwood City, for appellant Constance M. Uhl.

H. Ward Dawson, Jr., San Francisco, for respondents Eleanor Johnson and Helen B. Uhl.

DOOLING, Justice.

In this consolidated appeal appellant Constance M. Uhl appeals from an order of the Superior Court of San Mateo County amending a judgment *nunc pro tunc* in action No. 43838 and from an order of dismissal as to action No. 59072.

One of the respondents, Helen B. Uhl, mother of the appellant, filed action No. 43838 against appellant and others. The purpose of this suit was to determine the ownership of and rights to certain securities and a piece of real property consisting of a house and lot at 444 Villa Terrace, San Mateo, California. On June 8, 1950, the trial judge signed findings and conclusions in this matter. Finding 151 recites: "That plaintiff's intent was to create a joint tenancy in trust in such real and personal properties in herself and her said daughter with the profits and dividends therefrom to be paid to the plaintiff and said daughter in proportions as to the shares of stock set forth in these Findings of Fact, and of equal shares in the real properties to be held by them in such tenancy for their joint lives thereafter, upon the death of either of them the title of said properties revert to the survivor." The trial court concluded in part: "That the properties referred to in the foregoing findings are held in joint tenancy in trust by Helen B. Uhl and defendant Constance M. Uhl for their joint benefit during their joint lifetime, and with right of survivorship." Judgment for defendants (one of whom was appellant Constance M. Uhl) was entered May 29, 1951. The court ordered that the securities wer hold in joint tenancy between respondent, Helen B. Uhl and appellant and that:

"II

"That certain parcel of improved real property situated in the City of San Mateo, County of San Mateo, State of California, be and the same is hereby declared to be co-held in ~~joint~~ tenancy between Plaintiff, Helen B. Uhl, and Defendant, Constance M. Uhl, and which said property is more particularly described as follows: * * *"

On October 23, 1952, appellant filed an "Amended Complaint To Partition Cotenancy And For Accounting Or, In The Alternative, To Re-establish Joint Tenancy" against respondents Eleanor Johnson and Helen B. Uhl. In this complaint appellant asserted claims to the same securities and real property that had been the subject of the prior action. She alleged that on the 19th day of April, 1951, respondent Uhl, without advising appellant thereof, transferred an undivided one-half (½) interest in the real property to respondent Johnson and on April 12, 1951, transferred an undivided one-half interest in the securities to this same party. Appellant further alleged that the judgment in the prior action was unlawfully altered by a person or persons unknown to her to read that the real property was held in cotenancy rather than joint tenancy; that the parties entered into an agreement on or about the 27th day of May, 1951, providing that the real property "shall be held by First and Second Parties in joint tenancy until further agreement of the parties"; and that after appellant signed this agreement it was altered without her authority, consent or knowledge to provide that the real property should be held in cotenancy. Appellant prayed for a partition of the real property or if this could not be had then for a sale of the premises and a division of the proceeds between the parties according to their respective rights and for certain money judgments against respondents in connection with this real property; that the real property be declared to be held in joint tenancy, in trust for the joint benefit of appellant and respondent Uhl during their joint lifetime; and that the securities be declared to be held in joint tenancy, in trust for the joint benefit of appellant and respondent Uhl during their joint lifetime.

The only testimony taken at the trial of the second action prior to the order of dismissal was that of Arthur F. Edwards, the attorney who had represented appellant in the prior action and who filed the original complaint in the second action. (He was substituted out of the case shortly after

this complaint was filed and stated that he thereafter had nothing further to do with it.) Mr. Edwards testified that there was a good deal of altercation and argument between the parties even after the findings of fact and conclusions of law were drawn; that subsequently the parties got together and agreed to a property settlement to the effect that the property should be divided equally between them; that he drew up articles of agreement embodying this understanding. The provision in that agreement around which the present controversy revolves is paragraph VI which follows in part:

"The parties hereto agree that that certain parcel of real property located in the City of San Mateo * * * shall be held HBU CMU co by First and Second Parties in ~~joint~~ tenancy until further agreement of the parties, * * *"

(Appellant was First Party and respondent Second Party to this agreement. Respondent Eleanor Johnson to whom an interest in the property had been transferred on April 19, 1951, was also a party.) Mr. Edwards testified to the circumstances of the change in this paragraph. He stated that the original agreement providing for the joint tenancy was first signed by appellant and another party and then sent to his office and signed by him. During this period appellant was living in Santa Cruz and Edwards' office was located in San Francisco.) He than endeavored to get respondents Helen Uhl and Eleanor Johnson to sign the agreement but they would not agree to the joint tenancy provision preferring to have the property put in cotenancy. He discussed the matter over a period of time with appellant via the telephone and she finally agreed to a cotenancy provision. He did not recall when respondent Helen Uhl made the interlineation or initialed it but he did recall that as far as the final document was concerned that he added appellant's initials to the interlineation agreeing to the cotenancy rather than to the joint tenancy according to the agreement of the parties. He testified that he initialed this change for appellant with her knowledge and acquiescence.

Mr. Edwards testified that in a previous attempt to settle this matter (before the May agreement) he prepared a trust agreement whereby all the property was to be put in trust for the mutual benefit of appellant and respondent Helen Uhl but that appellant would not agree to such a proposal as she wished to have her half of the property free and clear. He stated that he knew that the findings of fact and conclusions of law purported to put the matter in joint tenancy in trust, but that in view of the subsequent agreement of the parties and with the acquiescence of Judge Cotton there was no joint tenancy in trust set up. He further testified that in drawing up the judgment he deleted the part as to the trust and that the trial judge was aware of the agreement and the subsequent judgment which did not put the property in joint tenancy in trust.

The judgment entered May 29, 1951, was designed to follow the Articles of Agreement of May 27, 1951. There is no testimony as to when the word "joint" referring to the ownership of the real property was crossed out and "co" interlined above it in paragraph II of the judgment. However Mr. Edwards did testify that there was no alteration in the judgment after it was prepared in his office up to the time it was presented to the trial judge. The judgment as originally entered did not contain the words "in trust."

On recross-examination Mr. Edwards was asked:

"Q. Do you recall in the agreement that the real property was to be sold upon the the death of Helen B. Uhl and not before and the proceeds divided equally between Miss Constance Uhl and Helen B. Uhl, unless Miss Constance Uhl desired to live in there, and she could live in there to her death, at which time the proceeds would be divided between her estate and Miss Uhl, and it was a fifty-fifty relationship to be carried out at all times?"

He answered that he thought generally that this was the understanding but that it was a little vague in his mind. Respondents' attorney then moved that the court "order that the property may be put in trust to provide a home for Helen B. Uhl so long as she lives, and the home to remain as such

for as long as Constance Uhl lives, if she desires to live there, and any time after the death of Helen B. Uhl if the property is desired to be sold by Constance Uhl the proceeds will be divided one-half and one-half."

The record then shows the following:

"The Court: I am going to grant the motion. I believe that is the effect of all these agreements and judgments and everything. I am going to grant that motion.

"Mr. Katz: Then, the motion is the property will be put back in joint tenancy in trust, is that right?

"Mr. Dawson: In trust, and a home provided for these two people and the proceeds divided one-half and one-half upon the death of Miss Uhl if Miss Constance Uhl desires, and as to all those matters, Your Honor, may we have a motion for res adjudicata granted to all?

"The Court: Yes, your motion to strike the testimony is granted and all of this is res adjudicata.

"Mr. Katz: Your Honor, we have not put on our testimony.

"The Court: Well, that is the order anyway."

The trial court thereafter on September 24, 1954, entered "Judgment Nunc Pro Tunc" ordering that the judgment of May 29, 1951, be "corrected to conform to the actual judgment announced and rendered by the court by adding to the said judgment * * * the words 'co-tenancy in trust,' so that paragraph II shall read as follows:

> "'That certain parcel of improved real property situated in the City of San Mateo, * * * is hereby declared to be held in co-tenancy in trust between Plaintiff, Helen B. Uhl, and Defendant, Constance M. Uhl,' * * *"

(In the "Direction For Entry Nunc Pro Tunc" filed on the same day the court stated that the original judgment read that the real property was to be held in joint tenancy.) It was also ordered "that the Articles of Agreement dated May 27th, 1951, by and between Constance M. Uhl, Helen B. Uhl, Eleanor Johnson, * * * be filed herein." This judgment stated that the written judgment previously filed and entered was not a correct memorial of the judgment as rendered and announced by the court in that the words "in trust" were omitted and that the order that the Articles of Agreement of May 27, 1951, be filed in the action was omitted. These omissions were stated to have been made "through clerical error and/or clerical mistake and/or clerical omission, * * * inadvertently * * *"

At the same time that the "Judgment Nunc Pro Tunc" was filed the court also filed a "Supplementary Order Concerning Trust Provisions Of Judgment" setting forth specifically the terms of the trust as to the real property. It was ordered that appellant and respondent Helen B. Uhl convey to a trustee all their right, title and interest in and to the real property "* * * said trustee to hold said property in trust until the death of Helen B. Uhl, or as long as Helen B. Uhl shall continue to reside on said premises, and during her residence thereon pay the insurance, taxes and upkeep thereof and thereon. Upon the death of Helen B. Uhl, or her vacating said premises, said trustee to continue to hold said property as a residence for Constance M. Uhl if, and only if, she shall desire to live therein. Upon the death of Constance M. Uhl, or upon her earlier decision not to live in said premises, same shall be sold and the proceeds to be divided one-half to Helen B. Uhl or her estate and one-half to Constance M. Uhl or her estate. Constance M. Uhl to pay the insurance, taxes and cost of upkeep of said premises in the event she lives therein."

At the same time the "Judgment Nunc Pro Tunc" was entered the trial court dismissed action No. 59072 on the ground of res adjudicata.

In discussing the propriety of the *nunc pro tunc* order respondents first assert that no appeal will lie from that order. They base this argument on the theory that since the judgment was entered as of May 29, 1951, that it has long since become final. Respondents are in error in this contention. The appeal is not taken from the original judgment of May 29, 1951, but from the order of September 24, 1954, correcting or amending that judgment. Phillips v. Phillips, 41 Cal.2d 869, 875, 264 P.2d 926; Ross-

low v. Janssen, 136 Cal.App. 467, 470–471, 29 P.2d 287.

[1–3] The rule is generally stated that a court may, at any time, and with or without notice, or on its own motion, correct a judgment by a *nunc pro tunc* order so as to make the judgment as entered conform to the judicial decision actually made. Benway v. Benway, 69 Cal.App.2d 574, 159 P.2d 682. Thus a trial court has jurisdiction to correct mistakes in its orders and records which are not actually the result of the exercise of judgment, but where the error is inherently judicial rather than clerical or inadvertent, the court has no power to amend its decision. In re Estate of Burnett, 11 Cal.2d 259, 79 P.2d 89; Key System Transit Lines v. Superior Court, 36 Cal.2d 184, 222 P.2d 867. Thus the question here presented is whether the change in the judgment ordered by the trial court constituted the correction of a clerical or a judicial error. Both the findings and the conclusions recited that the real property should be held by the parties in joint tenancy with the right of survivorship; the Articles of Agreement of May 27, 1951, recited that it should be held by appellant

HBU CMU co

and respondent Uhl "in ~~joint~~ tenancy until further agreement of the parties * * *"; the judgment recited that it should be held

co-

"in ~~joint~~ tenancy" between appellant and respondent Uhl. The effect of the *nunc pro tunc* order with its "in trust" provision seems to be a disposition of the property inconsistent with and different from what was contemplated in the findings, conclusions, agreement of the parties, or original judgment. There is nothing in the record to indicate that this "in trust" provision was part of the original judgment as rendered and that it was merely through clerical error that it was omitted from the judgment. Rather it would seem that the trial judge after listening to the testimony of appellant's former attorney on the trial of the second action reviewed the matter again and then came to the conclusion that the trust provision would express "the effect of all these agreements and judgments and everything." It is obvious that the trial judge attempted to correct a judicial error in making the *nunc pro tunc* order. It is true that the court recited that the words "in trust" and the order that the Articles of Agreement be filed were omitted from the original judgment because of "clerical error and/or clerical mistake and/or clerical omission, made inadvertently." However, the portion of the record quoted above demonstrates that the court attempted to redecide the case on his then understanding after hearing one witness and without allowing appellant to produce her full evidence. This was an attempt to readjudicate the case under the pretext of correcting a clerical error and without a full hearing.

Since the *nunc pro tunc* order was invalid because it constituted a judicial rather than a clerical correction of the judgment the trial court was in error in dismissing the second action on the ground that the issues presented by it had been determined in the prior action, and was also in error in denying appellant the right to produce her evidence in support of her complaint in the second action.

Order amending judgment *nunc pro tunc* in action No. 43838 and order dismissing action No. 59072 reversed.

NOURSE, P. J., and KAUFMAN, J., concur.

141 Cal.App.2d 884

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Paul G. CARPENTER, Defendant and Appellant.

Cr. 5565.

District Court of Appeal, Second District, Division 2, California.

May 28, 1956.

Hearing Denied June 27, 1956.

Prosecution for conspiracy to cheat and defraud by criminal means and to commit grand theft and for the crime of grand theft. The Superior Court Los Angeles County, Aubrey N. Irwin, J., granted defendant probation and defendant appealed from the judgment and from order denying motion for new trial. The District Court of Appeal, Fox, J., held that where defendant arranged to draw winning ticket for theater bank night and palmed and pretended to draw from drum surreptitiously acquired ticket so that defendant's coconspirator received award, there was a felonious taking of property of theater operators by trick and false and fraudulent representations.

Affirmed.

1. Criminal Law ⇐1023(12)

Order granting probation was deemed a final judgment for purpose of appeal. West's Ann.Pen.Code, § 1237.

2. Lotteries ⇐3

Elements of lottery are disposition of property on contingency determined by chance to person paying valuable consideration, or hazarding something of value on chance. West's Ann.Pen.Code, § 319.

3. Lotteries ⇐3

Where defendant had pretended to make drawing at theater bank night and had presented as winning ticket a ticket which he had palmed and which contained number corresponding to name of coconspirator who then received bank night award, defendant had eliminated element of chance and in prosecution for felonious taking of theater operators' property, defendant could not successfully maintain that game was lottery. West's Ann.Pen. Code, § 319.

4. Lotteries ⇐3

Where prize winning tickets for theater bank night were given away and names of winners announced inside and outside theater and it was not necessary for winner to pay admission to claim award, drawing was not a lottery and was not illegal. West's Ann.Pen.Code, § 319.

5. False Pretenses ⇐7(1)

Where defendant arranged to draw winning ticket for theater bank night and palmed and pretended to draw from drum surreptitiously acquired ticket so that defendant's coconspirator received $4,000 award, there was a felonious taking of property of theater operators by trick and false and fraudulent representation, and there was a theft under statute. West's Ann.Pen.Code, § 484.

Monroe & Chula and George H. Chula, Santa Ana, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

FOX, Justice.

[1] This case grows out of a bank night drawing at the Lakewood Theater, in Lakewood, California. Appellant was convicted, together with other defendants who have not appealed, of conspiracy to cheat and defraud by criminal means and to commit grand theft, and of the crime of grand theft. He appeals from the judgment[1] and the order denying his motion for a new trial.

Appellant's contentions are: (1) The bank night drawing was a lottery and therefore illegal; and (2) he and his associates did nothing more than fail to observe the rules of the game and that securing money by failing to observe the rules of an illegal lottery does not constitute a crim-

1 Appellant was granted probation but under Penal Code section 1237 such an order is deemed a final judgment for purposes of appeal.

inal offense. It is therefore necessary to delineate the bank night modus operandi and appellant's activities.

Late in 1950, as an advertising technique and in the hope of encouraging theater attendance, the operators of Lakewood Theater commenced to get registrations for proposed bank night drawings. They solicited registrations from house to house, and gave registration blanks to people in the theater, asking them whether they would like to register for bank night. This continued until several thousand names had been registered before bank nights were started. Thereafter, registration blanks were kept at the snack bar and sometimes at the box office and given to anyone who asked for them. It was not necessary to buy a ticket to register for bank night. A ticket containing each number was put into a drum kept by the theater as the name to which it was assigned was placed in the book; once a person was registered he was eligible to win at any bank night thereafter. After the bank nights were started, registrations for a bank night at the Circle Theater were combined with those secured for the Lakewood Theater when the former theater was taken over by the owners of the latter.

On bank night, which occurred once a week, the drum containing the numbered tickets was taken to the stage of the theater during intermission, and a person chosen by someone connected with the theater would put his hand into it and select a ticket at random. The ticket was withdrawn and given to the theater manager, who compared the number thereon with the numbers in the registration book and determined whose name was represented by that number. When that determination had been made, the name was announced over microphones directed within and without the theater, and the person of that name was given two minutes to reach the stage, where he was required to identify himself.

It was not necessary to pay admission to be present for the drawing and the announcement of the name on bank night, nor for claiming the award. Persons who wished to do so were permitted to enter the theater free for the purpose of seeing and hearing the drawing and announcement. The Lakewood-Circle Theaters' bank night drawings were conducted at the Lakewood for four weeks, and then the drum containing the tickets would be transported to the Circle, where the drawings would be held for four weeks. A person whose name was called could present himself at either theater and claim the drawing.

In the early part of January, 1954, defendant Floyd Jones talked to Richard Owen Landon, whom he had known for some years, about a scheme to make some money. Landon was not interested at that time. Two weeks later Jones called at the Landon home and asked whether he would like to make a few dollars for the use of his name for a drawing at one of the theaters. Jones told him that somebody working for the theater had entered his name in the book and it was all set up. He said that Landon would get a percentage of what was won at the drawing; Landon was to be at a certain theater at a certain date, where his name would be called and he would win the money.

Jones and Landon went to the Lakewood Theater on three successive bank nights but were unable to arrange for a confederate to do the drawing. Their luck changed, however, on Thursday night, February 9th. On that evening Landon met Jones in front of the Lakewood Theater. Jones had a small orange ticket which he said he had gotten through the theater; he told Landon he was going to give it to a party who would volunteer to do the drawing. Jones directed Landon to go to the Circle Theater. That evening appellant Carpenter contacted Mr. Wells, manager of the Lakewood Theater, and asked questions about how he handled the bank night drawing. Wells felt, from Carpenter's conversation, that he was not satisfied the management was handling the drawing right. As a consequence, Wells asked Carpenter to draw the ticket that night. He purportedly drew the ticket, and Landon was announced as the winner. He identified himself and claimed the drawing at the Circle Theater. Landon's name had been added to the registration book by taping it over the name of another registrant. This was proper under

certain circumstances but they were not present in this instance. The theater management, however, was apparently unaware of this.

The following week Landon went to the Circle Theater and was given a check for $4,000. After he received it, he went to Jones' home, as Jones had instructed him; there Jones said that he had instructions to keep the check over night, and that he would give Landon his personal check for $900, which he did. The next morning Jones and Landon went to Los Angeles to have the check "OK'd" by an official of the theater and get it cashed. Landon kept $900 of the money he received and gave the rest to Jones. Carpenter had followed them in another car.

In later conversation with Deputy Sheriff Garbe, Carpenter told him he had participated in a bank night drawing at the Lakewood Theater; that he presented as the lucky ticket one that previously had been given to him by Jones; that Landon was the "winner," and that when they got the check cashed Jones gave him $400.

[2] The initial question is, Was the bank night drawing a lottery? A lottery is defined by Penal Code section 319 as "any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it * * * upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift-enterprise, or by whatever name the same may be known." The elements necessary to constitute a lottery have been judicially stated to be: "(1) The disposition of property, (2) upon a contingency determined by chance, (3) to a person who has paid a valuable consideration for the chance of winning the prize, that is to say, one who has hazarded something of value upon the chance." People v. Cardas, 137 Cal.App. Supp. 788, 790, 28 P.2d 99, 100.

[3] Was the disposition of the $4,000 here involved "upon a contingency determined by chance"? The appellant and his co-conspirators prevented any element of chance whatsoever from occurring in the determination of who was to receive the bank night award. When the appellant pretended to draw a ticket from the drum he had no intention of drawing a ticket by chance, and he did not do so. He intended to draw and present as the winning ticket the one that he had palmed, and which contained a number corresponding to the name of a co-conspirator which had been added to the registration book. As the appellant had predetermined which ticket was to be drawn and presented, the determination of which ticket was to be drawn and who the winner of the money would be, could not have been, and was not, by chance. This theory finds support in Catts v. Phalen, 2 How. 376, 43 U.S. 376, 11 L. Ed. 306, which was an action to recover money obtained at a drawing by means similar to those employed here and which the court characterized as "a deeply concocted, deliberate, gross, and most wicked fraud." The court held the fraud avoided the drawing and placed the perpetrator in the same position as if there had been no drawing in fact.

It therefore follows that the appellant can not successfully maintain that the game in which he and his co-conspirators secured the bank night award was a lottery, inasmuch as he, by his own acts, eliminated the element of chance in the determination of the winner.

[4] We come now to the third element in a lottery, viz.: consideration for the chance of winning the prize. The question of consideration is not to be determined from the standpoint of the defendant, but from that of the holders of prize tickets. The question is: Did the holders of prize tickets pay a valuable consideration for the chance? Certainly those who received prize tickets without buying an admission ticket did not pay anything for the chance of getting the prize. They did not hazard anything of value. It would then seem to follow that those who purchased admission tickets and received prize tickets, not at the box office but from another employee, could not be said to have paid a consideration for

the prize tickets since they could have received them free.

The court in the Cardas case, supra, relied on Cross v. People, 18 Colo. 321, 32 P. 821, 822. In discussing the element of consideration in a lottery, the Colorado Supreme Court stated: "By the admitted facts it is shown that the plaintiffs in error gave business cards, which entitled the holders to a chance in a piano, to be distributed as the holders of such chances might elect. These tickets or chances were given indiscriminately to persons, whether they purchased goods of plaintiffs in error or not, to those who registered their names at their shoe store, and to those who, from a distance, sent the return postage. While it is admitted that Charles Linton purchased goods to the amount of one dollar at their store, and received one of these cards, it is admitted that such purchase, or any purchase of goods, was not a condition upon which the card was delivered. The fact that such cards or chances were given away to induce persons to visit their store with the expectation that they might purchase goods, and thereby increase their trade, is a benefit too remote to constitute a consideration for the chances. Persons holding these cards, although not present, were, equally with those visiting their store, entitled to draw the prize. The element of gambling that is necessary to constitute this a lottery within the purview of the statute, to wit, the paying of money, directly or indirectly, for the chance of drawing the piano, is lacking and the transaction did not constitute a violation of the statute."

Here, before bank night drawings commenced, solicitors went from door to door to secure names for the bank night registration book. At the same time, persons who patronized the theater were given registration blanks and were asked whether they would like to register for bank night. After several thousand names had been secured for the registration book in this manner, bank night drawings commenced. Thereafter, registration blanks were kept at the snack bar and box office, and anyone who asked for one was given it, and in order to register it was not necessary to buy a ticket. Once a person had registered, he could win at any bank night drawing thereafter. Names previously registered at another theater were later included. The name of the winner was announced over microphones directed within and without the theater, and the person whose name was drawn had two minutes to reach the stage. Anyone who wished to do so was permitted to enter the theater without paying for the purpose of seeing and hearing the drawing. It was not necessary to pay admission to be entitled to claim the award.

Certainly those who registered upon request of a solicitor without attending the theater did not pay for the chance of getting the prize; neither did those who later registered without purchasing an admission ticket. Those who purchased admission tickets and then registered while they were at the theater as patrons, cannot be said to have paid a consideration for the privilege of registering, as they could have done so without buying an admission ticket. Once a person's name was registered, it might be drawn at any bank night thereafter, and it was not necessary that he purchase an admission ticket either to listen to or see the bank night drawing or to claim the award if his name was called.

It therefore follows, under the principles of the Cardas case, supra, that no consideration was paid for the chance of winning the bank night prize in the instant case.

For the foregoing reasons it is apparent that the fake drawing in which appellant participated was not a lottery.

Our conclusion that the drawing in question was not a lottery and was not illegal destroys the basis of appellant's second contention, viz., that he merely violated the rules of an illegal game and that this is not a criminal offense.

[5] The activities of appellant and his co-conspirators, however, went far beyond a mere violation of the theater's rules for bank night drawings. They arranged to have the name of one of their group placed on the register opposite the number that was on the ticket to be drawn, which it may be inferred they stole from the drum or otherwise wrongfully acquired. Appellant arranged to draw the winning ticket, which

must have been done by chance if the drawing was in fact a lottery. Instead of drawing a ticket by chance, appellant palmed the surreptitiously acquired ticket and pretended to draw it from the drum. As a result of its presentation as the winning ticket drawn by chance from the drum, one of appellant's co-conspirators received the $4,000 bank night award. As pointed out in Catts v. Phalen, supra, the fraudulent acts on the part of appellant and his associates avoided the drawing and placed them in the position of having no right whatever to the bank night money. Nevertheless, by concealing the true facts, they thereafter secured such money. Their getting the money was without the real consent of the theater operators, who would not have turned the money over to them if they had known the true facts. This was therefore a felonious taking of the property of the theater operators by trick, and false and fraudulent representations, and was a crime under the law of this state. Pen.Code, § 484; People v. Rial, 23 Cal.App. 713, 717–718, 139 P. 661.

Appellant relies on People v. Gonzales, 62 Cal.App.2d 274, 144 P.2d 605. There is nothing in that case inconsistent with our decision in the instant matter.

The judgment and order are affirmed.

MOORE, P. J., and ASHBURN, J., concur.



141 Cal.App.2d 547

KAYNAR MFG. CO., Inc., a California corporation, Petitioner,

v.

SUPERIOR COURT of the State of California, IN AND FOR the COUNTY OF LOS ANGELES, Respondent,

Edgar Florado Nason, Real Party in Interest.

Civ. 21713.

District Court of Appeal, Second District, Division 1, California.

May 15, 1956.

Proceeding on petition for writ of prohibition to prevent respondent court from enforcing an order compelling petitioner to produce for inspection certain of its books and records. The District Court of Appeal, Nourse, J. pro tem., held that employee, claiming that he had been wrongfully discharged and seeking by way of damages not only his loss of stated salary for remainder of term of employment but a sum based upon his share of prospective net sales, was not required to have issue of liability first tried, or even to make prima facie showing of liability, in order to be entitled to discovery as to books and records relevant to damages issue, but held that since employment contract entitling employee to percentage of "net sales" defined quoted term as "gross sales less taxes, excise charges, discounts, credits, allowances, refunds, or returns" and there was no question as to correctness of employer's books of account, it had been error to require employer to produce detailed records which were basis for entries in books of account.

Order accordingly.

1. Discovery ⇐97(1)

In order that a party to an action may, pursuant to Code of Civil Procedure section, have right to inspect books of account or documents, he must (1) show that person against whom the order is sought has the writings to be inspected in his possession or under his control; (2) identify writings desired; and (3) clearly show that they contain competent and admissible evidence which is material to the issues to be tried. West's Ann.Code Civ.Proc. § 1000.

2. Discovery ⇐84

Employee, claiming that he had been wrongfully discharged and seeking by way of damages not only his loss of stated salary for remainder of term of employment but a sum based upon his share of prospective net sales, was not required to have issue of liability first tried, or even to make prima facie showing of liability, in order to be entitled to discovery as to books and records relevant to damages issue. West's Ann. Code Civ.Proc. § 1000.

3. Discovery ⇐88

Where employment contract, entitling employee to percentage of "net sales," de-

fined quoted term as "gross sales less taxes, excise charges, discounts, credits, allowances, refunds, or returns" and there was no question as to correctness of employer's books of account, it was error to require employer to produce, in connection with employee's action for wrongful discharge, detailed records which were basis for entries in books of account.

Mitchell, Silberberg & Knupp, Arthur Groman, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

A. J. O'Connor, Los Angeles, for real party in interest.

NOURSE, Justice pro tem.

Petitioner seeks a writ of prohibition to prevent the respondent court from enforcing an order compelling it to produce for inspection certain of its books and records.

The pertinent facts as disclosed by the petition are:

Petitioner entered into a contract with one Nason (real party in interest here) under which Nason was employed to perform certain services for petitioner. The term of contract was four years, commencing on the 13th of January, 1955. By the terms of the contract Nason was to be paid a stated salary per month and, at the end of each year, a sum equal to one-half of 1 per cent of petitioner's annual net sales during the preceding year which were in excess of petitioner's net sales for the year 1954, or in excess of the sum of $1,000,000, whichever should be the lesser figure, upon condition that he "well, truly, and competently performs his duties and obligations" under the contract.

At the end of the ninth month of his employment Nason was discharged, and thereafter commenced the action against petitioner in which the order in question was made.

In his complaint, Nason alleged that he was discharged without just or legal cause. He sought by way of damages not only his loss of stated salary for the remainder of the term, but a sum based upon his share of the prospective net sales.

Petitioner's answer admitted the contract of employment and the discharge of Nason, but denied that he had been wrongfully discharged and alleged that he had been discharged because of a breach by him of the obligations of the contract on his part to be performed. It further denied all allegations of the complaint as to damages.

Thus the only issues of fact formed by the pleadings were: Was the plaintiff wrongfully discharged; and, if so, in what sum was he damaged?

In February of 1956 Nason moved the trial court for an order compelling petitioner to permit him to examine and take copies of certain accounts from petitioner's general ledger and its sales journal and "any other accounts which defendant contends should be deducted from 'gross sales' to determine the correct amount of 'net sales'." Nason based his motion upon his complaint, and upon his affidavit which stated the relevant terms of the contract of employment including the definition of net sales as set forth in that contract, specified the accounts and records which he desired to examine, and alleged that they were material to the issue of damages.

In opposition to the motion petitioner filed an affidavit of its secretary, in which he stated that petitioner had a meritorious defense to the action in that Nason had breached his contract of employment by failing to do certain things specified in the affidavit, and had on account of this breach of duty been rightfully discharged; that petitioner was engaged in a highly competitive industry, and that the information sought by Nason was confidential and eagerly sought after by petitioner's competitors with whom Nason was connected.

The trial court granted Nason's motion and ordered petitioner to forthwith make available to a public accountant representing Nason the following books and records of the Kaylock division of petitioner corporation for the calendar years 1954 and 1955:

"From the general ledger or its equivalent:

"(a) Sales accounts;

"(b) Return and allowance accounts;

"(c) Discount on sales accounts; and

"From the sales journal or its equivalent:

"(a) Sales invoices;

"(b) Credit memoranda;

"(c) Cash received record journal; together with any other accounts which defendant contends should be deducted from 'gross sales' to determine the correct total of 'net sales'."

Respondent court will, unless the writ prayed for here issue, enforce its order by proceedings in contempt against the officers of petitioner.

[1, 2] In support of its application for a writ of prohibition, petitioner makes two points. Its first point is that "The books and records ordered to be produced (which relate to damages) would become material only in the event that Petitioner were held liable to Nason." In support of this contention petitioner argues that inasmuch as Nason did not file a counter-affidavit controverting the facts stated in the affidavit of petitioner's secretary as to Nason's breach of the contract of employment, he is not entitled to discovery pursuant to the provisions of section 1000 of the Code of Civil Procedure until he has established the liability of petitioner to him for damages. This contention cannot be sustained.

In order that a party to an action may, pursuant to section 1000, Code of Civil Procedure, have the right to inspect books of account or documents, he must (1) show that the person against whom the order is sought has the writings to be inspected in his possession or under his control; (2) identify the writings desired; and (3) clearly show that they contain competent and admissible evidence which is *material to the issues to be tried.* Milton Kauffman, Inc., v. Superior Court, 94 Cal.App.2d 8, 15, 210 P.2d 88, and cases there cited.

Petitioner here makes no contention that it does not have and control the documents demanded, nor, with one exception to be hereafter noted, that the order does not sufficiently identify the documents which petitioner is called upon to produce; nor does it, as to certain documents, assert that they do not contain competent and admissible evidence relevant to the issue of damages as framed by the pleadings. It does contend, however, that the issue of liability must first be tried and determined in Nason's favor before it is compelled to produce this evidence, or that at least plaintiff must first make a prima facie showing of liability. It bases this claim upon certain language used in the cases of Austin v. Turrentine, 30 Cal.App.2d 750, 87 P.2d 72, 88 P.2d 178, and Milton Kauffman, Inc., v. Superior Court, 94 Cal.App.2d 8, 210 P.2d 88, that it was necessary therein that the plaintiff first make a prima facie showing that a confidential relationship existed between the parties before inspection could be compelled. In both those cases, however, plaintiff was seeking an accounting, and the language of the court was addressed to the fact that if a confidential relationship existed then the plaintiff had a common right with the defendant in the books and records demanded; and the prima facie showing which the opinions in the two cases spoke of is the showing of that relationship, and therefore the showing of an issue to which the evidence sought would be relevant. The present action is one for damages and there is no question but that there is an issue to which the evidence sought is relevant. That is all that is required in order to entitle the plaintiff in the subject action to inspection.

To delay inspection until after the trial of the issue of liability would, in an action such as this where the plaintiff is entitled to have all issues submitted to a jury, defeat the purpose of Code of Civil Procedure, § 1000, as that section has been interpreted by our courts. See Milton Kauffman, Inc., v. Superior Court, supra, and cases cited at pp. 15 and 16 of 94 Cal.App.2d, at pages 92, 93 of 210 P.2d.

[3] Petitioner's second point is that the order of the court, even if properly issued, is too broad in its scope, in that it requires petitioner to produce and permit inspection not only of its books of account but of its detailed records which are the basis for the entries in its books of account, and in

that it also requires the production of documents which are not identified. We think that this contention of petitioner must be sustained.

The contract upon which Nason must rely contains the following definition of net sales: "As used herein, net sales are defined as gross sales less taxes, excise charges, discounts, credits, allowances, refunds, or returns."

Neither the complaint in the subject action nor the affidavit for the order in question tenders any issue or makes any showing as to the correctness of petitioner's books of account or that its true gross and net sales are not truly reflected in its ledger accounts; nor has any showing been made as to how the items of the order hereafter mentioned would be material evidence to show either the amount of gross sales or any of the items to be deducted therefrom under the contract in order to determine net sales. The items we refer to are "Sales invoices", "Credit memoranda", and "Cash received record journal", all of which are merely the basis for the entries in the books of account.

In this action, Nason's contract of employment having been terminated, he does not have the right to an accounting of profits as such; nor does he seek such an accounting, but seeks only damages which would be based in part upon the actual profit earned by petitioner during the first year of the contract and the estimated profits during the future years.

Nason therefore does not have a common right with petitioner to the books in question, and does not have any right to inquire into the details of petitioner's business. The purposes of discovery and the proper administration of justice will be fully served by permitting an inspection of the ledger accounts; and to require the petitioner to produce the additional records specified in the order upon the showing here made would amount to an unreasonable search, contrary to the provisions of article 1, § 19 of the Constitution of this state.

That part of the order by which petitioner is ordered to produce certain unidentified accounts described as "accounts which defendant contends should be deducted from 'gross sales' to determine the correct total of 'net sales'" certainly does not meet the requirements that the party seeking the inspection must identify the writings desired. If there are other accounts than those set forth in petitioner's ledger which contain evidence material to the issue of damages, this fact may be ascertained by the real party in interest by means of a deposition, and he may thus lay the basis for their production. Until he does so, he cannot go on a fishing expedition by demanding that petitioner produce all documents which it may deem relevant.

Let a peremptory writ of prohibition issue, enjoining the respondent court from enforcing its order for an inspection of books, made and entered on the first day of March, 1956, in action number 652139 in said Court, except insofar as it orders petitioner, defendant in said action, to produce and make available to the public accountant representing the plaintiff the following books and records of petitioner for the calendar years 1954 and 1955, to wit: from petitioner's general ledger or its equivalent, "(a) Sales accounts; (b) Return and allowance accounts; (c) Discount on sales accounts".

WHITE, P. J., and FOURT, J., concur.



141 Cal.App.2d 912

Manuel L. ROCHA, Plaintiff and Respondent,

v.

Mary ROCHA, Defendant and Appellant.

Civ. 5319.

District Court of Appeal, Fourth District, California.

May 28, 1956.

Husband's action under separation agreement to recover contribution for income tax deficiency paid for years 1949 and 1950. From a judgment of the Superior Court, Tulare County, W. G. Machetanz,

J., in favor of the husband, the wife appealed. The District Court of Appeal, Griffin, J., held that the husband was entitled to contribution under law and agreement and was not estopped to claim same though the agreement recited that all "indebtedness and liabilities" had been paid up through June 1952, in full.

Affirmed.

1. Internal Revenue ⇐1745, 1751

Under separation agreement reciting that all "indebtedness and liabilities" of parties through June, 1952 had been paid in full and providing that wife assumed and would pay one-half of income taxes for period ending December 31, 1951, phrase "indebtedness and liabilities", though it might under ordinary conditions have included income taxes, did not include them under circumstances of case, and husband was not estopped to claim contribution for income tax deficiencies paid for years 1949 and 1950, and was entitled to contribution under law and agreement. West's Ann.Civ.Code, §§ 1432, 1636–1641, 1652.

2. Internal Revenue ⇐1751

Mere issuance of receipt for tax paid was not conclusive evidence, with respect to requiring contribution from co-signer of joint income tax return, that tax was actually due. West's Ann.Civ.Code, § 1432.

3. Internal Revenue ⇐1751

In husband's action against wife to recover contribution for income tax deficiency paid, evidence was sufficient to establish fact that tax had actually been imposed and that payment was not voluntary. West's Ann. Civ.Code, § 1432.

Lewis, Field & DeGoff, San Franciso, for appellant.

Rush, Soares & Stringham, for respondent.

GRIFFIN, Justice.

Action by plaintiff and respondent to recover from defendant and appellant, his ex-wife, one-half of the Federal income tax for the years 1949 and 1950, claimed due by the terms of a property settlement agreement. The parties accumulated considerable community property since their marriage in 1930, consisting of a leasehold interest in a ranch, money, etc. On October 17, 1952, they entered into a written property settlement agreement whereby the wife received considerable cash and other property and the husband received the leasehold interest in the ranch, etc. They there agreed:

"Seventh: That all *indebtedness and liabilities* heretofore incurred or created by the parties hereto, to and including the 30th day of June, 1952, have been paid in full; that any and all indebtedness and liabilities incurred or created solely by the party of the first part subsequent to said 30th day of June, 1952, shall be wholly paid by the party of the first part and that the party of the second part shall not pay or be liable to pay any part thereof, and the party of the first part hereby agrees to keep the party of the second part safe and harmless from the payment of any part of the indebtedness and liabilities mentioned in this particular paragraph.

"Eighth: That any and all indebtedness and liabilities incurred or created solely by the party of the second part subsequent to said 30th day of June, 1952, shall be wholly paid by the party of the second part and that the party of the first part shall not pay or be liable to pay any part thereof, and the party of the second part hereby agrees to keep the party of the first part safe and harmless from the payment of any part of the indebtedness and liabilities mentioned in this particular paragraph * * *

"Thirteenth: That the parties hereto will execute all necessary joint or separate State of California and Federal income tax returns, or amendments thereto, concerning the business affairs of the parties hereto from the time of their marriage to and including the 30th day of June, 1952; and that the party of the first part agrees to assume and to pay one-half of all State of California and Federal income taxes owing by either or both of the parties hereto for the period

ending December 31, 1951, and that said party of the first part agrees to assume and to pay all State of California and Federal income taxes owing by either or both of the parties hereto for the period beginning January 1, 1952, and ending on June 30, 1952; and the party of the second part does hereby agree to assume and to pay one-half of all State of California and Federal income taxes owing by either or both of the parties hereto for the period ending December 31, 1951; and each of the parties hereto hereby agrees to keep the other party hereto safe and harmless from the payment of any of the income taxes agreed to be paid by him, or by her, as aforesaid." (Italics ours.)

In the month of December, 1952, the Internal Revenue Department decided to investigate the joint Federal income tax returns of the parties for the years 1949 and 1950, and the parties had knowledge of this fact at the time of the separation agreement.

On March 22, 1954, plaintiff paid the entire amount of $5,175.28 found due. Relying on the separation agreement, plaintiff demanded of defendant the one-half paid by him on her behalf. She refused to pay him contending that plaintiff, by the terms of the agreement, had represented to her that "all *indebtedness and liabilities*" of the parties up to June 30, 1952, had been paid and accordingly plaintiff was estopped from asserting the claim. She also argues that there was no sufficient showing that that sum was due and owing to the government and that the payment of the entire amount by plaintiff was a voluntary payment and accordingly defendant was not liable for such payment, citing such authorities as Machado v. Fernandez, 74 Cal. 362, 363, 16 P. 19; Vidal v. Stahmann Farms, 10 Cir., 93 F.2d 902, 903; and United States v. Globe Indemnity Co., 2 Cir., 94 F.2d 576.

The written agreement was drawn by plaintiff's then counsel, who testified at the trial that Section Thirteen thereof was placed in the agreement after consultation of plaintiff and defendant and their respective attorneys; that they all realized the possibility of an audit of these returns for the years indicated and that there might be a possibility of an income tax deficiency; that it was so drawn that plaintiff would be protected so as to entitle him to a contribution from defendant in case one was assessed, and that was the reason for including that provision in the separation agreement.

[1] The phrase "*indebtedness* and *liability*" incurred or created by the parties mentioned in Paragraph Seven might have covered such income tax assessment under ordinary conditions. It does appear to us that, when the other sections in relation to the probable additional tax for the years 1949 and 1950 were considered in connection with that paragraph, the trial court was fully justified in finding against defendant's contention. We see no merit to the claimed estoppel. Secs. 1636–1641 and 1652, Civ. Code; 18 Cal.Jur.2d p. 406, sec. 5; McClain v. Bercut-Richards Packing Co., 64 Cal. App.2d 420, 425, 148 P.2d 907; Cruise v. City and County of San Francisco, 101 Cal. App.2d 558, 562, 225 P.2d 988.

The Internal Revenue Bureau's agent was in consultation with plaintiff about the added assessment. He estimated the deficiency at $5,175.28 for both parties on March 12, 1953, and again on March 11, 1954, and they signed a consent fixing the period of limitation on the assessment of income and profit tax.

[2, 3] Plaintiff testified he went to the local agent and he "figured up how much tax we owed"; that he was about to go to South America, and he was told that before leaving the Bureau required that he pay the tax, so he paid it, obtained a receipt from the agent for that amount and later demanded one-half of that sum from defendant.

It was the positive duty of both plaintiff and defendant to satisfy their obligation to the government when that amount was established. Plaintiff paid it, under the conditions indicated, and according to law and the contract here involved, he was entitled to reimbursement from defendant for one-half of the amount paid. Sec. 1432, Civ. Code; Jackson v. Lacy, 37 Cal.App.2d 551, 559, 100 P.2d 313. Defendant argues there was no sufficient showing that the government had actually fixed the amount claimed due. It is true, as contended by defendant, the mere issuance of a receipt for the tax is

not conclusive evidence that the tax was actually due. United States v. Globe Indemnity Co., supra, 94 F.2d 576. There was a preliminary statement (marked for identification) of that tax liability issued by the agent. This evidence and the testimony of plaintiff rather indicates that the amount due actually was fixed and payment was to be made accordingly. To supplement this evidence, plaintiff now moves this court to consider additional evidence obtained on that subject. It consists of a certified copy of a waiver of restrictions on assessment and acceptance of over-assessment dated April 5, 1954, which sets forth the amount of the tax on the deficiencies and the over-assessment. It is signed by the parties to this action.

Since it is our conclusion that there was otherwise sufficient evidence to establish the fact that the tax had actually been imposed, the receipt of the additional evidence would be only cumulative. Accordingly the motion should be denied. No additional claims were raised on the motion for new trial. It was properly denied.

Motion to receive additional evidence denied. Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



141 Cal.App.2d 675

Christopher L. EDLER, a minor, by Henry G. Edler, his guardian ad litem, Plaintiff and Respondent,

v.

SEPULVEDA PARK APARTMENTS, a corporation, Defendant and Appellant.

Civ. 21545.

District Court of Appeal, Second District, Division 2, California.

May 21, 1956.

Action against plaintiff's parent's landlords for injuries sustained by plaintiff, when as three year old infant, he allegedly fell in hole made in lawn, around sprinkler outlet, by landlord's gardeners. After the jury returned verdict for defendant, the Superior Court of Los Angeles County, Orlando H. Rhodes, J., entered order granting plaintiff new trial, and defendant appealed. The District Court of Appeal, Ashburn, J., held that evidence on issue of whether landlord or servants were negligent in making hole or leaving it and whether such negligence proximately caused plaintiff's injuries supported order granting new trial.

Order affirmed.

1. Appeal and Error ⇐977(3)
New Trial ⇐6

Upon motion for new trial, it is function of trial judge to make independent appraisal of evidence, including all permissible inferences, and to exercise sound judicial discretion in determining whether verdict effects miscarriage of justice, and reviewing court cannot disturb order granting new trial unless abuse of discretion clearly appears.

2. Appeal and Error ⇐854(6), 933(1)

On appeal from order granting motion for new trial, all presumptions are in favor of order and order will be affirmed if sustainable on any ground.

3. New Trial ⇐71

Trial court in considering motion for new trial is not bound by conflict of evidence and has not abused its discretion in granting new trial when there is any evidence which could support judgment in favor of moving party.

4. New Trial ⇐71

On motion for new trial, where only conflict is opposing inferences deducible from uncontradicted probative facts, trial court may draw inferences opposed to those accepted by jury and may resolve conflicting inferences in favor of movant.

5. Appeal and Error ⇐1015(1)

It is only where it can be said as matter of law that there is no substantial evidence to support contrary judgment that reviewing court will reverse order of trial court granting new trial.

6. Appeal and Error ⇐933(1)

In reviewing order granting motion for new trial, reviewing court would accept as established all evidence and all reasonable inferences favorable to movant's case.

7. Landlord and Tenant ⇐169(6)

In action against plaintiff's parent's landlord for injuries sustained by plaintiff, as three year old infant, when he allegedly fell in hole made in lawn, around sprinkler outlet, by landlord's gardeners, evidence on issue of whether landlord or its servants were negligent in making hole or leaving it and whether such negligence proximately caused plaintiff's injuries did not sustain verdict for landlord.

8. Negligence ⇐33(3)

A landowner owed duty of reasonable care to see that no injury would come to infant playing on land, though infant was mere trespasser.

9. Negligence ⇐23(1)

One is negligent in maintaining agency which he knows or reasonably should know to be dangerous to children of tender years at place where he knows or reasonably should know that such children are likely to resort or to which they are likely to be attracted by agency unless he exercises reasonable care to guard them against danger which their youth and ignorance prevent them from appreciating.

10. Negligence ⇐23(1)

If, to knowledge of landowner, children of tender years habitually come on his property where dangerous condition exists to which they are exposed, he has duty to exercise reasonable care for their safety not because of implied invitation but because of his knowledge of unconscious exposure to danger which children do not realize.

11. Negligence ⇐2

It is every individual's duty to use toward others such due care as situation requires.

12. Negligence ⇐7

Known characteristics of children, including childish propensities to intermeddle must be taken into consideration in determining whether ordinary care for safety of child has been exercised.

Lee A. Solomon, Los Angeles, for appellant.

Seymour R. Winston, Beverly Hills and Stan Flinkman, Santa Monica, for respondent.

ASHBURN, Justice.

This is a personal injury action brought by a boy who was about three years old at the time of the accident. A jury rendered a verdict for defendant which appeals from an order granting plaintiff a new trial upon the expressed ground of insufficiency of the evidence to sustain the verdict.

[1–6] Upon motion for new trial it is the function of the trial judge to make an independent appraisal of the evidence, including all permissible inferences, and to exercise a sound judicial discretion in determining whether the verdict effects a miscarriage of justice, and a reviewing court cannot disturb the order unless an abuse of discretion clearly appears. All presumptions are in favor of the order and it will be affirmed if sustainable on any ground. "The trial court in considering a motion for new trial is not bound by a conflict in the evidence, and has not abused its discretion when there is any evidence which would support a judgment in favor of the moving party. Estate of Green, 25 Cal.2d 535, 542, 154 P.2d 692; Hames v. Rust, 14 Cal.2d 119, 124, 92 P.2d 1010. The only conflict may be the opposing inferences deducible from uncontradicted probative facts. In such case the trial court may draw inferences opposed to those accepted by the jury and may thus resolve the conflicting inferences in favor of the moving party, for 'It is only where it can be said as a matter of law that there is no substantial evidence to support a contrary judgment that an appellate court will reverse the order of the trial court.'" Ballard v. Pacific Greyhound Lines, 28 Cal.2d 357, 358, 359, 170 P.2d 465, 467. We must, for present purposes, accept as established all evidence and all reasonable inferences fa-

vorable to plaintiff's cause. The following discussion proceeds upon that basis.

[7] Defendant owned and operated a rental project of some 60 units which were laid out in courts, each building having front and back yards. Plaintiff's parents were tenants in one of the apartments. The yards were equipped with sprinkler systems, the sprinkler heads being approximately flush with the lawn and scattered at intervals throughout the grass. This was true of the lawn in front of each of the apartments. These lawns were 50 by 100 to 125 feet in dimensions and were separated by ordinary cement walks. The accident happened on February 24, 1953. On that morning plaintiff's grandfather, Warren Lincoln, and a neighbor, Mrs. Kryske, saw defendant's gardeners cutting the grass and earth from around the sprinkler heads in front of the Edler residence. They made a hole around each, which was about six inches in diameter and three inches in depth. This hole extended beyond the sprinkler head to a width of about two inches. Though it was customary for a workman to follow with a wheelbarrow of sand the one who reamed out the hole and to fill the hole with sand, it is a fair inference that that did not happen with respect to the hole involved in the accident. When Mr. Lincoln and Mrs. Kryske looked at it after that occurrence it was still six inches in diameter and three inches in depth. The practice of filling the holes, as explained by Joe Mesa, defendant's head gardener, was an effort to keep the children away because of the danger of the holes. Children were accustomed to use these front lawns for play or any other adventure that might appeal to them. This they did every day. The fact was well known to defendant and its agents and the lawns were thus used with their permission.

In the afternoon of February 24th plaintiff's grandparents took him to market. Upon their return they were busy unloading the automobile when the grandmother heard plaintiff scream. She started toward him and her husband then heard and saw the plaintiff. He was lying on his back with his feet close to the sprinkler head, not quite touching it, and no one was near him. He had received a spiral fracture of the femur described by the specialist as a twisting injury from a fall with the leg in a twisted position. Appellant argues that the evidence does not warrant a finding of negligence or, assuming negligence, that it was the proximate cause of plaintiff's injury.

As to negligence, the above recital of facts shows inferentially a failure to fill the hole around the particular sprinkler head, a precaution that was considered to be necessary to the safety of children. Moreover, these were Moody sprinklers. Mr. Wallace F. Hammer, who specializes in the installation of that particular type of sprinkler, testified that if the sprinkler head for any reason becomes lower than the lawn the remedy is to install a longer nipple and thus raise it as desired. Also, that a hole if dug around the head fills with water and if the head is flush with the earth there is no purpose in making a hole around it. Al Jennings, gardener for the City of Santa Monica for over 12 years, testified to long familiarity with Moody sprinklers and further said he had not found it necessary in those years of experience to cut holes around the Moody heads and that he had never done so. It appears therefore that an inference of negligence could be drawn from the making of the holes around the sprinkler heads in an area frequented by young children with the knowledge and consent of defendant. Also from the fact that the particular hole had not been filled in the manner required by ordinary care.

Appellant argues further that only through speculation and conjecture can the conclusion be reached that the injury was proximately caused by the sprinkler head or the hole around it. This was a small child, three years old, with a small foot which would easily got into the hole and cause a twisting fall. That is the type he suffered; after he had fallen he was unable to get up and his feet were almost touching the sprinkler head; there was no one near him. The inference that his fall was caused by the hole and sprinkler head is a reasonable one which the trial judge or the jury could well draw. If it involves any degree of speculation it is only that

minimal amount which is inherent in the ordinary process of drawing inferences. See Gilbert v. Pessin Grocery Co., 132 Cal. App.2d 212, 226, 282 P.2d 148; Miller v. Southern Pacific Co., 117 Cal.App.2d 492, 507, 256 P.2d 603; Finnegan v. Royal Realty Co., 35 Cal.2d 409, 424, 218 P.2d 17; Rovegno v. San Jose K. of C. Hall Ass'n, 108 Cal.App. 591, 595–597, 291 P. 848; Lindsey v. DeVaux, 50 Cal.App.2d 445, 454, 123 P.2d 144. There is sound basis in this record for an inference that defendant's negligence was the proximate cause of the accident.

[8] Appellant's counsel also argue that there can be no recovery because defendant owed no duty to exercise care toward plaintiff with respect to the sprinklers. This brings forth an argument by counsel for both sides as to what plaintiff's status was, —whether a tenant, invitee, licensee or trespasser. The argument is misplaced. If it were found that plaintiff, a small infant, was a mere trespasser in a place belonging to defendant in which his presence was normally to be expected by defendant, then it owed him a duty of reasonable care.

In Kading v. Willis, 135 Cal.App.2d 82, 286 P.2d 861, which involved an injury to a five and one-half year old boy when upon or near a delivery truck, it was held reversible error to instruct the jury: "'If plaintiff had gotten upon the truck of the defendant without being expressly or impliedly invited so to do, and defendant's driver was unaware of his presence, then plaintiff was a trespasser and defendant owed no duty to plaintiff except to refrain from intentional harm or from willful reckless or wanton injury. There is no liability for mere failure to exercise ordinary care under such circumstances. * * *'" 135 Cal.App. at page 92, 286 P.2d at page 868.

[9–12] Copfer v. Golden, 135 Cal.App. 2d 623, 627, 288 P.2d 90, 92: "Thus one is negligent in maintaining an agency which he knows or reasonably should know to be dangerous to children of tender years at a place where he knows or reasonably should know such children are likely to resort or to which they are likely to be attracted by the agency unless he exercises reasonable care to guard them against danger which their youth and ignorance prevent them from appreciating. If, to the knowledge of the owner, children of tender years habitually come on his property where a dangerous condition exists to which they are exposed, the duty to exercise reasonable care for their safety arises not because of an implied invitation but because of the owner's knowledge of unconscious exposure to danger which the children do not realize. [Citing cases.] Children of tender years have no foresight and scarcely any apprehensiveness of danger, a circumstance which those owning instrumentalities potential for harm must bear in mind; for it is every individual's duty to use toward others such due care as the situation then and there requires. Civ.Code, § 1714. 'The known characteristics of children, including their childish propensities to intermeddle, must be taken into consideration in determining whether ordinary care for the safety of a child has been exercised under particular circumstances.'" The court also said in 135 Cal.App.2d at page 628, 288 P.2d at page 93: "The Restatement says: 'A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land, if (a) the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and (b) the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children, and (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and (d) the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein.' Rest., Torts, § 339. See 65 C.J.S., Negligence, § 28, p. 454. The rule in California is substantially as stated in the Restatement." (To the same effect see Staggs v. Atchison, Topeka & S. F. Ry. Co., 135 Cal.App.2d 492, 500, 287 P.2d 817; Frederiksen v. Costner,

99 Cal.App.2d 453, 456, 221 P.2d 1008; Hilyar v. Union Ice Co., 45 Cal.2d 30, 36, 286 P.2d 21.

The order granting a new trial is affirmed.

MOORE, P. J., and FOX, J., concur.



141 Cal.App.2d 759

Henry H. SCHULER, Plaintiff and Appellant,

v.

E. A. WINSTANLEY, Public Administrator, as administrator of the Estate of John Clark, deceased, Defendant and Respondent.

Hoberly G. E. SPRAY et al., Plaintiffs,

v.

E. A. WINSTANLEY, Public Administrator, as administrator of the Estate of John Clark, deceased, Defendant.

E. A. WINSTANLEY, Public Administrator, as administrator of the Estate of John Clark, deceased, Defendant and Cross-Complainant and Respondent,

v.

Hoberly G. E. SPRAY et al., and Henry H. Schuler, Plaintiffs and Cross-Defendants,

Henry H. Schuler, Appellant.
Civ. 21230.

District Court of Appeal, Second District, Division 3, California.

May 23, 1956.

Action to recover personalty or its value from public administrator on ground that plaintiff was owner of the property by reason of gift causa mortis from decedent. The Superior Court, Los Angeles County, Herbert V. Walker, J., entered judgment for public administrator, and plaintiff appealed. The District Court of Appeal, Parker Wood, J., held that evidence was sufficient to sustain trial court's findings that there had not been any symbolic delivery of any of the property which was in certain garages to which decedent gave plaintiff a key and that decedent did not intend or make a gift of any of his property to plaintiff.

Judgment affirmed.

1. Gifts ⇐82(1)

Gifts causa mortis contravene general rules prescribed by statute for testamentary disposition of property and, therefore, should be established by clear and convincing proof of requisites of such a gift.

2. Appeal and Error ⇐931(1)

Upon appeal, all substantial conflicts in evidence must be resolved in favor of respondent and all reasonable inferences must be indulged in favor of trial court's findings.

3. Gifts ⇐82(2)

In action to recover personalty or its value from public administrator on ground that plaintiff was owner of the property by reason of gift causa mortis from decedent, evidence was sufficient to sustain trial court's findings that there had not been any symbolic delivery of any of the property which was in certain garages to which decedent gave plaintiff a key and that decedent did not intend or make a gift of any of his property to plaintiff.

Lyle W. Rucker, Los Angeles, for appellants.

Harold W. Kennedy, County Counsel, and Henry W. Gardett, Deputy County Counsel, Los Angeles, for respondent.

PARKER WOOD, Justice.

Plaintiff sought to recover personal property, or its value, from the public administrator of Los Angeles County, who was administrator of the estate of John Clark, deceased. The theory of plaintiff's case was that he was the owner of the property by reason of a gift causa mortis

from said decedent. Plaintiff appeals from judgment in favor of defendant.

(Mr. and Mrs. Spray, and Mr. and Mrs. Martinson, also filed an action against said administrator, seeking to recover the same property. Defendant administrator filed a cross-complaint therein and named Schuler, the plaintiff in the present action, as a cross-defendant. The pleadings in the Spray action are not in the record on this appeal. According to the judgment herein, the two actions were consolidated. The judgment was in favor of defendant and cross-complainant and was against the plaintiffs and cross-defendants. There is no appeal by any of the plaintiffs in the Spray action.)

The contention of appellant is, in effect, that the court erred in finding that decedent did not give the property to appellant.

John Clark, also known as Robert Lee Clark and Professor Clark, was a teacher and the "founder" of "Science of Characteristics," which pertains to metaphysics. He was also an author of manuscripts relating to that science, and he had copyrights on some of the manuscripts.

Mr. Clark, 79 years of age and without known relatives, had been living at the home of plaintiff Schuler in Eagle Rock about three weeks prior to June 2, 1952. On said June 2 Mr. Clark sustained a broken hip in an accident—when he, a pedestrian in downtown Los Angeles, was struck by a bus. Apparently, at the time of the accident he had two suitcases and a box with him. He was taken to a hospital, and the suitcases and the box were placed in a closet in his room, and other property which he had with him was placed in a deposit box in the office of the hospital. Three days after he was taken to the hospital an operation was performed on his hip, and about two weeks later he was taken from the hospital to the home of Mrs. Murrish in San Gabriel. At that time he was still a bed patient but he was able to move about with assistance. Thereafter pneumonia developed and he died on June 26, 1952.

Plaintiff Schuler, 41 years of age, testified that he met Mr. Clark in 1935, and that as a result of the work of Mr. Clark in the Science of Characteristics Schuler recovered, within six months, from a paralysis which he had had for two and one-half years; after such recovery he became a member of that science organization and an associate teacher of the science, and he has been closely associated with Mr. Clark since that time. Since 1938 he has been Mr. Clark's secretary and, under the direction of Mr. Clark, he has edited, prepared and distributed lesson sheets pertaining to the science; in the afternoon of June 3 (next day after the accident), Schuler visited Clark at the hospital, and Clark asked where his (Clark's) clothes and valuables were; Schuler replied that they were in the hospital; Clark said that he wanted Schuler to make arrangements to remove them from the hospital—that he wanted his clothes, baggage, and $200 in checkbooks to be removed from the hospital and that Schuler should have possession of them because they would be very important in continuing the work as he had instructed Schuler; Schuler replied that he would "take care of all this" as he had always done; in the evening of June 3 Schuler visited Clark and then, in the presence of Mrs. Schuler and Mr. and Mrs. Grimes, Clark told Schuler that he (Clark) had $200 in cash, a watch, checkbooks, clothes and two grips, and he wanted Schuler to take them home; Schuler then tried to make arrangements to get them but the cashier who had the deposit-box key had gone home; Schuler reported this to Clark who then told him to attend to it as soon as he could—that it "is very important that you protect this property"; Schuler told Clark that Dr. Purdy said that an operation on the hip was necessary and if the operation was not performed Clark would get complications and perhaps he would not last very long; Clark replied that he knew all about that, "but not yet"; the next morning, June 4, Schuler visited Clark and then, in the presence of Mr. and Mrs. Grimes and Mr. Sauer, Clark told Schuler to go downstairs and get the property; when Schuler asked the cashier for the property he replied that it was necessary to have a written authorization from Clark; Schuler replied that Clark's condition was such that

he could not write; the cashier told him to ask the supervising nurse to talk to Clark about it; then, at the request of Schuler, the nurse went to see him and Clark told her that Schuler was his associate, that "I have given him possession of my property to take. I want him to take it home. He is affiliated with my work"; then the cashier opened the box; Schuler then checked and received the contents of the box; a document therein was a statement, made by the police, listing personal belongings of Clark; those articles were his cash, keys, passport, watch, and "other small items"; Schuler took those articles to Clark's room, and then the nurse opened the closet and delivered a package (about 2-½′ x 2-½′ x 1′) and two suitcases; then Schuler said, "Here it is."; Clark replied: "Fine. You know what to do with it. Take it with you."; then Schuler asked him if he would submit to the operation of putting a nail in his hip; he replied that he would not agree that night—"not on the 4th"; Schuler took the property to his home that night; the next day (June 5) Clark said that he would allow the operation; the operation was performed on June 6; on June 9 Mr. Martinson told Schuler by telephone that Clark said he did not authorize Schuler to take the property, and that Clark told Martinson to tell Schuler to bring the property back to the hospital; in the evening of June 9 Schuler went to the hospital and told Clark what Martinson had said, and he also told Clark that he (Schuler) had the suitcases and bundle in the automobile and he had the other articles with him; Clark said: "Well, who are you going to believe? Whose instructions are you going to follow, mine or theirs?"; Schuler said that he would endeavor to follow Clark's instructions; Clark said: "All right, then, take it with you."; then Schuler put all the articles, which he had taken from the hospital office, on a table and he and Clark checked each article with the list that had been made by the police; then Clark told Schuler to put the articles in the envelope and "Take it home as I have instructed you," and "I have given you instructions. You are to carry them out at this time."; that night Schuler took the property home with him; Clark left the hospital on June 13 and went to the home of Mrs. Murrish; he died on June 26; Schuler found clothes, letters and keys in the suitcases; two of the keys were keys to garages where Clark kept some of his property; on July 1 Schuler and Mr. and Mrs. Spray went to a garage on Irolo Street, unlocked the padlock there with one of the keys, entered the garage, and found some manuscripts, clothing and a desk therein; then they took those things (except the desk) to a garage on Kingsley Drive; they unlocked the padlock there with one of the keys, entered the garage, and found filing cabinets, manuscripts, documents, and copyright certificates therein; he did not know whether there were other keys to the Kingsley garage; on July 2 Schuler and Spray went to the office of Mr. Coburn, an investigator for the public administrator, and discussed estate matters with him; Schuler delivered three bank books and other documents to him, but he did not deliver the copyright certificates or the articles received at the hospital; the investigator permitted him to keep manuscripts and other documents so that he could continue the work of the organization.

It may be stated generally that Mrs. Grimes, Mr. Sauer, and Mrs. Schuler gave testimony which corroborated the testimony of Schuler with respect to taking the property from the hospital. Mrs. Grimes testified, among other things, that Schuler and Clark checked the property item by item and that Clark told Schuler to take the property home with him. Mr. Sauer testified, among other things, that (after Schuler had returned the property to the hospital pursuant to Martinson's telephone call) Schuler and Clark checked the property, and then Clark told Schuler "to take it back with him again and keep it." Mrs. Schuler testified, among other things, that Schuler and Clark checked the property (which had been taken from the hospital office) and then Clark told Schuler "to take it home"; and that Clark said further, "You know what to do with it."; Schuler replied, "I will do that."

Mr. Painter testified that about June 15, after Clark had left the hospital, and in the presence of Painter, Clark said to Schuler: "I want you to take over my affairs. You have been instructed as to what to do. I want you to carry out these things that I have instructed you to do. You must not show any signs of weakness as this is an important issue."

Mrs. Martinson, called as a witness by defendant, testified in part that on June 4, 1952, she saw Schuler at the hospital and that he said that Clark "has instructed me as his agent to take these things to my home. I am going to do that."; she (and Mr. Martinson) were at the hospital on June 8, and Clark asked if they knew what happened to his belongings which he had with him at the time of the accident; they replied that they were present when the things were taken by Schuler and that the things were safe in the home of Schuler; Clark said that he wanted to see his belongings; he asked Mr. Martinson to call Schuler regarding the things; after the funeral, Schuler told them that Clark had told him that "he would be the agent or secretary as he had done in mailing the sheets [regarding science], taking in the dues, the UTS dues, and so forth."

Mr. Martinson, called as a witness by defendant, testified in substance the same as Mrs. Martinson had testified, except that he did not testify regarding the alleged statement by Schuler after the funeral.

In rebuttal, Schuler was asked if he ever stated to Mr. Martinson or Mrs. Martinson that he was Clark's agent to get property at the hospital. He replied, "I do not recall that I used that particular term." He testified further that he said, "I was handling Prof. Clark's affairs and that I had been instructed to get his property."

According to the complaint, the property sought to be recovered is as follows: $3,613.68, being the aggregate amount on deposit in five banks; three certificates of copyright registration; $200 cash, a watch, and minor articles, which were in deposit box at the hospital; and various manuscripts and articles which were found in the garages. It was stipulated that one of the alleged bank deposits (for $1,259.58) was not in existence. It seems to be agreed that the other bank accounts are not to be considered a part of the alleged gift causa mortis. The property now claimed under the alleged gift causa mortis consists of the copyrights, manuscripts and other articles which were in the garages, and the $200 cash, watch and other articles which were in the deposit box at the hospital.

Some of the findings of the court were: on March 30, 1953, Schuler made his first claim of ownership of the property; one of the certificates of copyright (AA71003) was not contained in the Kingsley Drive garage; the other two certificates of copyright were found in said garage after the death of Clark; it is not true that the sole means of access to said garage was by means of one key; two keys to said garage had been in possession of the owner of the garage, and one of the keys was lost and the other one remained in possession of the owner during the lifetime of Clark; it is not true that on June 3, 1952, or at any other time, Clark made a gift of the contents of said garage on Kingsley Drive, or any portion thereof, to Schuler by delivering to him the sole means of obtaining possession of said property; it is true that on June 3, 1952, Clark was critically ill in a hospital; it is not true that on said June 3, or at any other time, Clark made a gift or intended to make a gift of any property to Schuler by reason of having instructed the keeper of the deposit box at the hospital to allow Schuler to withdraw the contents of the box; on June 4, 1952, Clark instructed the keeper of said box to release the contents of the box to Schuler for the purpose of bringing the contents to Clark's hospital room; on said June 4 Clark instructed Schuler to take the contents of the box, and also two suitcases and a package which were in the hospital room, to Schuler's home, which was also the residence of Clark, and to keep them there and carry out instructions previously given concerning them; Schuler did not receive any of said articles as his property; on June 9, 1952, Schuler brought the property back to the hospital, and Clark again instructed him to take the property to Schuler's home;

on said June 4 or June 9 there was no manual delivery of any property from Clark to Schuler, and there was no delivery of the means of obtaining any property; on said June 4 or June 9 Clark spoke no express words of gift to Schuler concerning any of his property; it is not true that the acts of Clark in instructing the employees of the hospital to release the contents of his deposit box to Schuler, or in instructing Schuler to take the contents of the suitcases, package, and deposit box to his home, were done with the intent of giving to Schuler any of Clark's right, title, or interest in said property.

Appellant argues that since there was little, if any, conflicting evidence, the question on appeal pertains to the sufficiency of the evidence to support the judgment. He argues further that: Clark intended to and did make a gift to him of the copyrights and manuscripts relating to the "Science of Characteristics"; the delivery thereof was made symbolically by Clark by the delivery of keys to the garages where the documents were stored; the gift was made in contemplation of death; Clark died of the ailment which he feared at the time the gift was made; and appellant accepted the gift and took possession of it when it was made. He argues further that there was no object in Clark telling Schuler to take the property home and follow instructions, other than that Schuler was to use the property to carry on the "Science of Characteristics"; it was not unnatural that Clark should give to Schuler, who was the one person who could carry on the science, the only means by which the science could be carried on, namely, the copyrights and manuscripts; Clark's entire line of thought, as shown by his statements to Schuler, indicates only one thing, namely, that Clark believed he was not long for this world and he intended that Schuler should use the means of carrying on the science; when the suitcases containing the keys to the garages were given to Schuler there was a symbolic delivery of the documents which were in the garages.

[1–3] The essential elements of a gift causa mortis are stated in Barham v. Khoury, 78 Cal.App.2d 204, at page 209, 177 P.2d 579. It is not necessary to repeat them here. Gifts causa mortis "contravene the general rules prescribed by statute for the testamentary disposition of property and for this reason they should be established by clear and convincing proof of the requisites of such a gift." Barham v. Khoury, supra, 78 Cal.App.2d at page 211, 177 P.2d at page 583. Whether Mr. Clark made such a gift was a question of fact for the determination of the trial judge. Appellant asserts, however, as above stated, that there was little, if any conflict in the evidence and that the court should have found that Mr. Clark intended to and did make the gift. The testimony of Schuler was contradicted by the testimony of Mr. and Mrs. Martinson to the effect that Schuler told them that he took the property as agent. Even if there had been no testimony expressly contradicting evidence on behalf of appellant the trial judge was not required to find that the evidence on behalf of appellant established a gift causa mortis. In Barham v. Khoury, supra, the question was whether the trial court was required to find the facts as given in the uncontradicted testimony of appellant [the alleged donee]. The court said therein at pages 211 and 212: "[I]f from all the facts in evidence as well as from appellant's testimony the trial court drew inferences and made deductions which are not unreasonable the judgment cannot be reversed merely because no witness took the stand to contradict appellant's narrative of the events of June 25, 1945 [date alleged gift was made]." Furthermore, in the present case, even if the court believed the testimony on behalf of appellant, the court was not required to conclude therefrom that a gift was made. There was no express statement by Clark that he gave the property to Schuler as Schuler's own property. On the day of the accident Clark left Schuler's home, apparently intending to make a trip to Santa Barbara, and at the time of the accident he had two suitcases with him. Clark was taken to the hospital from the scene of the accident, and the suitcases were also taken there. While at the hospital Clark expressed concern regarding the property he had with him at the time of the accident. The statements of Clark, with respect to

his property which was at the hospital, included statements that Schuler should take the property home, take it with him, and follow instructions that had been given. The home of Schuler was also the home of Clark. The statements of Clark did not include any reference to the garage keys which allegedly were in one of the suitcases. The evidence was susceptible of the interpretation, among others, that Clark directed Schuler as his agent to remove the property from the hospital to their mutual home for safekeeping, and for use in continuing the science work under previous instructions of Clark. On appeal all substantial conflicts in the evidence must be resolved in favor of respondent and all reasonable inferences must be indulged in favor of the findings. As above shown, the court found in effect that there was no symbolic delivery of any of the property which was in the garages; and that Clark did not intend to make, and did not make, a gift of any of his property to Schuler. The findings of the court are supported by the evidence.

Respondent (defendant) asserts on appeal that a copyright is not a proper subject of a gift causa mortis, for the reason that a valid assignment of a copyright must be in writing. In view of the above conclusion with reference to the sufficiency of the evidence, it is not necessary to decide this contention.

The judgment is affirmed.

VALLÉE, J., concurs.

SHINN, Presiding Justice.

I concur. The only question in this case was whether plaintiff became the owner of certain personal property through a gift thereof by decedent Clark. In disposing of this simple issue the court made 29 findings and 9 conclusions of law. In the lengthy and involved findings of evidentiary matter I do not discover any clear-cut, definite finding as to ownership of the property. Since plaintiff makes no point of it I am concurring in the opinion upon the assumption that the evidentiary facts found could be pieced together in such fashion as to supply the equivalent of a finding of the ultimate fact.

141 Cal.App.2d 836

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Oliver Charles STANFIELD, Defendant and Appellant.

Cr. 5588.

District Court of Appeal, Second District, Division 3, California.

May 24, 1956.

Defendant was convicted of violating Penal Code, § 288, by commission of offense on person of six year old girl. The Superior Court of Los Angeles County, Edwin L. Jefferson, J., rendered judgment, and defendant appealed. The District Court of Appeal, Shinn, P. J., held that evidence was sufficient to sustain conviction.

Judgment affirmed.

Infants ⇐20

In prosecution for violating Penal Code, § 288, by committing offense on person of six year old girl, her testimony, not shown to have been fabricated, as to defendant's acts, his admissions that he picked her up in his automobile and gave her money, and evidence of his previous conviction of similar offense, were sufficient to sustain conviction. West's Ann.Pen. Code, § 288.

Gladys Towles Root, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., John McInerny, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

This is an appeal from a judgment of conviction in a court trial of the offense of violation of section 288 of the Penal Code and from an order denying a motion for a new trial.

Defendant Stanfield was accused of the offense committed upon the person of a six year old girl. It is conceded, through failure to discuss the point, that the acts de-

scribed by the child amounted to a violation of the section. This is a proper concession, although in the scale of wickedness in such matters the acts of the defendant did not reach the bottom. Defendant was working on a caterpillar near Lancaster; he came into town to get some parts; the child was watching swimming lessons at a swimming pool; defendant had not known her but entered into a conversation with her and gave her two nickels; he enticed her into his car and drove several miles out of town; they turned into a blind street where the car became stuck in the sand; after futile attempts to extricate it defendant went to a nearby house for help, which was forthcoming, and the car was returned to the road; in the meantime defendant had taken two drinks from a bottle; he then drove back to town with the child. There was no evidence as to the circumstances in which she made complaint. It was while the car was stuck in the sand that the alleged acts were committed. One of the witnesses for the People had kept the car under observation during this time. It is contended that the testimony of this witness proved that defendant was so fully occupied with his efforts to extricate the car that he could not have committed the acts charged. It is also contended that the testimony of the child was self-contradictory in several particulars and was so unsatisfactory as to be worthless as evidence of the incriminating facts. We have read the testimony carefully and are unable to agree with these contentions.

That the trial judge has a great responsibility in such cases in weighing the testimony of young children is well recognized and, we think, was fully appreciated by the trial judge. We find nothing in the evidence which causes us to suspect that the story of the child was fabricated. The circumstantial evidence was against the defendant. He admitted picking up the child and claimed that he was taking her to a place where they might buy some sort of refreshments. He had no reasonable excuse for accosting her or taking her into his car. He did not deny having given her money. She was a stranger to him. Moreover, he had suffered a previous conviction of a similar offense. Defendant cites numerous cases of the same class in which the evidence was held to be legally insufficient. Precedent, one way or the other, is of slight assistance in determining the question of the legal sufficiency of the evidence in a particular case. There is no doubt in our minds as to the sufficiency of the evidence in the present case.

The judgment and order are affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

140 Cal.App.2d 944

In the Matter of the ESTATE of Ermina BULLOCK, Deceased.

Bela SMITH, Mamie Newman and Elsie Burge, Contestants and Respondents,

v.

Nellie B. SMITH, as Legatee under the Will of said Decedent, and as Petitioner for the Probate of the Will of said Decedent and for Letters of Administration with the Will Annexed, Proponent and Appellant.

Civ. 8747.

Supreme Court of California.
In Bank.
June 7, 1956.

Prior opinion, 295 P.2d 954.

PER CURIAM.

Hearing denied.

CARTER, TRAYNOR and McCOMB, JJ., dissenting.

CARTER, Justice (dissenting).

Because of the far-reaching effect of the decision of the District Court of Appeal, 140 Cal.App.2d 944, 295 P.2d 954, in this case I am constrained to comment on the refusal of this court to grant a hearing and give the case further consideration.

I think it is obvious that the decision of the District Court of Appeal was influenced by the decisions of this court in In re Estate of Lingenfelter, 38 Cal.2d 571, 241 P.2d 990, and In re Estate of Welch, 43 Cal.2d 173, 272 P.2d 512, in both of which cases Mr. Justice Schauer and I dissented. In my dissenting opinion in In re Estate of Welch, 43 Cal.2d 181, 272 P. 2d 517, I pointed out that the Constitution and statutes of this state make it mandatory that questions of fact in will contests must be determined by a jury unless a jury is waived, and that there is no distinction as to what are issues of fact in will contests and any other type of case. However, the majority of this court has seen fit in the above cited cases and in the case at bar to disregard the constitutional and statutory provisions of this state and hold, in direct violation of said constitutional and statutory provisions, that the determination of the factual issues in a will contest is the function of this court and not of the trial court or jury, thus repealing, by judicial fiat, section 19 of article VI of the Constitution of California and section 371 of the Probate Code.

There can be no question but that the majority of this court has abrogated this constitutional and statutory provision because it is opposed to a trial judge or jury determining factual issues in cases of this character. In fact, the common expression is heard, when these cases are being considered, that "We do not want juries to be making wills for people." Of course, this is not the issue in any case of this character. The issues are, whether the testator is of sound and disposing mind and whether or not in executing the will, he acted freely and voluntarily or was under the undue influence of those who profited unduly by the execution of the will. These issues have been entirely ignored by the majority and the evidence bearing upon them has been disregarded. Even if it were the function of the jury in such a case to remake a will, which it is not, I believe it could make a better will than one who is insane or whose will is the product of the undue influence of an artful, designing person. Of course, the oft-repeated assertion that a jury in a will contest makes a new will for the testator is absurd, as the only effect of a verdict upsetting a will is that the law of succession will apply to the disposition of the estate, and the heirs at law of the testator will inherit his estate instead of those who may not be the true objects of his bounty. However, so long as a majority of this court continues to violate the constitutional and statutory provisions above cited it will be idle for anyone to exercise his constitutional and statutory right to contest a will even though the evidence shows conclusively that the testator was hopelessly insane at the time he executed the will or was completely overcome by undue influence of the proponent of the will. Thus, four members of this court by their arbitrary and capricious holding as demonstrated by every case that has come before this court involving a will contest during the past ten years or more has, in

disregard of the evidence, the verdict of a jury, the holding of the trial judge and, in many cases, the unanimous decision of the District Court of Appeal, upheld the validity of the will involved. This record clearly shows a pattern from which the inevitable conclusion must be drawn that the majority of this court is opposed to the constitutional and statutory provisions above cited and intends to nullify them by refusing to uphold any judgment rendered pursuant thereto which denies probate of a will on the ground that the maker thereof was of unsound mind or that its execution was procured by the undue influence of the proponent. In the case at bar the factual situation as disclosed by the record is as follows: On May 27, 1952, Mrs. Bullock was admitted to the Sacramento County Hospital. At that time, she was between the ages of 80 and 84 years and weighed but 57 pounds. At the time of her admission, her history was "unreliable." She was listed as senile. She was suffering from cerebral arteriosclerosis and senility. She continued to be confined in the Sacramento County Hospital from the date of her admittance, May 28, 1952, until her transfer to Mercy Hospital, in Sacramento, on June 7, 1952.

It was established at the trial by the Sacramento County Hospital records, and through the testimony of witnesses, that from the period of May 27, 1952 until June 7, 1952, and actually subsequent to that time, Mrs. Bullock was at death's door.

Mrs. Bullock was seen for the first time by Dr. Frank Warne Lee, a duly licensed physician, of Sacramento, California, who had practiced there since 1927, on June 7, 1952, at Mercy Hospital. Dr. Lee was not only a well qualified physician, he had treated Mrs. Bullock as a patient since May of 1949, had known her for many, many years when she formerly had been his neighbor, but also continued to treat her as her physician from June 7, 1952 until the date of her death on June 24, 1953. He is also a doctor who specializes in treating the aged. Dr. Lee testified variously as follows: "Mrs. Bullock remained mentally incompetent from June 7, 1952, to the date of her death," "she suffered from cerebral arteriosclerosis and encephalomalacia—softening of the brain."

She suffered from the medical conditions just described when Dr. Lee first saw her as a patient in May of 1949. The doctor testified in great detail as to his findings on June 7, 1952, which included that Mrs. Bullock was then suffering from "severe malnutrition" but in the interest of saving expenses, he testified he had her transferred to St. Ann's Nursing Home in Sacramento, on June 10, 1952. He continued to see Mrs. Bullock quite often during the subsequent years, while visiting other patients he had at St. Ann's, but he kept his official visits to her, and likewise his charges, limited to three actual visits for which he charged and was paid during that time. There was no medical cure for Mrs. Bullock's condition. Upon her admittance to Mercy Hospital, she was in "very poor" condition, was critical, and was unconscious and incoherent throughout the first night.

Contestants called as a witness, Mary Margaret Mackey, who was the proprietress of St. Ann's Nursing Home in Sacramento, which Mrs. Bullock entered on June 10, 1952. Mrs. Mackey was a registered nurse and kept the nursing home for "bedridden, critically ill patients." Mrs. Bullock was confined there from that date until the date of her death. Mrs. Mackey was at the nursing home daily for at least 8 to 16 hours per day during all of that time, administering to Mrs. Bullock, seeing her every day, and having the care of a maximum of 14 patients to cope with, with the aid of her assistants.

During all of those hundreds of times, Mrs. Bullock was seen and administered to by Mrs. Mackey, the registered nurse and proprietress of the nursing home. Mrs. Mackey testified that Mrs. Bullock was considered by her to be incompetent all of the time. She testified Mrs. Bullock's physical health improved to the point where she gained some 16 pounds by January 9, 1953, but that she was "absolutely not" mentally competent at any time during her entire stay at the nursing home. Mrs. Mackey

testified, "She paid no attention to her surroundings, to the people next to her, or anything like that."

Dr. Frank Warne Lee, by way of supplement to the foregoing, was called upon to give his medical opinion on July 1, 1952, regarding the competency of Mrs. Bullock, by reason of the fact Mrs. Laura Wheat had petitioned the Sacramento Superior Court for letters of guardianship over Mrs. Bullock. At that time Dr. Lee gave as his opinion that Mrs. Bullock was incompetent. Each time the doctor saw her during the period from June 7, 1952, until she expired on June 24, 1953, her mental condition was "the same." The doctor was asked:

"Q. [By Mr. Hefner.] Doctor, in your opinion, based upon the observations which you made of Mrs. Bullock from June 7, 1952, up to and including the time she passed away, while you were her attending physician, was she mentally competent to make a will? A. I don't think so, sir."

In addition to testifying that Mrs. Bullock had suffered from softening of the brain, when Dr. Lee first saw her as a patient in 1949, he not only stated there was no medical cure for the condition, but stated such condition gets progressively worse. She died of a cerebral hemorrhage which proved the doctor's diagnosis, on June 24, 1953.

On the issue of undue influence the record shows that on June 6, 1952, decedent allegedly executed a will at the Sacramento County Hospital which left all of her property to proponent herein, Nellie B. Smith, and her husband, John B. Smith.

The will herein offered for probate gave the entire estate to proponent and was allegedly executed on December 31, 1952, while decedent was confined as a patient in St. Ann's Nursing Home. It was that alleged will which the jury found to have been executed while the decedent was of unsound mind and while acting under the undue influence of proponent herein and her husband, John B. Smith.

A confidential relationship was proved to have existed between decedent and proponent herein, as well as proponent's husband, John B. Smith. They had been friends for over forty years, and during the last two or three years of decedent's lifetime, proponent's husband, John B. Smith, a co-beneficiary under the alleged will, dated June 6, 1952, had handled all of decedent's business affairs. Mr. Smith knew that decedent relied upon him and had great faith and trust in his integrity and ability. For a long time they had attended Rebekah Lodge meetings, Christian Science lectures and other functions together. They were in touch with each other "all the time" and visited three to four times per week.

Proponent's husband, John B. Smith, physically pushed decedent's second cousin from the hospital room. She had been the lifelong friend and almost daily dinner companion of decedent for many years. That occurred the day of the alleged execution of the said June 6, 1952 will at the county hospital. On the very day of the execution of said alleged will, dated June 6, 1952, decedent just "kinda stared," did not recognize the said second cousin, could not talk and was not of sound and disposing mind and memory. Decedent signed the alleged will with a wavy "X."

Proponent's husband, John B. Smith, admitted that he arranged for the lawyer to go to the hospital on June 6, 1952, and even drove the lawyer to the county hospital himself. The witness Smith, claimed that at that time decedent was in "quite good health"; that she was in "about the same condition" at Mercy Hospital on June 7, 1952, that he was present when the will was executed, and decedent was of sound and disposing mind at that time. Said witness, John B. Smith, gave conflicting versions as to the manner in which the will was executed. First he stated, in great detail, the entire conversation which allegedly took place between Mrs. Bullock and her lawyer, and later he impeached himself on the very same subject.

The evidence further showed that about 30 to 40 minutes was the length of time during which the attorney was at the hospital on June 6, 1952, when it was claimed the manner of disposing of her property was discussed, the will was actu-

ally drafted, there, in the handwriting of the lawyer, presented to the witness for signature, which she signed by a wavy X, and the two witnesses, one of whom was the attorney. At that time we find John B. Smith admittedly occupying, along with his wife, proponent herein, a confidential relationship to decedent. He had even settled and compromised a personal injury claim which Mrs. Bullock had some time before her illness. Mr. Smith had done her banking for years and had a power of attorney to draw checks on her account. Proponent admitted that decedent relied upon both her and her husband for the handling of her affairs. A confidential relationship has been conclusively proven by the admission of the adverse parties.

Proponent and her husband participated in proceedings to annul an adjudication duly made by the Superior Court of the State of California, in and for the County of Sacramento, wherein decedent was found to be incompetent. They attempted to assert decedent was sent to the county hospital against her will; they continued to see decedent three to four times per week; they attempted to whisk decedent away from the St. Ann's Nursing Home by ambulance, he waited outside while the ambulance was there, but she was not removed from the St. Ann's Nursing Home because the police were summoned. In addition, proponent and her husband falsely suggested that Mrs. Bullock was being mistreated at St. Ann's Nursing Home, and claimed to have had conversations with her to the effect that Mrs. Mackey was treating her rough, grappling with her and bruising her person. Actually, Mrs. Bullock's skin became mottled or blue, which is a condition of the skin which accompanies old age and circulatory disturbances.

In addition, the guardian and second cousin of Mrs. Bullock testified that Mr. Smith "poisoned the mind" of decedent against her.

To say that the foregoing facts do not create an issue as to the unsoundness of mind of the testatrix at the time the will in question was executed and that undue influence was exerted over her by the Smiths, is to disregard the testimony of competent, credible witnesses as well as all justifiable inferences which may be drawn therefrom, and can only be the result of arbitrary and capricious action by the majority of this court.

I would grant respondents' petition for hearing and affirm the judgment.



140 Cal.App.2d 688

Matter of the ESTATE of Edward M. KEENEY, Deceased.

Helen FRAZIER, Doris Line and Blanche Stephens, Contestants-Respondents,

v.

Julia McMANN, Proponent-Appellant.

Civ. 5302.

Supreme Court of California.
In Bank.
June 7, 1956.

Prior opinion, 295 P.2d 479.

PER CURIAM.

Hearing denied.

CARTER, TRAYNOR and McCOMB, JJ., dissenting.

CARTER, Justice (dissenting).

I have today filed a dissenting opinion, Cal.Sup., 297 P.2d 633 from the order denying a hearing after decision by the District Court of Appeal in Estate of Bullock, 295 P.2d 954, which involves the same problem as is involved in the case at bar and I here adopt the discussion of this problem in my dissenting opinion in that case.

The factual situation in the two cases is, of course, entirely different, but the facts of the case at bar which I shall set forth at length herein clearly support the determination of the jury and trial judge that the will here involved was procured by the

undue influence of the proponent. Those facts are as follows.

At the time of the decedent's death, he was approximately 75 years of age and was residing in Fresno. In 1946, at decedent's request, Mrs. McMann came to California and took care of him at his home during his wife's illness. In 1952, Mrs. Keeney died and shortly thereafter, Keeney suffered a coronary attack and was taken to the Veterans' Hospital in Fresno where he remained about four months. Upon his discharge in December, he returned to his home where Mrs. McMann who had moved to Fresno with her husband took care of his meals and personal needs. On January 14, 1953, one of his daughters filed a petition in the superior court seeking her appointment as his guardian. A hearing was had on January 21, 1953, and it was found that Keeney was competent and the petition was denied. *On January 23, 1953,* Keeney executed a will leaving one-fourth of his estate to each daughter and his sister. That will was destroyed on February 21, 1953, and the present one executed on that day. The will was offered for probate by Julia McMann on January 20, 1954.

There was testimony by one Smith, a close friend of the decedent, that Keeney was hurt by the action taken by his daughter and that he did not want a guardian. Smith talked with Julia McMann about what Keeney should do about it and Julia asked Smith to recommend an attorney. The attorney recommended by Smith was Douglas May. Mrs. McMann saw Mr. May and arranged for him to call on Keeney at his residence. Keeney employed May to contest the application for appointment of a guardian. Mr. May testified that Keeney told him that he did not want his daughters to handle his property; that after the guardianship proceedings while May was taking him home, he said he wanted to leave his property to his sister, Julia, and that he was through with his children. May suggested that he think it over and that Keeney said he would. May further testified that he talked to Keeney on the telephone and Keeney stated he had made up his mind to will one-fourth of his estate to each daughter and his sister. May also testified that two or three days prior to February 21, his secretary informed him that Keeney wanted him to come to his home to rewrite his will; that he called and talked to Mrs. McMann who told him how Keeney wanted the will changed; that he drafted the changes and on the morning of February 21, 1953, Mrs. McMann called him and told him that Keeney had had a heart attack and that he went immediately to the house and in the presence of three witnesses, one of whom was the husband of the proponent, called Keeney's attention to the will; that Keeney stated it was exactly what he wanted and that he had changed his will because his sister had been good to him while his daughters had not. The will was signed by the testator and the subscribing witnesses. The testator was then taken to the hospital in a critical condition. The record shows that he did not recognize his daughters that evening. He remained in the hospital until May 4, 1953 when he was returned to his home where he remained until May 15, 1953 when he was again taken to the hospital where he remained until his death. From the time of the incompetency hearing, Mrs. McMann lived in her brother's home.

It should be noted that the District Court of Appeal, in commenting on a statement made by one of the daughters that her father, on December 22, 1952, had said he wanted his property evenly divided between the three of them and so had not made a will, said that "this statement was made long before she filed a petition to be appointed his guardian and the evidence clearly indicates that the reasons Keeney made the changes in his will on February 21, 1953, were that he resented the attempt to declare him incompetent, that his daughters left him alone, and that his sister had taken care of his person and property." In this connection, it should be noted that *after the incompetency hearing on January 21, 1953, on January 23, 1953 the first will*

was executed leaving the property equally divided between his three daughters and Mrs. McMann. It was not until February 21, 1953, the day he went to the hospital in a critically ill condition that he executed the will leaving the major part of his property to his sister.

An examination of the record shows that the proponent sustained a confidential relationship to the testator; that she unduly profited by the will; and that she actually participated in procuring its execution. This evidence raised a presumption of undue influence, Estate of Pellegrini, 138 Cal.App.2d 143, 291 P.2d 558, which the jury, properly instructed, undoubtedly concluded was not overcome by any evidence to the contrary. The proponent testified that she destroyed the first will at the decedent's request and that, also at his request, she told Mr. May how to make out the new will. The jury as trier of the fact was free to disbelieve her testimony if it chose, which it obviously did inasmuch as it returned an affirmative answer to the interrogatory concerning undue influence on her part.

In the instant case, we have a motion for a directed verdict on the part of proponent denied, eleven members of the jury finding that undue influence was exercised by the proponent, a motion made by the proponent for a new trial denied, and then an appellate court reweighing the evidence to conclude that no undue influence was exerted by the proponent. The question of undue influence is one of fact to be determined by the trier of fact—in this instance the jury. The jury is the sole judge of the weight of the evidence, and the credibility of the witnesses, and its determination should not be disturbed where, as here, there is ample evidence in support thereof.

If this court were disposed to give effect to section 19 of article VI of the Constitution of California and section 371 of the Probate Code it would have granted a hearing and affirmed the judgment of the trial court.

46 Cal.2d 65

LEMOGE ELECTRIC, a corporation, Plaintiff and Appellant,

v.

COUNTY OF SAN MATEO, State of California, Defendant and Respondent.

S. F. 19116.

Supreme Court of California.
In Bank.
June 6, 1956.

Rehearing Denied July 5, 1956.

Action for reformation of contract. The Superior Court, San Mateo County, Aylett R. Cotton, J., sustained a demurrer to the complaint without leave to amend, and plaintiff appealed. The Supreme Court, Gibson, C. J., held that since plaintiff, knowing of mistake resulting in understatement of bid for electrical work to be done at county hospital, had nevertheless entered into formal contract with county on terms specified in bid and had then proceeded to perform required work, he was not entitled to reformation.

Affirmed.

Schauer and Shenk, JJ., dissented.

Opinion, 288 P.2d 518, vacated.

1. Counties ⇐116

Once opened and declared, bid for electrical work to be done in county hospital was in nature of an irrevocable option, being a contract right of which county could not be deprived without its consent, unless requirements for rescission were satisfied.

2. Counties ⇐116

Misplacement of decimal point, resulting in understatement of $11,744.39 in bid for electrical work to be done at county hospital, would have justified rescission of bid, and bidder could have done so without incurring any liability on its bond.

3. Reformation of Instruments ⇐22

Where bidder, knowing of mistake resulting in understatement of bid for electrical work to be done at county hospital, nevertheless entered into formal contract with county on terms specified in bid and

proceeded to perform required work, he was not entitled to reformation.

4. Reformation of Instruments ⇦1

Purpose of reformation is to correct written instrument in order to effectuate common intention of both parties, which was incorrectly reduced to writing.

5. Reformation of Instruments ⇦6

In order for plaintiff to obtain reformation of written instrument there must have been an understanding between parties on all essential terms, since otherwise there would be no standard to which writing could be conformed.

6. Reformation of Instruments ⇦2

Civil Code section, providing that, under specified conditions, written contract which does not truly express intention of parties may be revised so as to set forth that intention, has reference to a single intention which is entertained by both parties. West's Ann.Civ.Code, § 3399.

7. Reformation of Instruments ⇦19(1)

Reformation may be had for mutual mistake or mistake of one party which other knew or suspected.

8. Reformation of Instruments ⇦1

Purpose of remedy of reformation is to make written contract truly express the intention of parties.

9. Reformation of Instruments ⇦19(2)

Where failure of written contract to express intention of parties is due to inadvertence of both of them, mistake is mutual and contract may be revised on application of party aggrieved.

10. Reformation of Instruments ⇦19(1)

When only one party to contract is mistaken as to its provisions, but his mistake is known or suspected by other, contract may be reformed to express single intention entertained by both parties.

11. Reformation of Instruments ⇦6

Court of equity may revise written instrument to make it conform to real agreement, but it has no power to make new contract for parties, whether mistake be mutual or unilateral.

12. Reformation of Instruments ⇦36(1)

Bidder's complaint for reformation of contract for electrical work to be done at county hospital was insufficient.

13. Pleading ⇦225(2), 235

In furtherance of justice, great liberality should be exercised in permitting plaintiff to amend his complaint, and it ordinarily constitutes an abuse of discretion to sustain a demurrer without leave to amend if there is a reasonable possibility that defect can be cured by amendment. West's Ann.Code Civ.Proc. § 472c.

14. Work and Labor ⇦9

Where there was an express contract for a sum certain, plaintiff could not recover on theory of implied contract for reasonable value of services performed.

15. Counties ⇦129

Contractor which, with full knowledge of mistake resulting in understatement of its bid for electrical work to be done at county hospital, proceeded to perform contract could not thereafter compel county to pay amount which it claimed it intended to bid or obtain recovery on a quasi contractual basis as if no contract existed.

John F. O'Dea, San Francisco, for appellant.

Keith C. Sorenson and Howard E. Gawthrop, Redwood City, for respondent.

GIBSON, Chief Justice.

Plaintiff corporation, a licensed electrical contracter, brought this action for reformation of a contract with defendant county, and it appeals from a judgment for defendant after the sustaining of a general demurrer without leave to amend.

The allegations of the complaint may be summarized as follows: Plaintiff submitted a bid for $172,421 for electrical work to be done at the county hospital. This bid was found to be the lowest, and, when defendant announced that the bids of other contractors ranged from $197,500 to $222,700, plaintiff realized that some material mistake had been made in the preparation of its bid. The contract was not awarded

at that time, defendant having reserved a 30-day period in which to act. Prompt investigation by plaintiff revealed that in its work sheets the cost of certain materials amounting to $10,452 had inadvertently been listed by a clerk as $104.52. This mistake, considered with the applicable sales tax and "mark-up" for overhead and profit, resulted in an understatement of bid in the amount of $11,744.39. When the mistake was discovered plaintiff immediately notified defendant and furnished it with work sheets and adding machine tapes showing the error. With knowledge of the mistake and what caused it, defendant accepted the erroneous bid and attempted to bind plaintiff to the consequences of the error. Plaintiff requested that the bid be adjusted to compensate for the error, but defendant refused to allow the correction. It is further alleged that the mistake was of such a material and fundamental character that there has been no meeting of the minds of plaintiff and defendant.

Two questions are presented on this appeal. Does the complaint allege sufficient facts to entitle plaintiff to reformation? Did the court err in sustaining the demurrer *without leave to amend?*

[1–3] Once open and declared, plaintiff's bid was in the nature of an irrevocable option, a contract right of which defendant could not be deprived without its consent unless the requirements for rescission were satisfied. M. F. Kemper Const. Co. v. City of Los Angeles, 37 Cal.2d 696, 700, 235 P. 2d 7. Plaintiff then had the right to rescind, and it could have done so without incurring any liability on its bond. M. F. Kemper Const. Co. v. City of Los Angeles, 37 Cal.2d 696, 702–705, 235 P.2d 7. But plaintiff did not rescind. Instead, according to statements made by plaintiff in its briefs and at oral argument, it entered into a formal contract with defendant on the terms specified in the bid and proceeded to perform the required work. It is not claimed that defendant at any time agreed to pay plaintiff an amount greater than the sum designated in the bid. There was no element of fraud or failure to disclose; neither party knew of the error until after the bids were opened, and both parties knew of it before the bid was accepted or the formal contract was executed. The facts alleged do not entitle plaintiff to reformation, and, in view of other facts admitted by plaintiff, there is no reasonable possibility that the complaint can be amended to state a cause of action on any theory.

[4–6] The purpose of reformation is to correct a written instrument in order to effectuate a common intention of both parties which was incorrectly reduced to writing. Bailard v. Marden, 36 Cal.2d 703, 708, 227 P.2d 10. In order for plaintiff to obtain this relief there must have been an understanding between the parties on all essential terms, otherwise there would be no standard to which the writing could be reformed. Bailard v. Marden, 36 Cal.2d 703, 708, 227 P.2d 10; McConnell v. Pickering Lumber Corp., 9 Cir., 217 F. 2d 44, 48–49; see 5 Williston on Contracts (Rev.Ed., 1937), § 1548, p. 4339; Rest., Contracts, § 504, comment b; 45 Am.Jur. 586–587, 609–610. Section 3399 of the Civil Code [1] incorporates this principle by providing that, under specified conditions, a written contract which does not truly express "the intention of the parties" may be revised so as to set forth "that intention." As pointed out in Bailard v. Marden, supra, this language refers *to a single intention which is entertained by both parties.* 36 Cal.2d at page 708, 227 P.2d 10.

[7–12] Reformation may be had for a mutual mistake or for the mistake of one party which the other knew or suspected, but in either situation the purpose of the remedy is to make the written contract truly express the intention of the parties. Where the failure of the written contract to ex-

1. Section 3399 of the Civil Code reads: "When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised, on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value."

press the intention of the parties is due to the inadvertence of both of them, the mistake is mutual and the contract may be revised on the application of the party aggrieved. See e. g. Mills v. Schulba, 95 Cal. App.2d 559, 213 P.2d 408. When only one party to the contract is mistaken as to its provisions and his mistake is known or suspected by the other, the contract may be reformed to express a single intention entertained by both parties. Stevens v. Holman, 112 Cal. 345, 44 P. 670; Higgins v. Parsons, 65 Cal. 280, 3 P. 881; Eagle Indemnity Co. v. Industrial Accident Commission, 92 Cal. App.2d 222, 206 P.2d 877; see Hanlon v. Western Loan & Building Co., 46 Cal.App. 2d 580, 116 P.2d 465. Although a court of equity may revise a written instrument to make it conform to the real agreement, it has no power to make a new contract for the parties, whether the mistake be mutual or unilateral. Bailard v. Marden, 36 Cal.2d 703, 708, 227 P.2d 10; Burt v. Los Angeles Olive Growers Ass'n, 175 Cal. 668, 674–675, 166 P. 993; 5 Williston on Contracts (Rev. Ed., 1937), § 1549, pp. 4344–4345; Rest., Contracts, § 504, comment c; 45 Am.Jur. 587–588. As we have seen it is not alleged that defendant ever agreed to pay plaintiff an amount greater than the sum designated in the bid, and the complaint therefore does not state facts entitling plaintiff to reformation.

[13, 14] In the furtherance of justice great liberality should be exercised in permitting a plaintiff to amend his complaint, and it ordinarily constitutes an abuse of discretion to sustain a demurrer without leave to amend if there is a reasonable possibility that the defect can be cured by amendment. Wennerholm v. Stanford University School of Medicine, 20 Cal.2d 713, 717 et seq., 128 P.2d 522, 141 A.L.R. 1358; Guilliams v. Hollywood Hospital, 18 Cal.2d 97, 104, 114 P.2d 1; see Code Civ. Proc. § 472c; MacIsaac v. Pozzo, 26 Cal. 2d 809, 815–816, 161 P.2d 449; Klopstock v. Superior Court, 17 Cal.2d 13, 19–20, 108 P.2d 906, 135 A.L.R. 318. But it is clear, in view of what has been said, that plaintiff cannot amend its complaint so as to state a cause of action for reformation or rescission. Nor has plaintiff shown how the complaint can be amended to state a cause of action in quasi contract. In the circumstances existing here recovery on this theory would necessarily have to be based on the assumption that no contract ever existed. As we have seen when the bids were opened defendant had an irrevocable option to bind plaintiff to perform the work at the specified figure, and defendant could not be deprived of this right without its consent unless the requirements for rescission were satisfied. M. F. Kemper Const. Co. v. City of Los Angeles, 37 Cal.2d 696, 700, 235 P.2d 7. Plaintiff failed to assert its right to rescind, defendant accepted the bid, and plaintiff entered into a formal contract which incorporated the terms of the bid. Neither party was under any misapprehension as to what the provisions of the formal contract were, and since there was an express contract for a sum certain, plaintiff cannot recover on the theory of an implied contract for the reasonable value of services performed. We need not, therefore, consider the applicability of the general rule that, where a statute requires that a contract must be let by competitive bidding, a person cannot recover in quasi contract for labor or materials furnished. See Miller v. McKinnon, 20 Cal.2d 83, 88, 124 P.2d 34, 140 A.L.R. 570; Reams v. Cooley, 171 Cal. 150, 151 et seq., 152 P. 293; Gamewell Fire Alarm Tel. Co. v. City of Los Angeles, 45 Cal.App. 149, 154, 187 P. 163.

[15] Plaintiff had a remedy, which it chose not to exercise, that would have relieved it of any hardship that could result from its error. However, instead of rescinding, plaintiff, with full knowledge of its mistake, proceeded to perform the contract, and it cannot now compel defendant to pay the amount which it claims it intended to bid or obtain recovery on a quasi contractual basis as if no contract existed. Such a result would not only be contrary to settled legal principles, but it would also create uncertainty and confusion in the field of competitive bidding.

The judgment is affirmed.

CARTER, TRAYNOR, SPENCE, and McCOMB, JJ., concur.

SCHAUER, Justice (dissenting).

This case is before us on appeal from a judgment of dismissal after the sustaining of a general demurrer without leave to amend. As stated in the majority opinion, "In the furtherance of justice great liberality should be exercised in permitting a plaintiff to amend his complaint, and it ordinarily constitutes an abuse of discretion to sustain a demurrer without leave to amend if there is a reasonable possibility that the defect can be cured by amendment. [Citations.]" Nevertheless, the majority opinion, with unjust strictness rather than with liberality, refuses to permit plaintiff the opportunity to amend and forecloses plaintiff from any remedy for a mistake of which (it must be conceded for the purpose of this appeal) defendant sought to take advantage although, as alleged by plaintiff, defendant knew that the mistake occurred under circumstances which made it the result of excusable inadvertence and not the result of neglect of a legal duty.

In my opinion plaintiff has alleged facts sufficient to show that it might unambiguously state a cause of action on the one hand for recovery on a contract at a corrected figure or on the other hand for the reasonable value of the work and materials furnished. Plaintiff's allegations, tested by the general demurrer, are sufficient to show that no express contract was formed at the mistaken figure stated in the bid; that with full knowledge that the bid was based on a mistake, defendant sought to create a contract incorporating such mistake by purported acceptance of the offer which was purportedly represented by the bid; but that, although defendant did all that it could to accept the mistaken bid with knowledge of the mistake, the only offer which it could and did accept was an offer which it knew plaintiff intended to make.

Plaintiff has alleged particular facts by which he attempts to bring the case within the provision of section 3399 of the Civil Code that "When, through * * * a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention * * *"; i. e., an intention, plaintiff argues, to contract at a corrected figure. Plaintiff should have been allowed an opportunity to have made its complaint clear either by allegations showing such intention and removal from the complaint of the more general—and possibly immaterial—allegation that "there has been no meeting of the minds of plaintiff and defendant," or by allegations showing a quasi-contractual cause of action; i. e.: when defendant, knowing plaintiff's bid excusably expressed a mistake, attempted to accept the bid and form, and unjustly profit by, a contract based on the erroneous figure stated in the bid, no contract was formed at that figure; nor was a contract formed at the figure to which plaintiff subsequently attempted to correct the bid, for that figure was not known to defendant at the time it purported to accept the bid; since no contract was formed at either figure but since it is manifest in equity and good conscience that defendant should pay for the work and materials which it accepted the law implies a promise to pay their reasonable value.

On the basis of plaintiff's allegations it does not appear that it should be adjudged, by upholding the dismissal after the sustaining of the general demurrer without leave to amend, that plaintiff *could not* state any cause of action. I would reverse the judgment.

SHENK, Justice.

I dissent.

On the undisputed facts of the case section 3399 of the Civil Code was properly invoked by the plaintiff and he is entitled to relief by reformation. The record shows that on January 19, 1954, the board of supervisors of the defendant county opened bids for electrical work in connection with the county hospital. The bid of the plaintiff was the lowest. The board had reserved the right to reject any and all bids and to accept none for 30 days. No award of contract was made on the day the bids were opened nor until February 2nd.

On January 22, 1954, three days after the bids were opened, the plaintiff informed the

board of supervisors by letter of an error as to one item. This item was mistakenly listed as $104.52 when it should have been $10,452. The plaintiff submitted to the board its work sheets and machine tapes indicating the mistake in the placing of the decimal point. The error was brought to the county's attention immediately after the plaintiff became aware of it and an earnest and diligent effort was made to have the county recognize the error and approve its correction. Had the corection been made as requested the plaintiff would still have been the lowest bidder. Nevertheless, on February 2nd, the board by resolution accepted the erroneous bid.

By the present action, commenced within 22 days after the action of the board of supervisors in accepting the erroneous bid, the plaintiff sought a reformation of the contract. It has in good faith performed the contract in compliance with the demands of the county. It is conceded that section 3399 of the Civil Code is controlling. That section provides in part: "When, through * * * mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value." The rights of third parties were not involved.

The court holds that the purpose of reformation is to effectuate a *common* intention of both parties. But this is not its sole purpose. Another just as clear and distinct purpose is to permit "revision", which is "reformation" when there is a mistake of one party which is known to the other at the time the contract comes into being, and in this case that was when the plaintiff's bid was accepted on February 2nd. Both parties knew of the mistake as early as January 22nd.

It may be assumed that if an inadvertent error is discovered by one party after the contract is executed, and is not known to the other party prior thereto, reformation would not lie. Bailard v. Marden, 36 Cal. 2d 703, 227 P.2d 10. But that is not this case. The bid of a contractor in response to a request for bids constitutes only an offer, and contractual rights binding both parties come into being only upon the acceptance of the bid and the award of the contract. Argenti v. City of San Francisco, 16 Cal. 255; 12 Cal.Jur.2d 203. Here the county had at most an option to accept the offer of the plaintiff within the thirty day period. The option was outstanding until it was exercised by the county. Until then it did not constitute the contract for construction work. Bruce v. Mieir, 120 Cal. App. 287, 7 P.2d 1037; 12 Cal.Jur.2d 204.

The result of the court's decision is that the action of the defendant is condoned in compelling the plaintiff to accept $104.52 for $10,452 worth of work and materials furnished and under circumstances which should have impelled the board to grant the request of the plaintiff to correct the error. As shown the mistake consisted in the clerical error as to one item of placing the decimal point two places to the left, making a difference on its face of over $10,000. The request was promptly made and was so obvious from the work sheets produced by the plaintiff that no possible prejudice could have resulted to the county inasmuch as with the item as corrected the plaintiff was still the lowest bidder.

There can be no question but that the plaintiff has a cause of action for reformation under section 3399 of the Civil Code. It should not be foreclosed from amending the complaint. The Kemper case, M. F. Kemper Const. Co. v. City of Los Angeles, 37 Cal.2d 696, 235 P.2d 7, is not in point. That was a case in rescission. It is conceded that the plaintiff could have proceeded for that form of relief. But it was not compelled to do so. To thus relegate the cause of action would be to compel the plaintiff to forego the benefits of the contract to which it was plainly entitled.

If the facts alleged were applied to a controversy between private parties the defendant would not under the circumstances here shown be justified in retaining the benefit of over $10,000 worth of materials and services without paying for them. The fact that the defendant in this case happens to be a public entity should not clothe

it with immunity in perpetuating such an injustice as is here permitted. See Farrell v. County of Placer, 23 Cal.2d 624, 145 P.2d 570, 153 A.L.R. 323. I would reverse the judgment.

Rehearing denied; SHENK and SCHAUER, JJ., dissenting.



46 Cal.2d 588

Morris S. VAN METER, Plaintiff and Appellant,

v.

BENT CONSTRUCTION COMPANY et al., Defendants and Respondents.

L. A. 23369.

Supreme Court of California.
In Bank.
June 1, 1956.

Action by subcontractor against general contractor for a declaration of rights, reformation of their contract, recovery of reasonable value of services performed, and damages for false representation. The Superior Court, San Diego County, C. M. Monroe, J., entered judgment for general contractor and subcontractor appealed. The Supreme Court, Gibson, C. J., held that where subcontractor submitted a bid for performing clearing in a water basin for an area represented by general contractor to have been marked by flags, and later subcontractor discovered the flagged area contained only a part of the area he was expected to clear, trial court erred in concluding that having found subcontractor negligent in not discovering the total area to be cleared, he was precluded from obtaining any relief and that it was unnecessary for it to make any further findings, since reliance of subcontractor on representation of general contractor would not be a defense for equitable relief even if negligent, unless such reliance in light of subcontractor's intelligence and information was preposterous or irrational.

Judgment reversed.

Opinion, Cal.App., 286 P.2d 439, vacated.

1. Contracts ⇐94(5)

Negligent reliance of a party to a contract is not a defense to equitable relief from the terms of the contract where the other party to the contract with intent to deceive has falsely represented as a fact something which he does not believe to be true.

2. Contracts ⇐93(1)
Reformation of Instruments ⇐25

Even in the absence of any misrepresentation, negligent failure of a party to know or discover facts as to which both parties are under mistake does not preclude rescission or reformation because of such mistake.

3. Negligence ⇐13

"Gross negligence" means the want of even scant care or an extreme departure from the ordinary standard of conduct.

See publication Words and Phrases, for other judicial constructions and definitions of "Gross Negligence".

4. Contracts ⇐94(5)

A defendant who misrepresents the facts and induces a plaintiff to rely on his statements should not be heard in an equitable action concerning the parties' contract, to assert that the reliance was negligent unless plaintiff's conduct, in the light of his intelligence and information, is preposterous or irrational.

5. Contracts ⇐94(5)
Trial ⇐397(2)

Where contractor submitted a bid for performing clearing work in a water basin for an area represented by general contractor to have been marked by flags, and later subcontractor discovered the flagged area contained only a part of the area he was expected to clear, trial court erred in concluding that having found subcontractor negligent in not discovering the total area to be cleared, he was precluded from obtaining any relief and that it was unnecessary for it to make any further findings, since reliance of subcontractor on representation of general contractor would not

be a defense for equitable relief even if negligent, unless such reliance in light of subcontractor's intelligence and information was preposterous or irrational.

Higgs, Fletcher & Mack and Ferdinand T. Fletcher, San Diego, for appellant.

Procopio, Price, Cory & Schwartz, San Diego, Hill, Farrer & Burrill, Los Angeles, Alec L. Cory, San Diego, and Stanley S. Burrill, Los Angeles, for respondents.

GIBSON, Chief Justice.

Defendants contracted with the city of San Diego to construct a dam and remove brush and trees from the reservoir basin, and thereafter they entered into a subcontract with plaintiff for clearance of the basin, representing to him that the area to be cleared had been marked with flags. Plaintiff later discovered that the flagged area covered only a part of the reservoir basin, and he notified defendants that unless some adjustment was made he would not proceed with the work. It was then agreed that plaintiff should clear the entire basin without prejudice to his rights under the subcontract. Upon completion of the work he brought this action seeking, in separate counts, a declaration of rights, reformation of the subcontract, recovery of the reasonable value of services performed, and damages for false representations.

Certain issues were submitted to a jury on special interrogatories, and its answers were supplemented by findings of the court. It was found that defendants made false representations believing them to be true and that plaintiff relied on the misrepresentations and failed to use reasonable care in ascertaining the extent of the area to be cleared. The court concluded that, because the fraud perpetrated by defendants was not wilful, plaintiff's negligence precluded him from obtaining any relief. He has appealed from the ensuing judgment contending that the finding that he was negligent is not supported by the evidence and that the judgment is not supported by the findings.[1]

The provisions of the general contract between the city and defendants relating to clearance of the reservoir basin are found in section H of Specification No. 9—Sutherland Dam, under the designation "H–01 Clearing." Insofar as material here, the section states that "The reservoir basin shall be cleared below elevation 2073. The contour 2073 will be flagged by City forces during the bidding period and the Bidder shall make visual observation before submitting bid. The area of the basin is about one square mile, horizontal measurement." The contract, which is in book form, consists of 110 typewritten pages, including the table of contents, and 27 folded pages at the back of the book containing drawings and maps. One of the maps is entitled "Sutherland Dam Area to be Cleared and City Camp." This map, which is not referred to in the table of contents or in section H, shows elevation contour 2,073 enclosing an area irregular in shape consisting of two basins joined by a narrow neck. The Santa Ysabel Creek runs west through the upper basin, turns at the narrow neck and flows north through the lower basin. The upper basin, which is long and narrow, contains approximately 220 acres. The lower basin covers approximately 420 acres and is nearly as broad as it is long. The dam site is shown on the map as being located at the north end of the lower basin, and the map contains a notation on the lower basin area: "Contractor shall clear area below contour 2073 about (1) sq. mile."

Mr. Daley, a representative of defendants, asked plaintiff to submit a bid for removing trees and brush and showed him a copy of the contract, calling his attention to section H. Together they read the provisions dealing with the clearance of the reservoir basin, and Daley told plaintiff that the area to be cleared had been flagged by the city and that it was the area on which he was to bid. Plaintiff kept the copy of the general contract and marked with a paper clip the page containing section H. Daley made no reference to the map, which, as we have seen, was not mentioned in sec-

1. Judgment was also entered in favor of the city on a cross-complaint filed against it by defendants. No appeal was taken therefrom.

tion H or listed in the table of contents, and plaintiff did not see it until after he had commenced work. When plaintiff examined the area prior to making his bid he found that flags had been placed in the lower basin along contour 2,073. He looked for additional flags but found none, and it is undisputed that no flags had then been placed in the upper basin.

Plaintiff submitted a bid in the sum of $29,750, informing defendants that he was bidding on the flagged area, and he was again told by defendants that the area to be cleared was that flagged by the city. The bid was accepted, and plaintiff executed the subcontract which states that he is familiar with the terms of the general contract and that he "agrees to perform fully and completely all that portion of the work required to be done by Contractor under the General Contract which is hereinbelow particularly described as follows: All that work named in Specification No. 9, Sutherland Dam Section H—Clearing Reservoir Basin, H-01 Clearing Bid Item No. 76."

Plaintiff commenced work about August 1, 1952, and early in September he was informed by a city employee that a larger area than the one flagged was to be cleared. Shortly thereafter the city placed flags in the upper basin. Plaintiff notified defendants that he had learned that all of the area had not been flagged during the bidding period as required by section H of the general contract, that he had made his bid on the assumption that the flags marked the boundary of the area to be cleared, and that unless defendants made an adjustment he would stop work on October 1. The parties then agreed that plaintiff should complete the clearance of the entire reservoir basin without prejudice to their rights under the subcontract.

Evidence as to the amount of damages was deferred until determination of liability, and only a prima facie case as to costs and values was presented. Defendants' bid for constructing the dam and clearing the reservoir basin was $2,896,485, which included an estimated profit of $267,707.66. In their bid defendants listed $116,500 for clearing the reservoir area, but their accountant testified that $89,350 was included in that item to cover part of the general overhead expense of the project. Plaintiff's books showed that the cost of removing the trees and brush from the flagged area was $25,240.25 and that his cost of clearing the remaining portion of the reservoir basin which, although smaller, was more heavily wooded, was $50,085.25.

The findings may be summarized as follows: The general contract with the city required defendants to clear all of the reservoir basin below the elevation of 2,073 feet, and by the terms of the subcontract plaintiff undertook to perform that part of the general contract providing for clearing the reservoir basin. Plaintiff has completed the work required of him and has earned the sum of $29,750 specified in the subcontract. When he entered into the subcontract he believed in good faith that the area required to be cleared was that portion of the reservoir basin below contour elevation 2,073 which had been flagged by the city. Prior to the execution of the subcontract, defendants made untrue representations to plaintiff with regard to the extent of the area to be cleared. Defendants believed that flags had been placed around the entire contour, and they did not know that their representations were false, but defendants made the representations as positive assertions in a manner not warranted by their information. Plaintiff believed the representations, relied upon them in entering into the subcontract and was thereby caused to believe that by its terms he was to clear that portion of the reservoir basin lying below the flags which were then on the ground. A contractor of ordinary skill in the exercise of ordinary care should have known that the contract required that trees and brush be removed from both basins, and, had plaintiff made the inquiries reasonably suggested by the contract and an inspection of the premises, he would have discovered that it was intended that the entire reservoir basin be cleared. Plaintiff, who was an experienced contractor, failed to use reasonable care to ascertain the extent of the area involved.

The court concluded that because the fraud perpetrated upon plaintiff was not wilful and since plaintiff did not use rea-

sonable care in ascertaining the extent of the work to be performed under the subcontract, he was entitled to no relief and that "The findings heretofore made are determinative of all the issues involved in this action and that it becomes unnecessary to make any further findings of fact."

In view of the positive misrepresentations made by defendants, the trier of fact could have found that plaintiff was not negligent, but we cannot say that there is no substantial evidence to support the finding that he failed to use ordinary care to ascertain the extent of the area to be cleared. All reasonable inferences must be drawn in favor of the findings, and it may be inferred that, although section H does not refer to a map, plaintiff was negligent in not examining the maps and drawings attached to the general contract to see whether one of them contained a description of the area to be cleared and also in failing to ascertain whether the flagged area covered one square mile.

[1] In our opinion, however, the court erred in concluding that since the fraud perpetrated by defendants was not wilful, plaintiff's negligence precluded him from obtaining any relief and that it was unnecessary to make further findings. It is the general rule that the negligence of a plaintiff is not a defense where the defendant with intent to deceive has falsely represented as a fact something which he does not believe to be true. Hefferan v. Freebairn, 34 Cal.2d 715, 718–721, 214 P.2d 386; Seeger v. Odell, 18 Cal.2d 409, 414 et seq., 115 P.2d 977, 136 A.L.R. 1291; see California Trust Co. v. Cohn, 214 Cal. 619, 626 et seq., 7 P.2d 297. Although defendants were guilty of fraud as defined in subdivision 2 of section 1572 of the Civil Code, their fraud was not wilful since their representations were believed by them to be true and were not made with intent to deceive.[2] Defendants contend that their conduct, though characterized by the statute as fraudulent, was merely negligent and that, by analogy to the rule in tort cases, plaintiff's contributory negligence is as a matter of law a complete defense. There is an element of carelessness in nearly every case of mistake, and it is obvious that the unqualified application of the principle urged by defendants would result in the virtual destruction of the equitable remedies for relief from mistake.

[2, 3] It is settled that, even in the absence of any misrepresentation, the negligent failure of a party to know or discover facts as to which both parties are under a mistake does not preclude rescission or reformation because of the mistake. National Automobile & Casualty Ins. Co. v. Industrial Accident Comm., 34 Cal.2d 20, 24–26, 206 P.2d 841; Los Angeles & R. R. Co. v. New Liverpool Salt Co., 150 Cal. 21, 25–28, 87 P. 1029; Mills v. Schulba, 95 Cal.App.2d 559, 564–565, 213 P.2d 408; Hanlon v. Western Loan & Bldg. Co., 46 Cal.App.2d 580, 597–598, 116 P.2d 465; see Rest., Contracts, § 508; McClintock on Equity (1948), pp. 246–247, 265–266; 3 Pomeroy, Equity Jurisprudence (5th ed., 1941), § 856b, pp. 340–341; 12 Am.Jur., pp. 624–625; cf. M. F. Kemper Const. Co. v. City of Los Angeles, 37 Cal.2d 696, 702, 235 P.2d 7; Brunzell Const. Co. v. G. J. Weisbrod, Inc., 134 Cal.App.2d 278, 286, 285 P.2d 989. Some cases have said that a plaintiff will not be denied rescission or reformation because of lack of care unless his conduct amounts to gross negligence or the neglect of a legal duty. Los Angeles & R. R. Co. v. New Liverpool Salt Co., 150 Cal. 21, 28, 87 P. 1029; Hanlon v. Western Loan & Bldg. Co., 46 Cal.App.2d 580, 597–598, 116 P.2d 465. These terms are perhaps unfortunate

2. Section 1572 of the Civil Code provides: "Actual fraud, within the meaning of this Chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract: 1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true; 2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true; 3. The suppression of that which is true, by one having knowledge or belief of the fact; 4. A promise made without any intention of performing it; or, 5. Any other act fitted to deceive."

and have caused some confusion. The theory that there are degrees of negligence has been generally criticized by legal writers, but a distinction has been made in this state between ordinary and gross negligence. (See Donnelly v. Southern Pacific Co., 18 Cal.2d 863, 871, 118 P.2d 465.) Gross negligence has been said to mean the want of even scant care or an extreme departure from the ordinary standard of conduct. (See Kastel v. Stieber, 215 Cal. 37, 47–51, 8 P.2d 474; Prosser on Torts (1941), p. 260.) A breach of legal duty may, of course, consist of either ordinary negligence or gross negligence (Harper on Torts (1933), p. 170), but it has been held that ordinary negligence does not constitute the neglect of a legal duty as that term is used in section 1577 of the Civil Code [3], Los Angeles & R. R. Co. v. New Liverpool Salt Co., 150 Cal. 21, 25–28, 87 P. 1029; Hanlon v. Western Loan & Bldg. Co., 46 Cal.App. 2d 580, 597–598, 116 P.2d 465.

[4] There is even more reason for not barring a plaintiff from equitable relief where his negligence is due in part to his reliance in good faith upon the false representations of a defendant, although the statements were not made with intent to deceive. Cf. Shearer v. Cooper, 21 Cal.2d 695, 703–704, 134 P.2d 764; Fleury v. Ramacciotti, 8 Cal.2d 660, 662, 67 P.2d 339. A defendant who misrepresents the facts and induces the plaintiff to rely on his statements should not be heard in an equitable action to assert that the reliance was negligent unless plaintiff's conduct, in the light of his intelligence and information, is preposterous or irrational. 5 Williston on Contracts (rev. ed.) § 1512, pp. 4222, 4223.

The court did not determine that plaintiff's conduct was preposterous or irrational or that it amounted to gross negligence or the neglect of a legal duty, and we are of the opinion that any such determination could not be supported in view of the findings that were made. The subcontract required plaintiff to perform the work described in section H of the general contract. The only provision in section H which describes the area from which trees and brush are to be removed states that the reservoir basin shall be cleared below elevation 2,073, that contour 2,073 will be flagged by the city during the bidding period, that the area of the basin is about one square mile and that the bidder shall make a visual observation before submitting a bid. When plaintiff made his inspection he discovered that the area flagged by the city was approximately coextensive with the lower basin, at the end of which the dam was to be located. Defendants, who as general contractors were in a position to know the facts, represented to plaintiff, both before and after he inspected the premises, that the area to be cleared was that which had been flagged by the city. Plaintiff's failure to make a more thorough investigation of the work required by section H was no doubt due in a large part to the positive representations made by defendants and to the circumstances under which they were made.

[5] The court erred in concluding that, it having been found that plaintiff was negligent, he was precluded from obtaining any relief and that it was therefore unnecessary to make other findings. In the absence of findings upon all material issues we cannot determine what if any relief plaintiff would be entitled to receive.

The judgment is reversed.

SHENK, CARTER, TRAYNOR, SCHAUER, SPENCE, and McCOMB, JJ., concur.

3. Section 1577 of the Civil Code provides: "Mistake of fact is a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in: 1. An unconscious ignorance or forgetfulness of a fact past or present, material to the contract; or, 2. Belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing, which has not existed."

46 Cal.2d 570

Berenice Marie WISEMAN, and Lynne Wiseman, a minor, by her guardian ad litem and trustee, Berenice Marie Wiseman, Petitioners,

v.

INDUSTRIAL ACCIDENT COMMISSION OF the State of CALIFORNIA, Crocker First National Bank of San Francisco and Hartford Accident & Indemnity Company, Respondents.

S. F. 19470.

Supreme Court of California.
In Bank.
May 29, 1956.

Proceeding to review award of Industrial Accident Commission denying claims for death benefits under Workmen's Compensation Act filed by widow and minor child of deceased employee. The Supreme Court, Traynor, J., held that where employee died as result of fire in hotel room supplied by employer while employee was traveling away from home on employer's business, possibility that personal purpose of employee for which he had guest in room at the time may have been immoral and unlawful and that fire may have been started by careless smoking of guest did not preclude award of death benefits to dependents on ground that they had failed to prove that death arose out of and was proximately caused by employment.

Award annulled.

Spence and Shenk, JJ., dissented.

Opinion, 291 P.2d 180, vacated.

1. Workmen's Compensation ⇐715

Generally, a commercial traveler is regarded as acting within course of employment during entire period of travel upon employer's business, and his acts in traveling and procuring food and shelter are all incidents of his employment, and Workmen's Compensation Act applies to injuries sustained during course of such activities. West's Ann.Labor Code, § 3600.

2. Workmen's Compensation ⇐661

Where an employee is conducting his own business with that of his employer, or attending to both at substantially the same time, no nice inquiry will be made as to which business he was actually engaged in at time of injury for purpose of determining whether injury arose out of and was caused by employment, unless it clearly appears that he could not have been serving his employer either directly or indirectly at the time. West's Ann.Labor Code, § 3600.

3. Workmen's Compensation ⇐771

Where employee died of asphyxiation and burns sustained in fire in his hotel room supplied by employer while employee was traveling away from home on employer's business, fact that, for his personal purposes, employee had a guest in hotel room at the time did not preclude award of death benefits to his dependents, regardless of whether purpose for which he had guest in room was immoral and unlawful. Penal Law N.Y. §§ 100–102; West's Ann. Labor Code, §§ 3600, 4551; West's Ann. Const. art. 20, § 21.

4. Workmen's Compensation ⇐771

Where employee died as a result of fire in hotel room supplied by employer while employee was traveling away from home on employer's business, fact that fire may have been started by careless smoking of guest, who was in room for employee's personal purpose, did not preclude award of death benefits to his dependents on ground that they had failed to prove that death arose out of and was proximately caused by employment, regardless of whether employee's purpose in having guest in room was immoral and unlawful. Penal Law N.Y. §§ 100–102; West's Ann.Labor Code, §§ 3600, 4551; West's Ann.Const. art. 20, § 21.

5. Workmen's Compensation ⇐598

Causal connection between employment and injury to employee need not be sole cause of injury in order to make injury compensable under Workmen's Compensation Act, but it is sufficient if it is a contributory cause. West's Ann. Labor Code, § 3600.

6. Workmen's Compensation ⇐609

Injuries to employee on employer's premises in course of his employment

"arises out of employment" within Workmen's Compensation Act, unless connection between employment and injury is so remote that injury is not an incident of employment. West's Ann.Labor Code, § 3600.

See publication Words and Phrases, for other judicial constructions and definitions of "Arising Out Of Employment".

7. Workmen's Compensation ⇐660

Injuries caused by careless smoking while employee is in the course of his employment are not so remotely connected with employment that they do not arise out of employment within Workmen's Compensation Act. West's Ann.Labor Code, § 3600.

8. Workmen's Compensation ⇐771

Where employee died as result of fire in hotel room supplied by employer while employee was traveling away from home on employer's business, immoral and unlawful purpose for which employee allegedly had guest in room at the time was so unrelated and collateral to risk of fire that it did not destroy necessary causal connection between employment and death, since existence of such purpose, in absence of showing of some direct connection between it and risk of fire, would not justify conclusion that connection between employment and death was so remote from employment that it was not an incident of employment. West's Ann.Labor Code, §§ 3600, 4551; West's Ann.Const. art. 20, § 21.

Henry G. Sanford and John R. Smith, San Francisco, for petitioners.

Everett A. Corten, T. Groezinger, Daniel C. Murphy and Leonard, Hanna & Brophy, San Francisco, for respondents.

TRAYNOR, Justice.

Decedent, Lloyd A. Wiseman, a vice president of a San Francisco bank, died of asphyxiation and burns in a hotel room in New York City. He was in that city on bank business, and his traveling expenses, including his hotel bills, were paid by the bank. A woman, not his wife but registered as such, was found unconscious in his room and died shortly thereafter. There was evidence that they had been drinking. Sometime between 4 and 5 in the morning of his death, Wiseman telephoned the hotel manager for help because of a fire in his room. After calling the fire department, the manager went to the room but was unable to open the door with his passkey. Firemen arrived shortly thereafter and broke into the room but were too late to save the occupants. It was the opinion of the assistant fire marshal that the fire was caused by careless smoking by either one or both of the occupants.

Petitioners, the widow and minor daughter of the employee, filed claims as his dependents with the Industrial Accident Commission for death benefits. The referee made an award in favor of petitioners, but a panel of the commission granted the employer's petition for reconsideration, vacated the referee's award and findings, and denied petitioners' claim. Their petition for reconsideration was denied, and they brought this proceeding to review the award.

The commission's jurisdiction is not questioned. See Labor Code, § 5305;* Alaska Packers Ass'n v. Industrial Accident Commission, 294 U.S. 532, 55 S.Ct. 518, 79 L.Ed. 1044.

[1] "As a general rule a commercial traveler is regarded as acting within the course of the employment during the entire period of his travel upon his employer's business. His acts in traveling, procuring food and shelter are all incidents of the employment, and where injuries are sustained during the course of such activities, the Workmen's Compensation Act applies." Dalgleish v. Holt, 108 Cal.App.2d 561, 566, 237 P.2d 553, 556; California Casualty Indemnity Exchange v. Industrial Accident

* "The commission has jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this State in those cases where the injured employee is a resident of this State at the time of the injury and the contract of hire was made in this State. Any such employee or his dependent shall be entitled to the compensation benefits or death provided by this division."

Commission, 5 Cal.2d 185, 186, 53 P.2d 758. Respondents contend, however, that this rule is inapplicable in this case on the grounds that the employee was occupying the hotel room for an immoral and unlawful purpose, N.Y.Pen.Code, §§ 100–102, McK. Unconsol.Laws, c. 49, and that petitioners failed to prove that the fire was owing to the negligence of the employee rather than his companion.

[2, 3] Whether or not the employee was occupying the room for an immoral and unlawful purpose of his own, he was also occupying it as a necessary incident of his employment, which required him to be away from home in New York. "The established rule was repeated in Ryan v. Farrell, 208 Cal. 200, 204, 280 P. 945, viz.: That where the employee is combining his own business with that of his employer, or attending to both at substantially the same time, no nice inquiry will be made as to which business he was actually engaged in at the time of injury, unless it clearly appears that neither directly or indirectly could he have been serving his employer. [Citations.]" Lockheed Aircraft Corporation v. Industrial Accident Commission, 28 Cal.2d 756, 758–759, 172 P.2d 1, 3. The fact that the employee had a guest in his room while he was off duty in no way detracted from the fact that he was also there on his employer's business, and since the employee's fault is irrelevant if the requirements of the law are met, it is immaterial that the employee's personal purpose in having a guest in his room was immoral and unlawful. See Cal.Const. Art. XX, § 21; Labor Code, § 4551; State Compensation Insurance Fund v. Industrial Accident Commission, 38 Cal.2d 659, 660–661, 242 P.2d 311; State Employees' Retirement System v. Industrial Accident Commission, 97 Cal.App.2d 380, 383, 217 P.2d 992.

[4–8] Similarly, we do not believe that the fact that the fire may have been started by the careless smoking of the employee's companion justifies the conclusion that petitioners failed to prove that the death arose out of and was proximately caused by the employment. Labor Code, § 3600. In Madin v. Industrial Accident Commission, 46 Cal.2d 90, 292 P.2d 892, we pointed out that "If we look for a causal connection between the employment and the injury, such connection need not be the sole cause; it is sufficient if it is a contributory cause", 46 Cal.2d at page 92, 292 P.2d at page 894, and that "Where the injury occurs on the employer's premises, while the employee is in the course of the employment, the injury arises out of the employment unless the connection is so remote from the employment that it is not an incident of it." 46 Cal.2d at page 94, 292 P.2d at page 895. Injuries caused by careless smoking while the employee is in the course of his employment are not so remotely connected with the employment that they do not arise out of it, Whiting-Mead Commercial Co. v. Industrial Accident Commission, 178 Cal. 505, 507–508, 173 P. 1105, 5 A.L.R. 1518, and in this respect no reasonable distinction may be drawn between careless smoking on the part of the employee and careless smoking on the part of others. Thus there is nothing unusual in the fact that a traveling employee may entertain guests in his room who smoke, and the risk that such a guest may start a fire and injure the employee is just as much a risk of the employee's presence in the room on his employer's business as the risk that he will himself start a fire by his own careless smoking. Moreover, in the absence of some direct connection between the immoral and unlawful purpose and the risk of fire, the existence of such purpose cannot justify the conclusion that the connection between the injury and the employment "is so remote from the employment that it is not an incident of it." The risk of fire was in no way increased, or any more or less related to his employment, because the employee brought his companion to his room for an immoral and unlawful rather than for a moral and lawful purpose. Accordingly, we conclude that the employee's purpose was so unrelated and collateral to the risk of fire that caused his death that it did not destroy the necessary causal connection between the employment and the death.

The award is annulled.

GIBSON, C. J., and CARTER, SCHAUER and McCOMB, JJ., concur.

SPENCE, Justice (dissenting).

I dissent.

The respondent commission made a finding that "Said employee did not sustain an injury arising out of and occurring in the course of employment on October 5, 1952." The majority opinion annuls the award based upon that finding and necessarily holds, as a matter of law, that the injury was one "arising out of" and "proximately caused" by the employment. Labor Code, § 3600. In my opinion, the evidence clearly indicates that the injury arose out of, and was proximately caused by, an alcoholic and adulterous debauch while the employee was engaged in "a frolic of his own," and that it cannot be said, as a matter of law, that it arose out of and was proximately caused by his employment.

The authorities do not sustain the theory that every injury which is sustained by a traveling employee from the time he leaves home until his return is a compensable injury. The general rule to which petitioners allude is set forth in Dalgleish v. Holt, 108 Cal.App.2d 561, 566, 237 P.2d 553, 556, but it is there said: "However, this rule does not embrace all activities of a commercial traveler irrespective of their connection with the purposes of the employment. The conditions essential to compensation as set forth in Section 3600 of the Labor Code apply equal to traveling employees; the status of an employee as a traveling salesman does not change a course of action which is not within the scope of the employment to one that is." In that case, as well as in the so-called Lund case, State Employees' Retirement System v. Industrial Accident Commission, 97 Cal. App.2d 380, 217 P.2d 992, upon which petitioners strongly rely, the question was held to be one of fact under the evidence presented. The most that can properly be said here is that the question was one of fact rather than of law, which question has been resolved by the commission against petitioners.

The language used in affirming the denial of a claim in Lunde v. Congoleum-Nairn, Inc., 211 Minn. 487, 1 N.W.2d 606, appears germane to the present discussion. It was there said at page 607 of 1 N.W. 2d: "Basically, the argument for relator is wrong in its seeming assumption that factors of time and place are decisive. It ignores the real determinant, which is the employe's activity of the moment. [Decedent's] activity of the moment was wholly his own and, as found below, beyond the scope of his employment. That a traveling salesman is within his own 'territory' does not bring all his actions away from home within the compensation act. The risks of diversions on errands and for reasons personal to him are not all occupational as matter of law. * * * Too reasonable is the conclusion that course of employment of both was left for the time being for a detour leading to pleasure rather than business effort." See, also, Woodring v. United Sash & Door Co., 152 Kan. 413, 103 P.2d 837; Warren v. Globe Indemnity Co., La.App., 30 So.2d 346; Southern Casualty Co. v. Ehlers, Tex.Civ.App., 14 S.W.2d 111; United States Fidelity & Guaranty Co. v. Skinner, 188 Ga. 823, 5 S.E.2d 9; Hurley v. Lowe, 83 U.S.App.D.C. 123, 168 F.2d 553.

It may be conceded that the illegality or immorality of the acts of an employee do not compel a denial of compensation in all cases, but they were material here for the consideration of the commission in determining whether the injury to the employee arose out of and was proximately caused solely by a purely personal activity which was not reasonably contemplated by his employment. Petitioners do not urge that the illegal and immoral conduct of decedent here was reasonably contemplated, and the commission properly concluded that it was not. It follows that as the commission could reasonably infer that the injury and death arose out of and were proximately caused solely by such purely personal and uncontemplated activity, its finding that the injury did not arise out of the employment finds ample support in the evidence. The general language of the cases involving injuries incurred by the employee while engaged in reasonably contemplated activities on the employer's premises or in accommodations furnished by

the employer is therefore not in point here, and does not support the conclusion that the award of the commission should be annulled.

It seems clear that if a traveling employee should meet his death as the result of being shot by an intended victim while engaged in an illegal and uncontemplated personal activity such as an attempted robbery or an attempted rape by the employee of a guest in the employee's hotel room, such death would be held non-compensable as a matter of law. It would arise out of and be proximately caused solely by the illegal and uncontemplated personal activity rather than the employment. It seems equally clear here that the commission could and did properly determine from the evidence, as a matter of fact, that the death arose out of and was proximately caused solely by the illegal and uncontemplated personal activity of the deceased employee rather than the employment.

I would therefore affirm the award of the respondent commission denying compensation.

SHENK, J., concurs.



141 Cal.App.2d 782

Bartolo NAPOLI, Plaintiff and Respondent,

v.

Eleanor HUNT, Defendant and Appellant.

Civ. 5306.

District Court of Appeal, Fourth District, California.

May 23, 1956.

Action by eastbound motorist against southbound motorist for injuries received in collision at rural intersection which did not contain stop signs and which was within a 55 mile per hour prima facie speed zone. The Superior Court, Fresno County, Milo Popovich, J., entered judgment for eastbound motorist, and southbound motorist appealed. The District Court of Appeal, Mussell, J., held that question whether eastbound motorist was guilty of contributory negligence was for trier of fact and that evidence was sufficient to sustain trial court's finding that southbound motorist was negligent.

Judgment affirmed.

1. Automobiles ⇐245(78, 90)

In action by eastbound motorist against southbound motorist for injuries received in collision at rural intersection which did not contain stop signs and which was within a 55 mile per hour prima facie speed zone, questions whether plaintiff was guilty of contributory negligence and whether such negligence contributed to the accident was for trier of facts. West's Ann.Vehicle Code, § 550.

2. Negligence ⇐122(1)

Burden of proving contributory negligence is upon defendant.

3. Negligence ⇐135(1)

Contributory negligence may be found by trier of facts from plaintiff's own evidence.

4. Negligence ⇐136(9)

Contributory negligence is not established as matter of law unless the only reasonable hypothesis is that such negligence exists.

5. Automobiles ⇐242(8)

Plaintiff, who, by reason of injuries sustained in automobile collision, was unable to remember circumstances surrounding it, was entitled to presumption of due care.

6. Negligence ⇐122(1)

Disputable presumption that plaintiff, who, by reason of loss of memory, is unable to testify concerning his conduct at and immediately before time of accident, and who produces no witnesses to testify to such facts, was exercising due care at time of accident is sufficient to support a verdict unless dispelled by irreconcilable facts proved by party relying on it and may outweigh positive evidence adduced against it.

7. Automobiles ⇐242(8)

Where, in action by eastbound motorist against southbound motorist for injuries received in collision at rural intersection which did not contain stop signs and which was within a 55 mile per hour prima facie speed zone, eastbound motorist, by reason of injuries sustained in collision, was unable to remember circumstances surrounding collision, it would be presumed that eastbound motorist was not driving at an excessive rate of speed, looked to his left, saw southbound motorist's automobile approaching intersection, observed its speed, and did all that a reasonably prudent person would do under the circumstances to avoid the accident. West's Ann.Vehicle Code, § 550.

8. Automobiles ⇐245(14)

Evidence ⇐5(2)

As matter of common knowledge, conclusion is inescapable that, where two automobiles collide upon an open intersection, one or both motorists are negligent, and question as to which motorist is negligent is for jury.

9. Automobiles ⇐244(11)

In action by eastbound motorist against southbound motorist for injuries received in collision at rural intersection which did not contain stop signs and which was within a 55 mile per hour prima facie speed zone, evidence, which revealed that southbound motorist did not see eastbound automobile until after accident, was sufficient to sustain trial court's finding that southbound motorist was negligent. West's Ann.Vehicle Code, § 550.

10. Automobiles ⇐150

Motorist had duty to keep lookout for persons and vehicles ahead of her, and failure to keep such lookout or failure to see that which could have readily been seen if she had been looking constituted negligence.

11. Automobiles ⇐245(1)

Where motorist, in her statement on morning after automobile accident, related events of accident and further stated that she did not see plaintiff's automobile before accident, and fact that she did not see plaintiff's automobile and failed to apply her brakes to change course of her automobile could be inferred from lack of skid marks at the intersection, question whether, by reason of loss of memory, motorist was unable to testify, in personal injury action arising from such accident, concerning her conduct at and prior to time of accident was for trier of fact.

Hansen, McCormick, Barstow & Sheppard, Fresno, for appellant.

David E. Peckinpah, Denver C. Peckinpah, and Louis W. Caporale, Jr., Fresno, for respondent.

MUSSELL, Justice.

This is an action for damages for personal injuries sustained by plaintiff in a collision of automobiles at a rural intersection and the sole question involved in this appeal is whether the evidence is sufficient to support the findings and judgment in favor of the plaintiff.

The collision occurred at approximately 7:45 a. m. on May 25, 1954, and the point of impact was established as being in the southwest quadrant of the intersection of Belmont Avenue and Grantland Street in Fresno county. Belmont Avenue runs east and west and intersects Grantland Street at right angles. Both streets are paved and at the time of the accident there were no stop signs on either street at the intersection. It was an open intersection and, while there was a growth of wheat or oats on the northwest corner, the grain was not high enough to obstruct the view of the drivers of the two cars involved. Belmont Avenue is 21 feet wide with a broken white line down the center and Grantland Street is 15 feet wide and is not divided by a white line. The weather was clear and both streets were dry. The intersection was in a 55 mile an hour prima facie speed zone.

Plaintiff was driving a 1953 Buick sedan in an easterly direction in the south traffic lane on Belmont Avenue and defendant was driving south on Grantland Street in her 1951 Chevrolet sedan. Plaintiff was on his way to work and defendant was on her way to school, where she was employed as a teacher. Betty Ruth Doerksen, anoth-

er teacher, was riding with her at the time. Both plaintiff and defendant were familiar with the intersection involved. The Buick left skid marks on the pavement, measuring 42 feet leading to the point of impact and extending therefrom an additional 39 feet in a southeasterly direction. There were no skid marks left by the Chevrolet. It traveled approximately 55 feet after the impact.

A traffic officer, who arrived at the scene within a few minutes after the accident happened, spoke to both plaintiff and defendant. Plaintiff told him that he was going east on Belmont at about 50 miles per hour and did not see the other car. When questioned about the brake marks left by his Buick, he told the officer, "If it was his brake marks he must have put on his brakes, but he didn't remember it. He was very, very vague."

Plaintiff suffered severe brain damage in the collision. The medical testimony at the trial was that "He had a so-called subdural hematoma, which is a collection of blood or fluid, or both, located in a space between the brain and the dura, which is the tough covering over the brain which separates it from the skull." Surgery was performed three or four weeks after the accident to relieve the pressure on the brain by removing and draining the blood from the congested area, and it was found that plaintiff's brain was depressed downward about one inch.

Plaintiff testified at the trial and upon being asked what he remembered about the accident, stated, "Well, clearly, I remember standing beside my car, a little distance from the car, within an arm's reach, I think, and I was looking down at the two ladies that were on the ground and the first thing I was trying to, I was struggling mentally to piece the picture together, just what was before me, how I was there and how the ladies were there. It was almost impossible to put together immediately. I couldn't understand at the time why it was such a puzzle, but it was something important for me to figure out. That's the first thing I recall, trying to piece the picture together"; that he remembered talking to the highway patrol officer and remembered that he could not figure out the reason for the skid marks; that he had not recalled putting on the brakes.

The defendant told the officer at the scene that "she hadn't seen any car"; that they "had stopped at the stop sign and started out when they were struck." However, at that time there was no stop sign at the intersection. Defendant failed to appear at the trial, after having been served with a subpoena, and it was stipulated that her deposition be used in lieu of her appearance and testimony in court. In her deposition she stated, on being asked as to the last thing she remembered prior to the accident, "I remember going out Grantland to go to school. I remember that I turned off Belmont and went off Olive and I went south and that I looked to see if anything was coming, and then I heard them talking about an ambulance. That's all I remember." On the morning following the accident the statement of defendant concerning the accident was taken down by a shorthand reporter and in it defendant stated that she did not know how fast her car was going and did not know there had been an accident until she heard about it; that the accident happened between a quarter to eight and eight o'clock; that she never saw the other car or the driver. Betty Ruth Doerksen testified that she did not remember the day of the accident; that she had had a complete loss of memory for three days and had no recollection of the accident.

The trial court found that the accident was caused by the carelessness and negligence of the defendant and that it was not true that plaintiff drove or operated his automobile in a negligent manner, or that any carelessness or negligence of the plaintiff contributed to the collision. Judgment was entered in accordance with these findings and defendant appeals therefrom.

[1–5] Appellant's contention that plaintiff was guilty of contributory negligence as a matter of law and that his negligence contributed to the accident, thus precluding his recovery, is not supported by the record. The rule on this subject is cited in Anthony

v. Hobbie, 25 Cal.2d 814, 818, 155 P.2d 826, 829, as follows:

"The burden of proving contributory negligence is upon the defendant. 19 Cal.Jur. 697–699. True, contributory negligence may be found by the trier of fact from the plaintiffs' own evidence. But cases in which it can be said that the negligence of plaintiff contributes proximately to the accident as a matter of law are rare. The rule has been stated in various ways in a legion of cases, that contributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such negligence exists; that reasonable or sensible men could have drawn that conclusion and none other; that where there are different inferences that may be drawn, one for and one against, the one against will be followed; and that before it can be held as a matter of law that contributory negligence exists, the evidence must point unerringly to that conclusion." (Citations.)

We cannot here say that the evidence points unerringly to the conclusion that plaintiff was negligent. Plaintiff, by reason of the injuries which he sustained in the collision was unable to remember the circumstances surrounding it and there was substantial evidence to support this conclusion. The plaintiff was therefore entitled to the presumption of due care and this is conceded by appellant in her opening brief.

[6, 7] In Russell v. Andersen, 101 Cal. App.2d 684, 694, 226 P.2d 350, 357, the court, quoting from Simon v. City and County of San Francisco, 79 Cal.App.2d 590, 598, 180 P.2d 393, said:

" 'It is now well settled in this state that where a plaintiff by reason of loss of memory is unable to testify respecting his conduct at and immediately before the time of the accident, and produces no witnesses who testify to such facts, he is entitled to the benefit of the presumption that he was exercising due care. This presumption is itself evidence sufficient to create a conflict with the evidence produced by defendant, and requires that the issue of contributory negligence be submitted to the jury.' "

This disputable presumption is by statute declared to be evidence and is sufficient to support a verdict of a jury unless dispelled by irreconcilable facts proved by the party relying on it; and it may outweigh positive evidence adduced against it. Scott v. Burke, 39 Cal.2d 388, 394–395, 247 P.2d 313. In the instant case it is therefore presumed that plaintiff was not driving at an excessive rate of speed; that he looked to his left, the direction from which danger was to be apprehended; that he saw defendant's car approaching the intersection, observed its speed and did all that a reasonably prudent person would do under the circumstances to avoid the accident.

Appellant contends that the defendant had crossed virtually two-thirds of the intersection while plaintiff was just entering it and not only did the defendant arrive at the intersection first, but at a slower rate of speed, and that the contributory negligence of plaintiff is therefore apparent.

Section 550 of the Vehicle Code provides that the driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection from a different highway, and when two vehicles enter an intersection from different highways at the same time, the driver of the vehicle on the left shall yield the right of way to the driver of the vehicle on the right. However, here there was no testimony as to the speed of defendant's automobile or that it entered the intersection first. In Casselman v. Hartford Accident & Indem. Co., 36 Cal.App.2d 700, 707, 98 P.2d 539, 544, the court said:

" 'Whether or not, therefore, plaintiff, after observing the approach of defendant's car, its position, and the rate of speed it was traveling, and keeping the same within his side vision, was justified in proceeding upon his rightful way across the intersection in advance of defendant presents a question upon which reasonable minds might differ, and was therefore one for the jury to determine.' "

In Green v. Pedigo, 75 Cal.App.2d 300, 305, 170 P.2d 999, 1003, the court said:

"The question of proximate cause, negligence and contributory negligence is primarily one of fact for determination by the duly constituted arbiters thereof. Though it be conceded that defendant was strictly within the law as to the 'right of way,' there is sufficient evidence in the record to warrant an inference by the jury that he did not use, as was his duty, the required ordinary care and skill in the control and operation of his vehicle to avoid an accident."

Appellant argues that the physical facts as shown by the evidence, i. e., the brake marks left by plaintiff's Buick, the absence of any brake marks left by defendant's car, the point of impact, the makes and weights of the respective vehicles, and the condition and position of the respective cars after the accident prove that defendant entered the intersection first; that the Buick was going much faster than the Chevrolet, and that plaintiff was negligent. However, in Nagamatsu v. Roher, 10 Cal.App.2d 752, 755–756, 53 P.2d 174, 175, the court, in considering a similar condition, said:

"It is argued that the condition and position of the cars after the accident, with the laws of physics, conclusively prove that the car driven by the deceased was going much faster than the other car and that it struck the appellant's car, knocking it some distance to the north. As has been frequently pointed out in cases of this nature, such arguments are unreliable because they fail to take into account the human element, what may have been done by the respective drivers, and because of the many uncertainties which necessarily exist in such matters as the respective weights of the cars, the respective speeds, the exact positions, the force and direction of the blows, and many other elements." (Citations.)

In Kalfus v. Fraze, 136 Cal.App.2d 415, 424, 288 P.2d 967, 973, the court stated:

"Where the existing circumstances militate against precise mathematical calculations, this court has stated the rule that on appeal it 'will not make dubious calculations based upon evidence of time and distance and speed (which evidence after all consists of mere opinions of witnesses) for the purpose of upsetting the verdict of a jury as to the facts.'" (Citations.)

[8] We cannot here say that under the undisputed physical facts the accident was caused by plaintiff's negligence. The question of whether or not plaintiff exercised due care in the instant case was one of fact for the trial court. Green v. Key System Transit Lines, 116 Cal.App.2d 512, 521, 253 P.2d 780; Bramble v. McEwan, 40 Cal.App.2d 400, 410, 104 P.2d 1054. The question of whether defendant was negligent was also one of fact. As was said in Klemko v. Ryer, 118 Cal.App. 238, 239, 4 P.2d 998, 999:

"As a matter of common knowledge, the conclusion is inescapable that, where two automobiles collide upon an open intersection, one or the other of the drivers is negligent, and possibly both. The question as to which driver is negligent is one for the jury."

[9, 10] There is substantial evidence in the record to support the trial court's finding herein that the defendant was negligent. It was her duty to keep a lookout for persons and vehicles ahead of her and the failure to keep such lookout or the failure to see that which could be readily seen, if she had been looking, constituted negligence. Huetter v. Andrews, 91 Cal.App.2d 142, 146, 204 P.2d 655. Defendant's view of the intersection was unobstructed. She was approaching a more traveled avenue from a lesser traveled street. She should have seen the plaintiff nearing the intersection and should have exercised care to avoid the collision. There was no evidence that she slackened her speed or applied her brakes upon approaching and entering the intersection. Immediately after the accident and on the following morning when her statement was taken, she stated that she did not see plaintiff's car until after the accident.

[11] Appellant asserts that she is entitled to the presumption of due care because

of her inability to remember the events of the accident. However, in her statement the morning after the accident, she related the events surrounding the accident and there stated that she was on yard duty and had to meet the school bus at 8:00 a. m., and that her companion told her that she would not reach school in time for her yard duty if she did not hurry. She further stated that she did not see plaintiff's automobile before the accident. The fact that she did not see plaintiff's car and failed to apply her brakes or change the course of her car may be inferred from the lack of skid marks at the intersection. Under the circumstances shown by the record, it was a question of fact whether defendant, by reason of loss of memory, was unable to testify concerning her conduct at and prior to the time of the accident. Gioldi v. Sartorio, 119 Cal.App.2d 198, 201, 259 P.2d 62.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



141 Cal.App.2d 688

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Ben Robert REINSCHREIBER, Defendant and Appellant.

Cr. 5460.

District Court of Appeal, Second District, Division 3, California.

May 21, 1956.

Hearing Denied June 20, 1956.

Defendant was convicted of grand theft. The Superior Court, Los Angeles County, Aubrey N. Irwin, J., entered judgment and order denying motion for new trial, and defendant appealed. The District Court of Appeal held that evidence was sufficient to sustain conviction of grand theft by trick and device.

Judgment and order affirmed.

1. Embezzlement ⇐1
False Pretenses ⇐1
Larceny ⇐14(1)

As defined in the Penal Code, "theft" includes theft by trick and device, theft by false pretenses, and embezzlement. West's Ann.Pen.Code, § 484.

See publication Words and Phrases, for other judicial constructions and definitions of "Theft".

2. Criminal Law ⇐881(1)

Juries need no longer be concerned with technical differences between the several types of theft but can return a general verdict of guilty if they find that an unlawful taking has been proved. West's Ann. Pen.Code, § 484.

3. Criminal Law ⇐1159(2)

Upon appeal from judgment of conviction of theft, where only asserted basis of appeal is insufficiency of the evidence, judgment must be affirmed if there is sufficient evidence to support the judgment on theory of theft by trick and device, by false pretenses, or by embezzlement. West's Ann. Pen.Code, § 484.

4. Larceny ⇐14(1)

"Larceny by trick and device" is the appropriation of property of which possession has been fraudulently acquired. West's Ann.Pen.Code, § 484.

See publication Words and Phrases, for other judicial constructions and definitions of "Larceny by Trick and Device".

5. False Pretenses ⇐1

"Obtaining property by false pretenses" is the fraudulent or deceitful acquisition of both title and possession. West's Ann.Pen.Code, § 484.

See publication Words and Phrases, for other judicial constructions and definitions of "Obtaining Property by False Pretenses".

6. False Pretenses ⇐49(1)
Larceny ⇐55

Corroboration is required to prove theft by false pretenses but corroboration is not required to prove theft by trick and device. West's Ann.Pen.Code, § 1110.

7. Larceny ⇐26

Fact that defendant returned prosecuting witness' money more than year after

defendant took it did not constitute a defense to the criminal charge of grand theft. West's Ann.Pen.Code, § 484.

8. Larceny ⇐65

Evidence was sufficient to sustain convictions of grand theft by trick and device. West's Ann.Pen.Code, § 484.

9. Criminal Law ⇐1173(3)

Where, in prosecution for grand theft, evidence was sufficient to support judgment of conviction upon theory that grand theft by trick and device had been committed, failure to instruct jury on corroboration required in prosecution based on false pretenses and to instruct jury on elements of crime of false pretenses was not error. West's Ann.Pen.Code, § 484.

10. Criminal Law ⇐824(1, 4)

In a criminal case, court has duty to give, of its own motion, instructions on general principles of law pertinent to the case but does not have duty to give instructions upon specific points developed through the evidence introduced at trial unless such instructions are requested by party desiring them.

11. Criminal Law ⇐1173(3)

Where, in prosecution for grand theft, evidence was sufficient to support conviction on theory of theft by trick and device, failure to instruct jury on defense of claim of title in an embezzlement charge was not prejudicial. West's Ann.Pen.Code, § 484.

12. Criminal Law ⇐829(3)

Where, in prosecution for grand theft, jury was properly instructed, in instruction which defined the three forms of theft, as to knowledge, design, and intent of person in obtaining, converting, and depriving owner of title to or possession of property, failure to give instruction that it was necessary for prosecution to prove a specific intent to steal was not error.

13. Larceny ⇐70(1)

Where same trickery, which was basis for theft by trick and device, was basis for alleged creation of partnership between defendant and prosecuting witness, refusal to give instruction to effect that merely investing money for such purposes would create a partnership was not error.

14. Partnership ⇐25

If payment of money by prosecuting witness to defendant was procured by trickery and fraud, partnership between prosecuting witness and defendant would not be created. West's Ann.Pen.Code, § 484.

15. Criminal Law ⇐824(4)

Where, in prosecution for grand theft, defendant asserted defense based upon alleged creation of partnership between defendant and prosecuting witness, failure to give instruction, which stated elements of partnership, and which was not requested by defendant, was not error. West's Ann. Pen.Code, § 484.

16. Criminal Law ⇐781(2)

In prosecution for grand theft, evidence was sufficient to warrant giving of an instruction on subject of accusatory statement. West's Ann.Pen.Code, § 484.

17. Criminal Law ⇐317

Where defendant does not testify, jury may take failure to testify into consideration as tending to indicate truth of any evidence which is against defendant and which he can reasonably be expected to deny.

18. Criminal Law ⇐730(1), 1171(1)

In prosecution for grand theft, defense counsel was unduly restricted in his attempt to argue defense based upon partnership between defendant and complaining witness, but such error was not prejudicial. West's Ann.Pen.Code, § 484.

Morris Lavine, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and John S. McInerny, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

In a trial by jury, defendant was convicted on four counts of grand theft. He admitted an allegation of the information that he had been convicted of a felony (issuing checks without sufficient funds). He appeals from the judgment and the order denying his motion for a new trial.

Appellant contends that the evidence was insufficient to support the verdicts; and that the court erred in instructing the jury, and in limiting his attorney's argument to the jury.

Some of the facts, with reference to Count I, are: On November 2, 1954, about 10 a. m., one Steiner introduced Mr. Scoll to defendant. At that time Steiner, whom Scoll had known about three years, said that defendant was a Cadillac dealer and had five to eight Cadillac cars "coming in from out of state," and that he (Steiner) was going to take (buy) one of them. Defendant said that the cars were being transported into the state and he had to have $5,000 that had to be paid that day, before noon, in order to get the cars. Defendant also said that he had a dealership or "brokerage" in Cadillacs, and if Scoll would put up the $5,000 to pay the freight on the cars, that Steiner and Scoll would share "in 50 per cent" in the profit derived from the sale of the cars. Scoll relied on defendant's statement with reference to profits. Immediately after said conversation, Scoll borrowed $5,000 from a friend and gave the $5,000 in cash to defendant. Scoll testified that he did not consider the $5,000 was a loan to defendant; that Scoll was to be a partner in the venture with Steiner, defendant, and one Chodak (who will be referred to later). Scoll asked defendant "for the papers" on the vehicles that were being shipped. Defendant replied that they were coming with the vehicles. Scoll told defendant that he (Scoll) had to return the $5,000 to the lender within ten days, that is, by November 12. Defendant said that he was sure the money would be covered by that time through the sale of the cars. On November 3, defendant told Scoll that the cars had not arrived but they certainly would be there that day, and that "there were to be more vehicles" making a total of 13, and he needed an additional $3,000 "to pick up the remaining five vehicles." Scoll then gave defendant three checks for $1,000 each to pay freight on the additional vehicles that were coming in. On November 4, Scoll saw defendant at Steiner's apartment, and he asked defendant if the cars had arrived. Defendant replied that they had not arrived, and that he had sent Chodak to Detroit to find out what was holding up the cars. Later that day Scoll returned to the apartment, accompanied by Mr. Otash, a police officer. (It was not disclosed to defendant that Otash was a police officer.) At that time defendant said that Scoll had given him $5,000 in cash and three $1,000 checks for the purpose of defraying the cost of transporting eight Cadillac automobiles to California from Detroit; that when the cars were sold, Scoll and Steiner were to derive half of the profit, and defendant and his partner (Chodak) were to derive the other half of the profit; that Steiner was to buy one of cars; and that defendant had already put up $18,000 of his own money to buy the cars. Otash asked defendant if Scoll had lent the money to him. Defendant replied that he had not and that they had entered into a business transaction and were partners. Defendant also said that his partner, Chodak, was in Detroit "that day" arranging to bring the cars back or that he was on the way back with them. Otash said that he thought defendant was a swindler and that the deal was a bunco scheme. Then Otash advised Scoll to stop payment on the three $1,000 checks, and to take the matter up with the police and district attorney. Defendant then said that he would prove that it was not a phony deal, that he would call Detroit "right now," and they could listen to his conversation. Thereupon defendant pretended to call Detroit and to have a conversation with someone in Detroit as to whether his man had arrived with the money and whether he had left with the cars. When he had finished the pretended conversation, he said that as far as he knew the cars were en route to California. Otash noticed that defendant, while dialing the telephone, put "his thumb down on one of the buttons" of the telephone—the buttons upon which the telephone receiver rests when the telephone is not in use. Otash told defendant that he thought it was a phony and that he had observed the way defendant handled the telephone on the call to Detroit. Then defendant said that Otash had no right to accuse him of being a swindler. Scoll

stopped payment on the three $1,000 checks.

Sometime between November 2 and November 12, 1954, defendant gave Scoll a promissory note for $5,000; and also during that time defendant gave Scoll a promissory note for $3,000. Two or three days after said amounts had been paid by Scoll to defendant, Scoll said that he had no proof that any money had been given to defendant; and he asked defendant to give him something to show that money had been given to him. Then defendant gave the notes to Scoll—both notes were given at the same time. About November 8, 1954, defendant paid $2,000 to Scoll. Prior to the trial in April, 1955, defendant paid the remaining $3,000—between said November 8, and January 1, 1955, $500 was repaid, and in March $2,500 was repaid. About November 12, 1954, defendant gave Scoll a check for $5,000, drawn by defendant, and payable to Scoll. The check was deposited in a bank by Scoll on January 17, and it was returned unpaid—"No such account."

In a conversation with a police officer after the arrest, defendant said that he never had any cars in prospect from the East, and that he had not made any telephone calls to Detroit or any place east.

Courts II and III relate to transactions with Mr. Ross. Some of the facts, with reference thereto, are: About March 1, 1954, defendant told Ross that he purchased a car in Texas which he thought Ross would like to have, that it was a blue 1953 Fleetwood Cadillac with power steering and air conditioning, that it was in immaculate condition and had 6,000 miles on it, and that the price was $3,200. It was to be a Fleetwood 60 series. On that day, or a day or two thereafter, Ross gave defendant $1,750 cash to apply on the price. The car was to be brought from Texas and delivered within four or five days. A car was not delivered within that time and defendant said that the car was on the way from Texas, was delayed, had gotten into a sandstorm, and was being repaired. Ross had conversations with defendant for many days thereafter as to where the car was. About August 16, 1954 (about five months later), defendant told Ross that the car was ready for delivery, that it was being driven from Las Vegas and that Ross would have it that evening or the next day. Then Ross gave him a check for $1,450, which check was paid by the bank. A few days thereafter defendant said that he needed $158 additional for license and tax. Then Ross paid that amount to him. About September 15, defendant brought a Cadillac Fleetwood limousine to Ross, who said he did not want a car like that. He did not accept it. Defendant said that if Ross did not want the car, he (defendant) would sell it at a profit. Ross asked for the return of his money. Defendant said that he would return the money the next day, with the profit. Then defendant left, taking the car with him. He did not return the money the next day. About October 20, defendant gave Ross a check for $3,500, drawn by one Weingart, payable to and endorsed by defendant. Ross deposited the check in a bank, but it was not paid. On November 4, defendant gave Ross two $1,000 checks which were drawn by Scoll. Ross presented the checks to the bank but they were not honored by the bank. (These checks were involved in Count I, and Scoll had stopped payment of them as above stated.) Ross made further demands for the return of his money but he has received only $600.

Mr. Barton was present when defendant brought the limousine to Ross, and he heard Ross tell defendant that Ross could not use a limousine 75, that he wanted the 60 series. A few weeks later, defendant told Barton that defendant had taken Ross' money to buy a Rolls-Royce for a customer and he made a quick $500.

Some of the facts, with reference to Count IV, are: On October 7, 1954, defendant told Mr. Lank that Chodak (who was then present) was a "car repossessor" for a finance company; that defendant had a 1952 Cadillac Coupe de Ville which Chodak had just repossessed; that the amount owed on the car was $1,612; that if Lank could pay that amount defendant would turn the car over to him. About an hour and a half later Lank told defendant that he would like to see the car before

he paid the money. Defendant said that the car could not be seen until the money was paid. Lank paid $1,612 in cash to defendant and asked for a receipt. Defendant wrote and signed a document as follows: "Received of Harold Lank, $1,612. Said money to be used to purchase 1952 Cadillac Coupe de Ville, car to be approved by Harold Lank—If not I guarantee to sell said car and divide profit with Harold Lank." The next day defendant delivered a 1953 Cadillac. Lank asked what happened to the 1952 Cadillac. Defendant said that he could sell it to another buyer and make $400 profit for himself, and that Lank was to get the 1953 Cadillac at no further investment. Lank said that he would take the 1953 car at that time. Defendant said he could not leave the car there; that Chodak had to take it back to the finance company and keep it there for five days until "impounds" were cleared; that at the end of five days he would bring it back and turn it over to Lank for the $1,612. Five days later defendant asked Lank, by telephone, to meet him at a certain place, and stated that Chodak would meet them there with the car, and at that time the car would be turned over to Lank. Defendant and Lank went there about 2 p. m. and waited more than an hour for Chodak but he did not arrive. Later that day, defendant told Lank that Chodak had gone to San Bernardino to repossess a car, that he had been beaten up and was in a hospital there. A few days later, defendant told Lank that the 1953 Cadillac, which was to be sold to Lank, "was paid off by the original owner," and it had to be returned to the owner. Defendant also said that if Lank would wait, they would get a Cadillac for him. Thereafter defendant promised to deliver a car to Lank on November 6, but on that day defendant told him that the car, which was to be delivered to him, had been repossessed from a person who was in jail and that defendant's lawyer was trying to get the car released. Defendant also said that the car would be delivered later that day. About a week later defendant told Lank that the transmission in the car was broken, and that Lank could accept it as it was or they could try to get the insurance company to pay for the damaged transmission. The next day defendant said that the insurance company would pay $460 to have the car fixed and the car was to be fixed at a certain garage. The next day Lank told defendant that the car was not at that garage. Defendant replied that he had decided not to take the car there, that instead of fixing the car he was going to take the check from the insurance company and then sell the car, and with the check and "the difference" he would get a 1954 Cadillac for Lank. Defendant told Lank to go to a certain dealer and select a 1954 Cadillac, and he would have the car delivered to Lank for an additional $400 or $500. On December 11 Lank selected a car and told defendant that he had selected it. Defendant replied that he would get it for Lank immediately, and that probably he would need $400 more but he could get that later. That car was not delivered. The next day Lank told defendant that he was tired of the "stalls" and that he wanted a car or the return of his money. Defendant said that he had found a better deal "for the same car for less money" from another person, and that he would get the car for Lank on that day. Then defendant made a telephone call to one Miller, who told Lank by telephone that defendant had given him a 1953 Cadillac, a check for $400, and that for $400 more he would deliver a 1954 Cadillac to Lank. Lank replied that that was "Fine," and asked where he could meet Miller and get the car. They made an appointment to meet at 2 p. m. that day. Lank was present at the appointed place and time, but Miller did not appear and the car was never delivered. That afternoon defendant told Lank that he would deliver the car that evening. The car was not delivered. Lank relied upon the statements of defendant regarding the automobile. Lank did not receive any automobile from defendant; and no part of the money that Lank paid to defendant was returned to Lank.

Lank filed a civil action to recover the money he paid to defendant. (The action was filed on April 21, 1955, during the trial of the present case.)

In a conversation with police officers, defendant was asked why he did "these sort of things," and he replied that since his indictment in Las Vegas he "was robbing Peter to pay Paul."

Defendant did not testify, and he did not call any witness in his behalf.

Appellant argues, with respect to his claim of insufficiency of the evidence, that the transactions with Scoll, Ross and Lank were civil transactions and did not constitute theft. As to the Scoll transaction, he argues further that the negotiations were varied from time to time and there was to be a division of profits, and when the transaction was not completed satisfactorily he received all his money back and there was no theft. As to the Ross transaction, he argues that the only kind of car specified was a Cadillac Fleetwood and that he delivered a Cadillac Fleetwood limousine, and when Ross would not accept the limousine the matter became a civil case of a dissatisfied buyer and there was no theft. As to the Lank transaction, he argues that the 1952 Cadillac was to be approved by Lank and if he did not approve it the car was to be sold and profit divided with Lank; that when defendant discussed selling the car (to another customer) for a profit, Lank said that was satisfactory with him; that after several conversations with defendant regarding a car, Lank finally said he wanted his money; and he filed a civil action to recover it. He argues further that there was no corroboration of any of his alleged representations, as is required by section 1110 of the Penal Code in a prosecution based on alleged false pretenses.

[1–6] Theft, as defined in section 484 of the Penal Code, includes theft by trick and device, theft by false pretenses, and embezzlement. People v. Jones, 36 Cal.2d 373, 376–377, 224 P.2d 353; People v. Ashley, 42 Cal.2d 246, 258, 267 P.2d 271; People v. Bartges, 126 Cal.App.2d 763, 769, 273 P.2d 49. "Juries need no longer be concerned with the technical differences between the several types of theft, and can return a general verdict of guilty if they find that an 'unlawful taking' has been proved." People v. Ashley, supra, 42 Cal.2d 258, 267 P.2d 279. On appeal from a judgment of conviction of theft, where the only asserted basis of appeal is insufficiency of the evidence, the judgment must be affirmed if there is sufficient evidence to support the judgment on the theory of theft by trick and device, or by false pretenses, or by embezzlement. See People v. Jones, supra, 36 Cal.2d 375, 224 P.2d 354; People v. Andary, 120 Cal.App.2d 675, 680, 261 P.2d 791. "Larceny by trick and device is the appropriation of property, the possession of which was fraudulently acquired; obtaining property by false pretenses is the fraudulent or deceitful acquisition of both title and possession." People v. Ashley, supra, 42 Cal.2d 258, 267 P.2d 279. In People v. Bartges, supra, 126 Cal.App.2d 763, at page 770, 273 P.2d 49, at page 52, wherein the crime was theft by trick and device, the court said: The evidence "clearly shows that appellant with a preconceived design to appropriate the money to his own use, obtained possession of it by means of fraud and trickery. The fraud vitiated the transaction and the owner is deemed still to retain a constructive possession of the property. The owner does not part with title to the alleged thief where as here, he delivered it to appellant to be applied by the latter to a particular purpose and the recipient, having obtained possession with the preconceived intention to appropriate the money to his own use, subsequently did convert it to his own use instead of applying it to the purpose contemplated by the owner." In People v. McCabe, 60 Cal.App.2d 492, at page 496, 141 P.2d 54, at page 57, it was said: "Such crime [theft by trick and device] usually results when the victim of a fraud intends not to pass complete title to his property but that it shall be applied to a special purpose while the recipient of the property intends to appropriate it to his own use." Corroboration is required to prove theft by false pretenses, Pen.Code, § 1110; People v. Ashley, supra, 42 Cal.2d 259, 267 P.2d 279; but corroboration is not required to prove theft by trick and device. People v. Bartges, supra, 126 Cal.App.2d 771, 273 P.2d at page 53.

[7] In each of the three counts in the present case, the evidence would support a finding that the money was taken by defendant from the prospective purchaser for the specific purpose of paying for freight on automobiles or paying for an automobile, and at the time of so taking the money defendant had the preconceived design and intention of appropriating the money to his own use. As to the first count, the evidence shows that defendant did not have any automobile coming from the East and that there was no freight bill to pay with the money he took from Scoll, and that defendant appropriated the money to his own use in buying a Rolls-Royce to make a quick $500. The fact that defendant returned Scoll's money (more than a year after he took it) is not a defense to the criminal charge. See People v. Wynn, 44 Cal.App.2d 723, 729, 112 P.2d 979. As to the second count, the evidence shows that defendant had not purchased an automobile in Texas, he did not have an automobile for delivery to Ross such as the one described by defendant, and he appropriated the money to his own use (repaying, after many months, only $600 of the $3,358). As to the third count, there was ample evidence to support a finding that defendant did not have a 1953 or 1954 automobile or any automobile for delivery to Lank, and he appropriated the money to his own use by keeping all of it. As to all counts, defendant made many untrue statements as to highly material matters.

As above indicated, it was not necessary (in order to prove theft by trick and device) that the testimony of the victims of the fraud be corroborated. See People v. Bartges, supra, 126 Cal.App.2d 763, 771, 273 P.2d 49. It appears, however, that there was corroboration of such testimony. The testimony of Officer Otash (who accompanied Scoll when he talked to defendant) corroborated Scoll's testimony. The testimony of Barton (who was present when defendant brought the limousine to Ross) corroborated Ross' testimony that the automobile was to be a 60 series—not a limousine 75. The receipt given to Lank by defendant corroborated Lank's testimony that the money he gave defendant was to be used to purchase a 1952 Cadillac. The testimony of each victim in each count was corroboration of the testimony of each victim in the other counts, since the trickery involved in all the transactions was similar. See People v. Ashley, supra, 42 Cal. 2d 246, 268, 267 P.2d 271; and People v. Frankfort, 114 Cal.App.2d 680, 701, 251 P. 2d 401.

The asserted defense that Scoll and Lank were defendant's partners has no merit. The same trickery which was the basis for getting the money from Scoll and Lank was the basis for the alleged creating of a partnership. It is evident that defendant was using some of the money which he stole from one person to repay money he stole from another person.

[8] In the present case, the evidence amply supports the convictions of grand theft by trick and device.

[9] A further contention of appellant is that the court erred in failing to instruct the jury on corroboration as required in a prosecution based on false pretenses; and on the elements of the crime of false pretenses. Instructions were given which properly defined theft and forms of theft, namely, larceny by trick and device, obtaining property by false pretenses, and embezzlement. Also there was an instruction that if the jury found that defendant committed any of the three kinds of theft, it should return a verdict of guilty, and it would not be necessary to state in the verdict which of the three forms of theft was committed. In People v. Waxman, 114 Cal.App.2d 399, at page 409, 250 P.2d 339, at page 346, the court said: "[T]he jury were required only to determine as to each count whether the crime of grand theft had been committed. [Citations.] Courts and lawyers are no longer required to puzzle over fine distinctions between the crimes formerly denounced by separate statutes. The crime is complete when the criminal agency appropriates the property of another to his own use without regard to the particular route he chooses to effectuate his wicked purpose. * * * The jurors might not agree on the ancient technical distinctions of the three crimes, but at the same

time agree that the defendant stole the money." It is to be noted that defendant did not request the giving of such instructions as he now asserts should have been given. Irrespective of whether there was such a request, the court did not err in not giving such instructions which pertain to theft by false pretenses. As above stated, the evidence was sufficient to support the judgments of conviction upon the theory that grand theft by trick and device had been committed. Also as above stated, corroboration was not required to prove theft by trick and device.

[10, 11] Appellant also contends that the court erred in failing to instruct the jury on the defense of claim of title in an embezzlement charge. Appellant did not request such an instruction. Apparently such an alleged claim of title refers to an implication, assertedly developed in cross-examination of the People's witnesses, to the effect that the money became partnership money. "'"It is the duty of a court in criminal cases to give, of its own motion, instructions on the general principles of law pertinent to such cases * * *. But it is not its duty to give instructions upon specific points developed through the evidence introduced at the trial, unless such instructions are requested by the party desiring them."'". People v. Bender, 27 Cal. 2d 164, 175, 163 P.2d 8, 15. Furthermore, the failure to give such an instruction pertaining to embezzlement was not prejudicial since the evidence was sufficient to support the judgments upon the theory of theft by trick and device.

[12] Appellant also asserts that the court erred in failing to give an instruction that it was necessary for the prosecution to prove a specific intent to steal. He did not request such an instruction. In the instruction defining the three forms of theft, the jury was properly instructed with reference to knowledge, design and intent of a person in obtaining, converting, and depriving the owner of the title to or possession of property. The jury was adequately instructed on the subject of intent to commit theft.

[13–15] Appellant also contends that the jury should have been instructed as to the elements of a partnership. At his request the jury was instructed that a general partner cannot be convicted of embezzling partnership property which comes into his possession during the course of the partnership business. The court refused to give a part of the requested instruction which part was to the effect that if Scoll invested money with defendant to purchase or transport automobiles, and that upon a sale of the automobiles Scoll and defendant were to divide the profits, then Scoll and defendant were general partners. As above stated, the same trickery which was the basis for the theft by trick and device was the basis for the alleged creating of a partnership. It would have been error to instruct the jury, as requested, to the effect that merely investing the money for such purposes would create a partnership. If the payment of the money to defendant was procured by trickery and fraud a partnership would not be created. The court did not err in refusing to give said part of the requested instruction. Defendant did not request an instruction stating the elements of the partnership, and the court did not err in failing to give such an instruction.

[16] Appellant contends further that the court erred in giving an instruction on the subject of accusatory statement. He argues that the alleged accusatory statement was promptly denied and there was no conduct warranting such an instruction. It is true that when Otash told defendant that he thought defendant was a swindler and that the whole deal was a bunco scheme, the defendant replied that he would prove to them that it was not a phony deal and he would call Detroit and they could listen to the conversation. It is to be noted, however, that when Otash (after defendant's pretended telephone conversation) "called him on the way he handled the phone" and told him that he thought it was a phony, the defendant did not deny the accusation that it was a pretended telephone call, and his only reply was that Otash had no right to accuse him of being a swindler. The court did not err in giving the instruction.

Appellant also asserts that the court erred in limiting the argument of his at-

torney when he was addressing the jury. Appellant has not set forth in his brief the statements his attorney made immediately preceding the alleged limiting of argument. The attorney for defendant, in his argument, said that the law of this state is simple as to what a partnership is, "one partner in the course of a partnership cannot embezzle—." The deputy district attorney objected on the ground that defendant's attorney was arguing the law to the jury. The judge said that the attorney might argue any point of law that is applicable to the facts of the case. The attorney then continued his argument by stating that if there was a partnership between Scoll and defendant "then the law of California states, and I am reading now from People v. Brody [29 Cal.App.2d 6, 83 P.2d 952]—." The deputy district attorney objected to the reading from any case. The court said that the attorney might argue the law, but he was not going to permit the attorney to read the decisions; that the attorney might argue the facts, but he should not argue as to what he thinks the law is; that the attorney might argue the facts and say that from those facts, if the court so instructs the jury, the jury might bring in a verdict accordingly, if the court gives the instruction; and that the court would tell the jury what the law is. In People v. Baldwin, 42 Cal.2d 858, at page 871, 270 P.2d 1028, at page 1036, defendant's attorney made a statement regarding a legal matter and then said: "'That is the law.'" The judge said: "'I am going to instruct the jury as to what the law is and I will ask you to refrain from telling the jury what your idea of the law is.'" The Supreme Court said, 42 Cal.2d at page 871, 270 P.2d at page 1036, that the ruling was correct and that it was for the judge to instruct the jury as to questions of law, and "he could refuse counsel permission to argue the law, although counsel had a right to argue facts pertinent to the law." In the present case the court did not unduly restrict defendant's attorney in his argument to the jury.

[17] Appellant also asserts that the court erred in giving an instruction to the effect that as to any evidence against defendant which he can reasonably be expected to deny, if he does not testify the jury may take that failure into consideration as tending to indicate the truth of such evidence. It was proper to give the instruction. See People v. Steccone, 36 Cal. 2d 234, 239, 223 P.2d 17.

The judgment, and the order denying the motion for a new trial, are affirmed.

SHINN, Presiding Justice.

[18] I concur in the judgment and in the opinion except in a single particular. I think defendant's attorney was unduly restricted in the arguments. He was endeavoring to argue that defendant and one or more of the victims were partners and undertook to state what constitutes a partnership. He was abruptly halted and told the court would instruct as to the law.

The notion that counsel must refrain from ever mentioning any principle of law in argument is a fetish that is often carried to inordinate lengths. Almost all argument is devoted to the matter of the duties of the parties, what they had or had not a right to do, and in criminal cases to the elements of the offense. Instead of instructing the jury before the arguments the court instructs after they are finished. If counsel undertake to discuss the duties of the parties in, we'll say, a negligence case, and mention familiar provisions of the vehicle code, they are halted and told that the court will state the law. In a criminal case argument is necessarily directed toward the evidence that is relevant to the elements of the offense, and whether those elements have been established. But the jury may have to wait for the instructions to learn what are the elements of the offense. A forceful argument that there was no evidence of an intent to defraud may be regarded as quite irrelevant by a jury that is uninformed that a specific intent must be proved and to inform them of that fact when the argument is cold and largely forgotten cannot recapture its effectiveness. There is no sense in limiting argument to discussion of the evidence relevant to the rights and duties of the parties while the jury is kept in ignorance as to what those rights and duties are. The jury should be

informed as to the essential factual issues under applicable principles of law and appropriate instructions should be given before the arguments. I am convinced, however, that there was no error in the trial that was prejudicial.

VALLÉE, Justice.

[18] I concur in the judgment and in the opinion except in the particular noted by Mr. Presiding Justice SHINN. I agree with his comment.

Hearing denied; CARTER, J., dissenting.



141 Cal.App.2d 795

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Johnny COSTA, Defendant and Appellant.

Cr. 1204.

District Court of Appeal, Fourth District, California.

May 23, 1956.

Rehearing Denied June 4, 1956.

Hearing Denied June 20, 1956.

Prosecution for statutory rape upon 13 year old girl and for performing lewd and lascivious acts upon her body. In the Superior Court, Tulare County, W. G. Machetanz, J., defendant was found guilty and took or purported to take an appeal from judgment and order granting probation, order denying new trial and other orders. The District Court of Appeal, Griffin, J., held, inter alia, that a statement by prosecutor to jury that "I know the judge would never do anything other than what the jury recommends," was improper, and court's action in interrupting and stating "I don't understand that the court is precluded from granting probation despite the recommendation," did not constitute prejudicial error.

Judgment and order denying new trial affirmed; attempted appeal from remaining orders dismissed.

1. Infants ⇐20
Rape ⇐52(1)

In prosecution for statutory rape and for performing lewd and lascivious acts upon body of girl 13 years of age, evidence was sufficient to show commission of both offenses charged, though defendant was convicted only of the latter offense. West's Ann.Pen.Code, § 288.

2. Indictment and Information ⇐122(1)

Where information at preliminary hearing charged only statutory rape, it was not improper for District Attorney to add additional count charging performance of lewd and lascivious acts upon body of 13 year old girl if evidence at preliminary hearing was sufficient to justify such action. West's Ann.Pen.Code, §§ 288, 739, 999a.

3. Criminal Law ⇐1023(8)

No direct appeal lay from order denying motion to set aside information, and where no relief was sought by way of prohibition, such order could only be reviewed on an appeal from the judgment, and attempted appeal from such order would have to be dismissed. West's Ann.Pen.Code, § 999a.

4. Criminal Law ⇐1023(8)

No direct appeal lay from order denying defendant's oral motion in arrest of judgment and attempted appeal from such order would have to be dismissed.

5. Criminal Law ⇐730(1), 792(2)

In prosecution for statutory rape upon 13 year old girl, and for performing lewd and lascivious acts on her body, trial court was justified by evidence in ruling that boys involved, other than accused, could not be held to be principals, and properly refused requested instruction to effect that other boys were equally guilty of the offenses by reason of aiding and abetting the accused, and, in view of defendant's argument to jury, trial court was authorized to inform counsel for defendant, as well as jury, of such ruling. West's Ann.Pen.Code, § 288.

6. Indictment and Information ⇐191(8)

Contributing to delinquency of a minor was an offense included in charge of statutory rape.

7. Criminal Law ⇐717

In prosecution for statutory rape on girl 13 years of age, and for performing lewd and lascivious acts upon her body, question of punishment as to second count, or possibility of probation on either count should not have been mentioned to jury either by counsel for defendant or prosecution, and should not have been considered by jury in determining whether defendant was innocent or guilty. West's Ann.Pen.Code, §§ 288, 1237, subd. 1.

8. Criminal Law ⇐713, 1166½(12)

In prosecution for statutory rape upon 13 year old girl, and for performing lewd and lascivious acts upon her body, statement by prosecutor to jury that "I know the judge would never do anything other than what the jury recommends," was improper, and court's action in interrupting and stating "I don't understand that the court is precluded from granting probation despite the recommendation," did not constitute prejudicial error. West's Ann.Pen. Code, §§ 288, 1237, subd. 1.

9. Criminal Law ⇐730(16)

In prosecution for statutory rape upon 13 year old girl, and for performing certain lewd and lascivious acts upon her body, prosecuting attorney's argument in reply to argument of defendant's counsel to effect that second count did not give jury privilege of recommending and was a state penitentiary offense was not prejudicial in view of trial court's correctly informing jury in final analysis as to jury's duty in this respect. West's Ann.Pen.Code, § 288.

On Petition for Rehearing.

10. Indictment and Information ⇐122(2)

Evidence at preliminary hearing on statutory rape charge justified action of district attorney in adding additional count charging performance of lewd and lascivious acts upon body of 13 year old girl. West's Ann.Pen.Code, §§ 288, 739.

J. M. Lopes, Visalia, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Victor Griffith, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant and appellant, aged 18 years, was charged by information, in count one, with the crime of committing statutory rape on a girl 13 years of age. In the second count he was charged with violating section 288 of the Penal Code by performing certain lewd and lascivious acts upon her body. A jury trial resulted in a verdict of not guilty on the first count and guilty on the second count. Conditional probation was granted for three years providing defendant served five months in the county jail. He appeals from the orders denying a new trial, an oral motion in arrest of judgment, motion to set aside count 2 of the information and judgment or order granting probation under section 1237, subdivision 1 of the Penal Code.

On July 18, 1955, the minor child, Susan, resided in Visalia with her parents who, that evening, were at a show. About 9:30 p. m. she, accompanied by a 13 year old girl from Whittier named Judy, met by prearrangement, defendant and five other boys, all under 19 years of age, and went with them in a pick-up truck to a somewhat secluded place near Visalia. Their truck, driven by one of the boys, stopped. Defendant was seated in the front seat with him. The girls were in the back portion of the truck. Susan and a boy named Glenn walked down the road and in 15 minutes returned. Apparently they had been arguing as to whether Susan was a virgin, and this fact was discussed in the presence of all. Defendant stated he "didn't take that from any woman or any girl", and that he was going to "make her". There is a conflict in their stories as to whether force was used by defendant in the acts that followed. They repaired to a secluded place near the river bank and the girl continued to remark of her virginity. Apparently defendant made overtures toward her in an endeavor to have an act of sexual intercourse with her and he stated that she would only allow him to place his finger in her vagina, which he did do. Thereafter, he lifted her over a fence and carried her to another spot, took off one shoe so one leg of her pedal pushers could be removed. He then placed himself on top of her. The girl testified

there was a partial penetration of her private parts by his. Defendant contended at the trial that there was no penetration but he was satisfied by placing his private parts next to hers. Thereafter the group left and returned to the girl's home. She discovered that her parents had returned home so she went to the home of a neighbor in whom she had confidence and told her of the affair. The neighbor noticed the dirty condition of her clothing, hair and her general physical condition and mental disturbance, took her to the hospital and called the sheriff. A doctor examined her and found fresh spermatic fluid in the pubic hair and in the vagina and found a short fresh bleeding hymenal laceration between one-eighth and one-fourth inch in length.

[1] The sheriff's officers apprehended defendant at his home. Later he told about the occasion, signed a statement to this effect, admitted partial penetration and that he inserted his finger in Susan's vagina. The evidence is sufficient to show the commission of both offenses charged. People v. Greer, 30 Cal.2d 589, 184 P.2d 512.

[2–4] It appears that defendant was originally charged in a complaint before the committing magistrate with the crime of statutory rape and was held to answer on that charge. Subsequently, the district attorney added the additional count to the information based upon the evidence at the preliminary hearing. Defendant now claims that the trial court erred in denying his motion to set aside that count of the information on the ground that there was no sufficient evidence before the committing magistrate of such added offense. There is no reporter's transcript of the preliminary hearing before us. No relief was sought under section 999a of the Penal Code. From the record before us the proceedings appear to be proper. Sec. 739, Penal Code; People v. Martin, 128 Cal.App. 2d 361, 275 P.2d 635. Since there is no direct appeal from the order denying the motion to set aside the information, it can only be reviewed on an appeal from the judgment. Accordingly, the attempted appeal from such order must be dismissed. People v. Egan, 73 Cal.App.2d 894, 167 P.2d 766. The attempted appeal from the order denying defendant's oral motion in arrest of judgment on the same ground must likewise be dismissed. People v. McGee, 31 Cal.2d 229, 187 P.2d 706.

[5] The next claim is that the prosecuting attorney and the trial court were guilty of prejudicial misconduct during the argument of the case and in instructing the jury. It appears that several of the boys on the trip testified at the trial. Counsel for defendant on cross-examination of the boys first brought out the fact that they had each been charged with and plead guilty to contributing to the delinquency of a minor child but had not been sentenced at the time of this trial. In his argument to the jury he bore upon the fact that the prosecution showed partiality in charging this defendant with the crimes indicated and not also charging him with that lesser offense. He argued that under the law those other boys were equally guilty of these offenses because they did, as a matter of law and fact, aid and abet defendant in the commission of them. An instruction to this effect was offered by defendant and refused. The court interrupted his argument and told the jury that as a matter of law, under the evidence, those boys could not be held to be principals. The trial court, from the evidence produced, was justified in so holding, in refusing the proffered instruction and was authorized to inform counsel for defendant, as well as the jury, of such ruling so as to preclude further argument to that effect.

A more serious question arises as to the next claim. In the prosecutor's opening argument to the jury he properly informed it that if it found defendant guilty on the first count it was its duty to recommend whether defendant be punished by confinement in the state prison or a county jail. He then improperly said: "I know the judge would never do anything other than what the jury recommends * * *". At that point the court interrupted the prosecutor and said: "I don't understand that the court is precluded from granting probation despite the recommendation * * *". Defendant's counsel assigned the remark of the court as prejudicial error. The prose-

cutor refrained from further comment in this respect and endeavored to explain the possible verdicts that could be rendered under the charge, including the included charge of contributing to the delinquency of a minor child, and said: "If you find him guilty of lewd and lascivious conduct you don't make any recommendation * * * that is something which is only in the province of the judge and you are not to concern yourself with punishment."

[6] In the argument of counsel for defendant he suggested, at most, a verdict of guilty of contributing to the delinquency of a minor, an included offense. See People v. Greer, supra. He then remarked that the prosecution elected to file charges of statutory rape, a felony, with the right of the jury to determine whether or not "you shall send him to the penitentiary or recommend local incarceration"; that as to the second count "it does not give you the privilege of recommending. It is a state penitentiary offense. That is what it amounts to". In reply the prosecutor stated that it would have been unfair to have charged these other boys with the crimes here charged, and it was unfair, from the evidence, for counsel for defendant to suggest that they be treated alike. He then said that counsel for defendant well knew that the question of punishment on the second count was "up to the judge"; that neither he nor defendant's counsel had a right to tell the jury about the punishment on that count; that since defendant's counsel brought up the question of punishment on that count it was only fair to say that the judge could exercise his discretion and "put defendant on probation, if he wants to." No assignment of error was made to the argument of the prosecutor.

After the jury retired, it returned for further instruction and one juror stated that some of the jurors were confused as to punishment on the second count, i. e., whether it was a jail sentence, state prison sentence or probation. The judge then admonished the jurors that he was not permitted to advise of the punishment; that the matter of probation rested with the court alone and that in fulfilling their duty they should not consider the matter of punishment on that count. Thereafter the jury returned a verdict as above mentioned.

[7–9] While the question of punishment as to the second count, or the possibility of probation on either count should not have been mentioned to the jury either by counsel for defendant or the prosecution, and should not have been considered by the jury in determining whether the defendant was innocent or guilty, we conclude that the trial judge did not commit prejudicial error in the remarks made. It was a conscientious effort to clarify the statement made and insinuations left by respective counsel. No prejudicial error resulted from the prosecution attorney's argument in reply to the argument of defendant's counsel, since the trial court correctly informed the jury in the final analysis as to the jury's duty in this respect. People v. Sykes, 44 Cal.2d 166, 280 P.2d 769.

Judgment and order denying a new trial affirmed. Attempted appeal from remaining orders dismissed.

BARNARD, P. J., and MUSSELL, J., concur.

On Petition for Rehearing.

PER CURIAM.

[10] On a petition for rehearing it has been pointed out that the transcript of the proceedings at the preliminary examination was included among the pages of the voluminous reporter's transcript at the trial. We have carefully examined it and conclude that there was sufficient evidence authorizing the district attorney to add the second and additional count to the information and that the trial court was justified in denying the motion to dismiss that count. As thus modified, the petition for rehearing is denied.

142 Cal.App.2d 99

Donnie L. CARMEAN, by his Guardian ad litem, Jewel Pambogo; and Jewel Pambogo, Plaintiffs and Respondents,

v.

Claude William BRIDGES et al., Defendants, Claude William Bridges, Appellant.

Donald V. MEEKS, by his Guardian ad litem, Lois Meeks; and Lois Meeks, Plaintiffs and Respondents,

v.

Claude William BRIDGES et al., Defendants, Claude William Bridges, Appellant.

Civ. 8877.

District Court of Appeal, Third District, California.

June 6, 1956.

Actions against host driver for injuries sustained by guests when the automobile in which they were riding on a straight portion of a two-lane highway skidded left and collided head on with an automobile proceeding in the opposite direction when host lost control of his automobile in an attempt to stop or slow down for an approaching automobile which had turned into his lane in an attempt to pass another approaching automobile. The Superior Court, Madera County, Stanley Murray, J., entered judgments for guests and host appealed. The District Court of Appeal, Van Dyke, P. J., held, inter alia, that evidence sustained finding of trial court that host driver was guilty of willful misconduct in driving at speeds up to 80 miles per hour on a two-lane highway past oncoming traffic.

Judgment affirmed.

1. Appeal and Error ⇐931(1)

On appeal by host driver from an adverse judgment, District Court of Appeal had to consider the testimony in the record most strongly against host driver.

2. Automobiles ⇐181(1)

"Wilful misconduct" as the term is used in automobile guest law is doing something that ought not to be done or in failing to do something that ought to be done under circumstances which show either knowledge that serious injury to a guest probably will result or which show a wanton and reckless disregard of the possible results.

See publication Words and Phrases, for other judicial constructions and definitions of "Wilful Misconduct".

3. Automobiles ⇐245(24)

Question of whether or not a host driver has been guilty of wilful misconduct is primarily a question of fact for the trial court's determination.

4. Automobiles ⇐244(20)

In actions against host driver for injuries sustained by guests when the automobile in which they were riding on a straight portion of a two-lane highway skidded to its left and collided head on with an automobile proceeding in the opposite direction when host lost control of his automobile in an attempt to stop or slow down for an approaching automobile which had turned into his lane in an attempt to pass another approaching automobile, evidence sustained finding of trial court that host driver was guilty of wilful misconduct in driving at speeds up to 80 miles per hour on a two-lane highway past oncoming traffic.

5. Damages ⇐130(1)

Award of $20,000 to minor serving in the United States Navy who suffered a dislocation of his right clavicle, fracture of his lower jaw, fractures of three transverse processes of his vertebrae, and a fractured rib, a cerebral concussion and whose back and right arm continued to give him trouble two years after the accident and who had recurring headaches and suffered a personality change, was not excessive.

6. Damages ⇐130(3)

Award of $15,000 to a minor serving in the United States Navy who suffered a cerebral concussion, fracture of three ribs, fracture of the scapula, a puncture in his lungs and extensive laceration of the right ear which was deformed, and whose shoulder continued to bother him in cold weather, was not excessive.

Landram & Silveira, William L. Garrett, Merced, for appellant.

Chandler & Hammerberg, Madera, for respondents.

VAN DYKE, Presiding Justice.

These actions were brought by respondents against appellant Bridges based on alleged wilful misconduct whereby respondents, who were guests in appellant's automobile, were injured. The two cases were consolidated and tried to the court sitting without a jury. The court rendered judgments in favor of the plaintiffs and Bridges appeals.

The two respondents were minors who were serving in the United States Navy. They had been hitch-hiking. Near Gilroy they were picked up by appellant who was eastbound and traveling alone along Highway 152 which crosses over the Pacheco Pass and into the San Joaquin Valley. The accident occurred on a straight two-lane stretch of highway shortly after appellant had emerged from the pass and had reached the floor of the valley. The traffic was described by respondent Carmean as being "fairly heavy". He said there "was a line of cars" going west. It was daylight and the weather was dry and clear.

[1] The testimony of appellant as to his driving, if accepted, would clearly absolve him of the charge of wilful misconduct. Under the well-known rule, however, we must, on appeal, take the testimony in the record most strongly against him. That evidence may be stated as follows: After emerging from the pass and coming to the straight road appellant stepped up his speed so that he was proceeding at between 70 and 80 miles per hour and at fluctuating speed within those limits. Ahead of him and going in the opposite direction was this line of cars. It was late afternoon and these cars were proceeding toward the pass. When the speed reached 70 to 80 miles per hour, Carmean commented to the driver that he had seen an accident about two weeks prior to that, that the road was dangerous, "the curves were dangerous at that speed." He said that he did not protest because it appeared to him the appellant was sober, was watching the road, "was driving in a manner where I would trust his driving and seemed to be intelligent enough to be able to take care of himself." While appellant was driving at the indicated speed and passing the line of cars, a car at a distance ahead which Carmean estimated at about one-half mile pulled out into appellant's lane with the apparent purpose of passing a car or cars ahead. Within the space of a "city block" appellant applied his brakes, whereupon his automobile skidded diagonally across the highway a distance of 150 feet and struck an oncoming car. The driver of the passing car pulled entirely off the road to his left and entered a field. Respondents received severe injuries. The court awarded Meeks $20,000 and Carmean $15,000.

Upon these appeals appellant contends that there is insufficient evidence in the record to sustain the finding of wilful misconduct and further asserts that the damages awarded were excessive.

[2] The commonly-accepted definition of "wilful misconduct" as the term is used in the guest law is that it consists in doing something that ought not to be done or in failing to do something that ought to be done under circumstances which show either knowledge that serious injury to a guest probably will result or which show a wanton and reckless disregard of the possible results. (See Volume 2, B.A.J.I., Civil, 692, and cited cases.) We quote the following from Reese v. Day, 131 Cal.App. 2d 730, 734, 281 P.2d 263, 266:

> "Undoubtedly there is sufficient evidence of circumstances to support an inference that the deceased driver was grossly negligent. But is there sufficient evidence of wilful misconduct in view of the tests laid down by the cases? There is of course no evidence and no possibility of securing any evidence to show that he had an actual intent to injure * * *. Appellant must then show that there are circumstances from which it can be inferred that deceased acted in a wanton and reckless disregard of the safety of his guest. In Wright v. Sellers, 25 Cal. App.2d 603, 613, 78 P.2d 209, 215, it is said that it is 'sufficient if the act, or the failure to act, be done or omitted

under such circumstances as would justify the reasonable inference that the driver should have known that injury to his guest was a probable result.'

"In Meek v. Fowler, 3 Cal.2d 420, 45 P.2d 194, 197, the court stated that '"Willful misconduct implies at least the intentional doing of something either with a knowledge that serious injury is a *probable* (as distinguished from a possible) result, or the intentional doing of an act with a wanton and reckless disregard of its *possible* result."' A recent case, Mercer-Fraser Co. v. Industrial Acc. Comm., 40 Cal.2d 102, 251 P.2d 955, 962, cites Meek v. Fowler, with approval, and quotes from Porter v. Hofman, 12 Cal. 2d 445, 85 P.2d 447, the definition of 'wilfulness' as necessarily involving "'the performance of a deliberate or intentional act or omission regardless of the consequences.'"

[3] Within the limits of the definition it is well settled that the question of whether or not a host has been guilty of wilful misconduct is primarily a question of fact for the trial court's determination. Woodson v. Everson, 61 Cal.App.2d 204, 212, 213, 142 P.2d 338; Hallman v. Richards, 123 Cal.App.2d 274, 281, 266 P.2d 812.

[4] While the situation portrayed by the testimony in this case, taken most strongly against appellant, poses a question not easy to answer, we have concluded that the findings of the trial court are sufficiently supported. Driving conditions on congested highways present well-known dangers and this is especially true where the highway contains but two lanes, so that any attempt by the driver of a car to pass a car ahead involves occupancy of the lane for opposing traffic for a considerable time during which both the driver of the passing car and the drivers of oncoming cars may easily and quickly come into a situation of great peril. Notwithstanding this, it is to be expected that anxious and perhaps insufficiently cautious drivers will decide to pass. A man driving past a line of approaching cars at a speed of 80 miles an hour can be held to be acting in disregard of a known danger. At that speed he covers about 120 feet of distance per second. If approaching traffic is moving at about prima facie maximum speed the passing car will approach him at about 80 feet per second so that the distance between the two will diminish at the rate of about 200 feet per second. If a driver ahead pulls out of his traffic lane to pass, his observation of approaching traffic can be nothing better than an estimate of the speed at which cars are approaching. He is not apt to anticipate such high speed under those conditions. What happened in this case is a good illustration of the great danger of driving past oncoming traffic which is lined up ahead at such a speed as 80 miles an hour. Respondent Carmean estimated that when the car ahead pulled out to pass it was half a mile away. This, of course, would have to be a fairly vague estimate since the car was coming directly toward him. In any event, we have a picture of the passing car being turned off the road and into a field in an apparent endeavor to avoid an otherwise inescapable collision, and we have also a picture of an attempt by appellant to stop his car which, due to the high speed, proved impossible and resulted in his loss of control. We think the trial court could justifiably conclude that the appellant had been guilty of wilful misconduct.

During the course of the trial the trial judge made a statement indicating that at that time he was viewing the question of liability from the standpoint of negligent conduct rather than that of wilful misconduct. However, we feel certain from the record that the decision of the court was not based upon such an erroneous concept. Trial briefs were filed setting forth definitions of "wilful misconduct" and we have no doubt that the court's conclusions were made after considering that the evidence measured up to the definition of wilful misconduct.

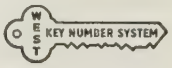
[5, 6] Appellant contends that the damages awarded by the trial court were excessive. The contention cannot be sustained. The physician at the hospital to which the respondents were first taken from the scene of the accident testified as

follows: Donald Meeks had suffered a dislocation of the right clavicle, a fracture of the lower jaw, fractures of the right third, fourth and fifth transverse processes of the vertebrae, and a fracture of the first rib on the left side. He also suffered a cerebral concussion. He was semi-conscious when brought to the hospital and regained consciousness about the date of his discharge three days later when he was taken to Castle Field Hospital. Respondent Carmean had suffered a cerebral concussion, fractures of the third, fourth and ninth ribs on the left, a fracture of the scapula on the left side, a puncture in his lungs from one of the fractured ribs and extensive laceration of the right ear. He, too, had been transferred to Castle Field Hospital. Meeks testified that he could remember nothing of the accident. He stated he had received concussion of the brain, a slight fracture at the base of the skull near the right ear, a broken jaw, a broken clavicle, a broken rib and a breaking of spinal processes. He said his clavicle was deformed after recovery and that two years after the accident he suffered from headaches which occurred every two or three days; that they were severe headaches. He said his right arm goes out of place occasionally if he jerks it and his back continues to give him a lot of trouble. He was in the field hospital nearly three months, as a bed patient until a short time before he went back to base where he was given light duty until he left the base and went to another hospital at Oak Knoll. His mother testified that he was in perfect health before the accident and was of a cheerful and alert disposition, enjoying athletic activity, that two years after the accident he still had "a temperature around six in the evening", that he had recurring headaches that last two or three days at a time; that he had suffered a personality change in that he no longer cared to read or to be active in any way and just wanted to lie and rest without talking to anyone.

Carmean testified that he spent 39 days in the field base hospital as a bedridden patient except for the last two weeks when he was ambulatory in the ward. He testified to the same injuries which the physician at the receiving hospital said he had received and additionally he said he had a bad cut on his knee and his forehead was skinned. He said he had returned to active duty; that he had no residual injury outside of the fact that in cold weather his shoulder bothered him and when he played games his left side gave him trouble. He had a deformed ear. The $20,000 award of general damages to Meeks and $15,000 award of general damages to Carmean are substantially supported by the evidence.

The judgments appealed from are affirmed.

PEEK and SCHOTTKY, JJ., concur.



141 Cal.App.2d 857

Wilfred RICHARD and Marie Richard, husband and wife, Plaintiffs and Appellants,

v.

Harrison R. BAKER, Richard D. Davis, and Gerald C. Fitzgerald, both individually and as members of La Canada Acres, a co-partnership, et al., Defendants,

Harrison R. Baker, Richard D. Davis and Gerald C. Fitzgerald, Respondents.

Civ. 21301.

District Court of Appeal, Second District, Division 1, California.

May 28, 1956.

Action by purchasers against vendors for fraud and misrepresentation as to boundaries of land sold. The Superior Court, Los Angeles County, Clarence M. Hanson, J., granted vendors' motion for nonsuit, and purchasers appealed. The District Court of Appeal, Fourt, J., held that, where dimensions of lot could not be determined from face of deed, which contained mere reference to map on file in county records, and purchasers allegedly purchased the property, not on basis of map in recorder's office but on representa-

tions of vendors' agents as to boundary markers on ground, parol evidence rule would not prevent showing that such boundaries differed from those described on map.

Order reversed.

1. Fraud ⇐31

Purchaser, who has been induced to purchase property by fraud or deceit may, upon discovery, either rescind the contract or allow it to stand and sue for damages.

2. Vendor and Purchaser ⇐33, 34

Single material misstatement knowingly made by vendor and relied upon by purchaser will warrant rescission with damages, and a misrepresentation as to boundaries is a material misrepresentation.

3. Evidence ⇐66

Vendors of realty were presumed to know area and boundaries of their land.

4. Fraud ⇐20

Prospective purchaser has right to rely upon representations of vendor concerning area and boundaries of the land, and, if purchaser suffers damage by reason of such representations, purchaser has good cause of action against vendor.

5. Fraud ⇐22(1)

Where purchasers had no good reason to doubt veracity of vendors or vendors' agent and did not independently check size of lot, purchasers were not required to check size but were entitled to rely upon representations made by vendor's agent as to location of boundary of the land sold.

6. Fraud ⇐13(1, 3)

Representation which is made with intent that recipient thereof shall act in reliance thereon is actionable when falsely made or made without sufficient information to warrant it.

7. Evidence ⇐434(8)

Parol evidence of fraudulent representations is admissible, as an exception to the parol evidence rule, to show that a contract was induced by fraud.

8. Contracts ⇐113(1)

Public policy forbids enforcement of an agreement relieving from the legal consequences of fraud.

9. Evidence ⇐434(11)

Where dimensions of lot could not be determined from face of deed, which contained mere reference to map on file in county records, and purchasers allegedly purchased the property not on basis of map in recorder's office but on representations of vendors' agents as to boundary markers on ground, parol evidence rule would not prevent showing that such boundaries differed from those described on map.

10. Evidence ⇐434(1)

Parol evidence rule was not intended to insure success of a fraud but was intended to prevent a fraud.

Wallace & Wallace, San Diego, for appellants.

J. Clifford Argue and Wilbur E. Quint, Los Angeles, for respondents.

FOURT, Justice.

From a judgment of nonsuit in an action for damages for fraud and misrepresentation, plaintiffs appeal.

In their complaint plaintiffs allege that on or about the 10th day of January, 1949, defendants, doing business as a copartnership under the name of La Canada Acres, were engaged as owners in selling a certain tract of land in the County of Los Angeles known as tract number 15282; said defendants had theretofore subdivided said tract into lots, among which was a lot designated as number 9; on said date, defendants exhibited lot 9 to plaintiffs, as prospective purchasers thereof, and at said time and place pointed out and indicated to plaintiffs the boundary lines of said lot; defendants represented and designated to plaintiffs that the easterly boundary line of said lot, which was the boundary between lot 8 and lot 9 of said tract 15282, was indicated at the front thereof by a marker in the circular curb of the street, and at the

rear thereof by a stake driven into the ground and a pole bearing electric wires; plaintiffs had no information concerning the boundary between lot 8 and lot 9, and relied solely upon the statement of defendants as to the location of said boundary; lot 9 and both lots adjoining thereto were vacant and unimproved at that time; thereafter, relying upon the representations of defendants as to the true and correct boundary between lot 8 and lot 9, plaintiffs purchased lot 9 from defendants; plaintiffs intended to purchase and defendants intended to sell to plaintiffs the area as pointed out, and all of the parties understood and intended that the easterly boundary of lot 9 should be as marked by the pole and stake and curb marker; thereafter plaintiffs constructed a residence on lot 9, entered into possession thereof and planted a lawn and shrubbery, installed a sprinkling system, erected a wall, and built a fence along the easterly boundary of said lot; in the month of July, 1953, plaintiffs discovered that the representations of defendants as to the boundary of lot 9 were false and untrue; that the true location of the boundary line of lot 9, between it and the immediately adjoining lot 8, was not as represented by the defendants but was in fact located three feet to the west of the indicated line in the front of lot 9, and 32 feet to the west in the rear of the lot line, and the stakes and markers indicated by defendants did not correctly locate the boundary line of lot 9; that plaintiffs have been compelled to remove certain of their improvements to their damage in the sum of $850; that because of the misrepresentations of defendants as to the area of the lot and the location of plaintiffs' residence thereon in accordance with such representations, the reasonable market value of plaintiffs' property has decreased to their damage in the sum of $5,000.

At the trial, plaintiff Wilfred Richard testified that early in 1949, he purchased lot 9 of tract 15282, as per map recorded in book 323, page 2, records of Los Angeles County from the defendants. The deed was received in evidence. Mr. Richard further testified that prior to such purchase he and his wife, Marie Richard, were looking around the area and contacted the agent, Hauck, who pointed out the boundaries of lot 9 to them. Counsel for defendants objected to any further testimony with reference to the boundaries on the grounds that the parol evidence rule would not allow the introduction of any evidence to contradict the terms of the written document.

Plaintiffs then made an offer of proof, the essence of which was that they were taken onto the property in question, when it was vacant land, by Mr. Hauck, the agent of defendants; that Mr. Hauck pointed out the boundary lines of lot 9, indicating that the northeasterly boundary line of lot 9 was near a telegraph pole and stated at that time, "there is your northeasterly boundary line"; that plaintiffs and defendants entered into an escrow and plaintiffs paid for the lot; that defendants gave plaintiffs a deed describing lot 9; that plaintiffs entered into possession, presented plans and specifications to the defendants of the house to be constructed upon the property, showing its location upon the lot; that the house was built and while being built the agent was upon the property; that the plaintiffs improved the property, which was described and pointed out to them by the agent as being the property which they were purchasing, by landscaping, building retaining walls, planting shrubs and installing a sprinkling system and erecting a fence along the line from the telegraph pole to the street; that the plaintiffs built the house in conformity with the boundary lines pointed out to them by the agent; that in 1953, when lot 8 was sold it was discovered that the area between the boundary line pointed out to the plaintiffs and the true boundary line between lots 8 and 9 was occupied by shrubbery placed there by plaintiffs; that it was then discovered that the true line of lot 9, that is the northwesterly corner thereof, was about 32 feet to the west of where it had been pointed out as being; that plaintiffs' house was located within three feet of the true property line, rather than about ten feet from the property line as plaintiffs had supposed; that had the true line been pointed out in the first instance, plaintiffs would have had

ample space within which to construct their house to the west, and could have been well within the tract restrictions; that plaintiffs would offer the escrow instructions dated January 7, 1949, in evidence to show the purchase price and the restrictions referred to; that Mr. Hauck, the person who pointed out the boundaries, was the agent of the defendants; that the area in question consisted of about 1,300 square feet in a triangular shape; that the market value of the property is less with the house constructed where it is than it would have been had it been constructed in conformity with the true boundary line; that the plaintiffs relied upon the representations made to them as to the true location of the boundary line; that the defendants pointed out to the purchasers of lot 8 that the northwest corner of lot 8 was the pole, the same being the common corner of lots 8 and 9. The escrow instructions, a letter enclosing a copy of an agreement of sale and a sales agreement were offered in evidence under the offer of proof.

An objection was made to all of such offered testimony and the court sustained the same upon the grounds that it would tend to change the terms of a written instrument. Plaintiffs thereupon rested their case and defendants moved for a nonsuit, which motion was granted.

[1, 2] A vendee who has been induced to purchase property by fraud or deceit may, upon discovery, either rescind the contract or allow it to stand and sue for damages. Morey v. Bovee, 218 Cal. 780, 783, 25 P.2d 2; Rothstein v. Janss Investment Corp., 45 Cal.App.2d 64, 69, 113 P.2d 465. A single material misstatement knowingly made by a vendor and relied upon by his vendee will warrant a rescission with damages, and a misrepresentation as to boundaries is a material misrepresentation. Younis v. Hart, 59 Cal.App.2d 99, 103, 138 P.2d 323.

[3, 4] The respondents were the owners and sellers of the property in question, and as such they are presumed to know the area and boundaries of their own land. A prospective purchaser has a right to rely upon the representations of the seller concerning such existing facts and if the vendee suffers damage by reason of such representations, he has a good cause of action against the seller. Dohrman v. J. B. Roof, Incorporated, 108 Cal.App. 456, 291 P. 879; Hargrove v. Henderson, 108 Cal.App. 667, 292 P. 148.

In Younis v. Hart, supra, 59 Cal.App.2d at page 104, 138 P.2d at page 326, the court said: "In the purchase of land the buyer has the absolute right to rely upon the express statement of the seller concerning an existing fact the truth of which is known to the vendor and unknown to the vendee."

Also, in Nathanson v. Murphy, 132 Cal. App.2d 363, at page 369, 282 P.2d 174, at page 179, the court said: "'As a general rule the owner of real estate, in the absence of facts showing the contrary, is presumed to know the boundaries and area of his land, and a buyer is warranted in relying upon his representations in respect to such facts.' Eichelberger v. Mills Land, etc., Co., 9 Cal.App. 628, 634, 100 P. 117, 120."

[5] In the instant case, plaintiffs offered to prove that the agent of the defendants pointed out the location of the boundaries of the land sold. They had no good reason to doubt the veracity of the defendants or their agent; they did not independently check the size of the lot, nor were they required to do so. They were entitled to rely upon the representations made. Bramaric v. Churich, 101 Cal.App.2d 846, 848, 226 P.2d 657.

In the case of Dohrman v. J. B. Roof, Incorporated, 108 Cal.App. 456, at page 464, 291 P. 879, at page 882, the court stated:

"Appellant further contends that respondent had access to the proper means of obtaining information with respect to the property which she was about to buy; that opportunity was afforded her to investigate the property, and to verify the representations made to her; and that therefore, if she neglected to make such investigation, and made a bad bargain, she cannot complain. Such is not the law. The owner of real estate is presumed to know the area and boundaries of his own land, and a prospective purchaser has a right to rely upon the representations of

the seller with reference thereto. It is true that if a purchaser undertakes to make an investigation for himself, after a representation of a fact has been made to him, and has recourse to the proper means of obtaining information, and actually learns the real facts, he cannot claim to have relied upon the misrepresentation and to have been misled by it. In the instant case, there was no sufficient evidence of any attempt on the part of the purchaser to make an independent inquiry or investigation of her own as to the area or dimensions of the lot she was buying. She relied, as she had a right to do, upon the representations of appellant's agent as to these particulars."

In Mills v. Hellinger, 100 Cal.App.2d 482, 224 P.2d 34, certain real property which was advertised as comprising nine acres was auctioned. It in fact contained only 6.6 acres, and upon becoming aware that the representations were false, plaintiff rescinded and filed suit for his deposit on the purchase price. The court said, in deciding the case, that it is established that the owner of land is presumed to know the area and boundaries of his own land, and that the law is also established that the vendee has the right to rely on a vendor's representation as to the quantity of land he is offering for sale and is not under a duty to make an independent investigation. As to the question of whether the plaintiff was presumed to know the extent of the land because it was a matter of public record the court said, 100 Cal.App.2d at page 487, 224 P.2d at page 37: "The purpose of the recording acts is not to afford protection to those who make fraudulent representations but to bona fide purchasers for value. Therefore the party to whom fraudulent representations are made is not bound to make an investigation which would reveal the facts."

[6] Defendants' agent either knew the true location of the boundaries and knew, therefore, that he was telling an untruth, or he should have known the true boundaries, and a representation made with intent that the recipient thereof shall act in reliance thereon is actionable when falsely made or made without sufficient information to warrant it. Gagne v. Bertran, 43 Cal.2d 481, 275 P.2d 15.

[7] It is also settled that parol evidence of fraudulent representations is admissible as an exception to the parol evidence rule to show that a contract was induced by fraud. Mooney v. Cyriacks, 185 Cal. 70, 81, 195 P. 922; Morey v. Bovee, supra, 218 Cal. 780, 783, 25 P.2d 2; Rothstein v. Janss Investment Corp., supra, 45 Cal.App.2d 64, 67, 113 P.2d 465.

In Ferguson v. Koch, 204 Cal. 342, 268 P. 342, 58 A.L.R. 1176, with respect to the question of whether parol evidence is proper to prove false representations where there is a written contract of sale, the court said that where the parties have reduced to writing a complete and certain agreement, it will be conclusively presumed to contain the whole agreement of the parties in the absence of fraud, and parol evidence of prior contemporaneous or subsequent conversations or representations will not be received for the purpose of adding to or varying the written instrument. In such a case, what the seller may have said is not admissible to show that the contract was different from that expressed in the writing, and the parties will be held to their agreement and to no other. The court then stated, 204 Cal. at page 347, 268 P. at page 345, "It is equally well settled, however, that a writing may be impeached for fraud, and a parol warranty really made may then be relied upon rather than the written one thus shown to be fraudulently imperfect or defective. * * * Parol evidence is always admissible to prove fraud, and it was never intended that the parol evidence rule should be used as a shield to prevent the proof of fraud. * * * There is no such sanctity surrounding a writing that parties may not be permitted to go back of it and show that there was such fraud practiced in the procurement of the same as to vitiate the writing. The law never countenanced a rule which would deny to one the right to prove that fraud had been practiced upon him. [Citing cases.] In actions for rescission on the ground of fraud, the statutory provisions that, when the terms of an agreement have been reduced to writing,

such writing is to be considered as containing all the terms (Code Civ.Proc. § 1856), and that the execution of a contract supersedes all prior negotiations or stipulations (Civ.Code § 1625), have no application, and do not control".

[8] It would seem to be axiomatic that public policy forbids the enforcement of an agreement relieving from the legal consequences of fraud. Indeed without such an exception the victim of the most aggravated fraud would be entirely helpless.

In the instant case it could not be determined from the face of the deed itself what the dimensions of lot 9 were. The deed contained a mere reference to a map on file in the records of the county of Los Angeles. It is true that where a deed refers to a map, the map is regarded as incorporated in the deed as a part thereof. However, to get the dimensions of the lot or locate it the parties would have to go elsewhere than the deed itself. Plaintiffs contend that they did not purchase lot 9 as the same is delineated on a map in the recorder's office, but rather and to the contrary they purchased the property which was pointed out to them on the ground by the agent of the defendants; that in purchasing the property they relied on the representations of defendants' agents as to the boundaries, which boundaries differ from those described on the map.

[9, 10] To hold, under such circumstances, that the parol evidence rule should prevent a showing of the facts would open the door to the worst sort of fraud in the sale of real property. Were such the rule, the seller could defraud the buyer by showing him some very desirable property and pointing out the specific corners and boundaries of the property supposedly to be sold, and then, by the simple expedient of later describing a parcel by lot and tract number with reference to a recorded map, which lot would be less in dimensions and size than the property shown, omit therefrom entirely the desirable portions of the property shown and pointed out. The parol evidence rule was never intended to insure the success of a fraud—rather, it was to prevent a fraud.

In the case of Stock v. Meek, 35 Cal.2d 809, 221 P.2d 15, plaintiff brought the action to rescind the purchase from defendants of space in a cooperatively-owned apartment house and to recover the amount she had paid defendants therefor. Plaintiff had signed documents for the purchase of the space. At the trial for the rescission because of misrepresentation, the court excluded the plaintiff's testimony concerning conversations before she made the purchase of the space. Defendants contended that such evidence would tend to vary the terms of the written contract. The court said, among other things, the following, 35 Cal. 2d at page 816, 221 P.2d at page 19:

"Extrinsic evidence to show mistake or fraud is admissible. Section 238 of the Restatement of Contracts states the general rule: 'agreements prior to or contemporaneous with an integration are admissible in evidence: (b) to prove facts rendering the agreement void or voidable for illegality, fraud, duress, mistake or insufficiency of consideration.' This court has approved the admission of extrinsic evidence to show a mistake of law by the grantor of a quitclaim deed, taken advantage of by the grantee. Jersey Farm Co., v. Atlanta Realty Co., 164 Cal. 412, 129 P. 593. 'It is, of course, true that, where an instrument is sought to be avoided for fraud or for mistake in law or in fact, evidence is admissible as to what the grantor intended to do or to convey.' [Citing cases.] Since the testimony by plaintiff should not have been excluded either as a variance or under the parol evidence rule, the trial court erred in its ruling. This error precluded plaintiff from presenting her case for recovery and requires reversal of the judgment for defendants in plaintiff's action for rescission."

The order is reversed.

WHITE, P. J., and DORAN, J., concur.

141 Cal.App.2d 866

Wilfred RICHARD and Marie Richard, husband and wife, Plaintiffs, Cross-Defendants and Appellants,

v.

Loyd MEAD and Maren Mead, husband and wife, Harrison R. Baker, Richard D. Davis, Gerald C. Fitzgerald, both individually and as members of La Canada Acres, a Copartnership, et al., Defendants,

Loyd Mead and Maren Mead, husband and wife, Cross-Complainants and Respondents.

Civ. 21302.

District Court of Appeal, Second District, Division 1, California.

May 28, 1956.

Action by purchasers against vendors and adjoining landowners to determine boundary dispute. Adjoining landowners cross-complained against purchasers for declaratory relief, trespass, ejectment, quieting of title, and damages. The Superior Court, Los Angeles County, Clarence M. Hanson, J., entered judgment for adjoining landowners against purchasers, and purchasers appealed. The District Court of Appeal, Fourt, J., held that evidence was sufficient to sustain award of $431.73 damages.

Judgment affirmed.

1. Adjoining Landowners ⇐9(1)

Where survey of boundary between land of purchasers and of adjoining landowners showed that purchasers' claim to disputed area was unfounded and without merit, any occupancy by purchasers under such conditions was wrongful.

2. Action ⇐28
Use and Occupation ⇐1, 6

Action will lie for recovery of reasonable value of use and occupation of realty irrespective of question whether use thereof by occupant was tortious or wrongful, and in such case, the tort, if any, may be waived, and an action based upon implied assumpsit is maintainable to recover the value of use of the realty for time of such occupation if no special damages are sought.

3. Use and Occupation ⇐8

Landowner, who institutes action upon implied assumpsit for value of use of realty for time of wrongful occupation by defendant, need only allege his ownership of the land, not defendant's occupation thereof, reasonable value of use of property for period of occupation, and failure to pay such sum.

4. Adjoining Landowners ⇐9(3)

Title to disputed area claimed by purchasers was in adjoining landowners from and after recordation of their deed, even though title to the disputed area was not established judicially prior to filing of stipulation in action between purchasers, adjoining landowners, and others, and therefore damages would not be limited to those arising after date of stipulation by which purchasers acknowledged the true boundary line and agreed to remove, within ten days, improvements made on adjoining landowners' land.

5. Adjoining Landowners ⇐9(3)

In action by purchasers against vendors and adjoining landowners to determine boundary dispute, wherein adjoining landowners cross-complained against purchasers for declaratory relief, trespass, ejectment, quieting title, and damages, evidence was sufficient to sustain award of $431.73 damages.

6. Appeal and Error ⇐971(2)
Evidence ⇐546

Qualification of person to testify as an expert witness was matter largely within trial court's discretion, and its determination would not be disturbed by the District Court of Appeal in absence of showing of clear abuse of such discretion.

Wallace & Wallace, San Diego, for appellants.

Wallace E. Wolfe, Percy V. Hammon, Los Angeles, for respondents.

FOURT, Justice.

This is an appeal from a judgment entered in favor of the defendants and cross-complainants Loyd and Maren Mead

against plaintiffs and cross-defendants in the sum of $431.73 and costs.

The action was instituted after a dispute arose with respect to the boundaries of two adjacent lots of tract 15282 in the county of Los Angeles, one of which is owned by plaintiffs and the other by defendants Loyd and Maren Mead.

Lot 9 of said tract was purchased by plaintiffs in 1949. The Meads purchased the adjoining lot 8 in 1953, and shortly thereafter caused a survey to be made of their property at which time it was discovered that the plaintiffs were encroaching on a triangular shaped portion of lot 8. The triangular shaped parcel might be described substantially as follows: Beginning at the southeast corner of lot 9, which said point is also the southwest corner of lot 8, thence northerly 110′ along the boundary line between lots 8 and 9, thence easterly 32′ along the northerly boundary line of lot 8, thence southwesterly about 110′ to a point on the south line of lot 8, about 3′ east of the point of beginning, thence along the southerly boundary of lot 8 to the point of beginning.

Following their purchase of lot 9 in 1949, plaintiffs erected on the triangular shaped portion of lot 8 a fence and placed certain improvements thereon consisting, among other things, of shrubs, a sprinkling system, a brick border and lawn. Plaintiffs remained in undisputed and undisturbed possession of the area in question from 1949 to 1953. Other persons, not parties to this appeal, owned lot 8 at the time such improvements were placed thereon. Plaintiffs claimed ownership of the triangular shaped parcel in question as a part of lot 9.

On July 28, 1953, the Meads wrote plaintiffs, informing them that they were encroaching on their property and notifying them to remove the encroachments within thirty days and that they would be charged rent if they failed to do so.

Plaintiffs thereafter filed this action in which the Meads filed a cross-complaint for declaratory relief, trespass, ejectment, quiet title and for damages. Subsequently a request for entry of a partial dismissal and stipulation prepared by the attorneys for the plaintiffs was filed and entered. By the stipulation the plaintiffs dismissed with prejudice their complaint against the defendants Loyd and Maren Mead, and acknowledged the true boundary line between the lots as indicated on a survey made on behalf of the Meads; it further provided that within ten days from the date of the stipulation, plaintiffs would remove the fence posts, the sprinkling system and a brick wall which extended in a general north-south direction on lot 8; that plaintiffs made no claim to any right, title or interest in or to lot 8; that the issues of damages in the cross-complaint of defendants Loyd and Maren Mead should go off calendar to be reset and not to be affected by the stipulation, and that plaintiffs would sign the necessary documents to waive any claim they might have in and to lot 8.

Following a trial on the cross-complaint, solely on the question of damages, judgment was rendered in favor of the cross-complainants in the sum of $431.73, plus costs and plaintiffs have appealed.

[1–3] Appellants contend that they believed the area in question belonged to them and therefore there was no wrongful occupancy of the disputed property by them. They argue that their occupancy was under a claim of right—that they relied upon what the seller of lot 9 told them as to the boundaries of the property and that up to the time that the respondents had the property surveyed everybody who had anything to do with either lot 8 or lot 9 believed, in good faith, that the triangular shaped parcel in question belonged to the plaintiffs. However, after the surveys were made which definitely established the boundaries, plaintiffs continued to claim title to the disputed area. Any claim to the property in question following such surveys was obviously without any right whatsoever, unfounded and without merit. It follows, therefore, that any occupancy under such conditions was wrongful. In any event, as it was stated in Herond v. Bonsall, 60 Cal.App.2d 152, 155–156, 140 P.2d 121, 123: "An action will lie for recovery of the reasonable value of the use and occupation of real property irrespec-

tive of the question of whether or not the use thereof by the occupant was tortious or wrongful. In such a case the tort, if any, may be waived and an action based upon implied assumpsit is maintainable to recover the value of the use of the real property for the time of such occupation, where no special damages are sought. A landowner instituting such a suit need only allege his ownership of the land, occupation of such land by the defendant, the reasonable value of the use of the property for the period of occupation, and that such sum is unpaid. [Citing cases.] For a continuing trespass, section 3334 of the Civil Code prescribes the measure of damage."

[4] Appellants further contend that title was not established prior to the stipulation and therefore damages could only be asserted from the date of the stipulation, and it was admitted by the respondents that appellants removed from the disputed area within the time prescribed by the stipulation. A complete answer to any such contention is that while the title to the disputed area was not established judicially prior to the filing of the stipulation, yet title to the area was in the respondents from and after the recordation of their deed. In the stipulation the appellants simply admitted that the line claimed by the respondents was the correct line. The stipulation was not a compromise of any claim of the boundary lines.

[5, 6] Appellants contend that the damages were erroneously assessed, and in this connection claim that the expert witness called by respondents did not and could not qualify as an expert in real estate values. The qualification of a person to testify as an expert witness is a matter largely within the discretion of the trial court and its determination, in the absence of a clear abuse, will not be disturbed by an appellate court. People v. Haeussler, 41 Cal.2d 252, 261, 260 P.2d 8; Pfingsten v. Westenhaver, 39 Cal.2d 12, 20, 244 P.2d 395. No such abuse was shown or demonstrated in this case. From the evidence which was introduced the damages could have been considerably higher than the court allowed.

Appellants next contend that there were errors in the admission of certain testimony. We have carefully examined the record and find no prejudicial error. The findings in each instance are supported by substantial evidence.

In our opinion the evidence supports the findings and the findings support the judgment.

Judgment affirmed.

WHITE, P. J., and DORAN, J., concur.



141 Cal.App.2d 801

Helen HURLIMANN and Armin Hurlimann, Plaintiffs and Appellants,

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Executor of the Last Will and Testament of Modesto A. Giordano, Deceased, et al., Defendants and Respondents.

No. 16593.

District Court of Appeal. First District. Division 1, California.

May 24, 1956.

Hearing Denied July 18, 1956.

Action against deceased physician's executor and others predicated upon alleged negligence of physician in treating a plaintiff who allegedly did not discover such negligence until after physician's death. The Superior Court, City and County of San Francisco, Harry J. Neubarth, J., entered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Fred B. Wood, J., held, inter alia, that in Probate Code section requiring "all claims" to be presented within six months of first publication of notice to creditors, quoted words include cause of action for injured person who has not yet discovered wrong.

Judgment affirmed.

1. Limitation of Actions ⇐95(1)

In malpractice cases, one year limitation on causes for negligent personal injuries does not commence to run until date of discovery of wrongful act or date when, by exercise of reasonable diligence, plaintiff should have discovered it. West's Ann. Code Civ.Proc. § 340, subd. 3.

2. Limitation of Actions ⇐179(2)

Where it is alleged in malpractice case against the physician that action was brought within year of discovery of injuries, complaint must state when discovery was made, circumstances under which it was made, and facts which show that plaintiff was not at fault for not having made earlier discovery, and that he had no actual or presumptive knowledge of facts sufficient to put him on inquiry. West's Ann. Code Civ.Proc. § 340, subd. 3.

3. Appeal and Error ⇐1040(3)
Limitation of Actions ⇐179(2)
Pleading ⇐225(1)

Where, in malpractice case against physician, plaintiff alleges that action was brought within year of discovery of alleged malpractice, although plaintiff must narrate circumstances concerning his delayed discovery in such detail that court may determine whether discovery was within time alleged but if allegations might be more explicit as to reason for not discovering cause sooner and it does not appear that complaint could not be amended to cure such objections, sustaining of demurrer without leave to amend would be reversible error. West's Ann.Code Civ.Proc. § 340, subd. 3.

4. Statutes ⇐223.1

A cardinal rule of statutory construction requires reconciliation of inconsistent statutes, if at all possible, where only one legislative purpose and policy is involved.

5. Executors and Administrators ⇐225(1)

Statute requiring all claims to be presented within six months of first publication of notice to creditors implements long established policy of requiring prompt presentation of claims against decedent's estate. West's Ann.Prob.Code, § 707.

6. Executors and Administrators ⇐225(1)

In Probate Code section requiring "all claims" to be presented within six months of first publication of notice to creditors, quoted words include cause of action for injured person who has not yet discovered wrong. West's Ann.Civ.Code, § 956; West's Ann.Code Civ.Proc. § 340, subd. 3; West's Ann.Prob.Code, §§ 707, 716.

See publication Words and Phrases, for other judicial constructions and definitions of "All Claims".

7. Executors and Administrators ⇐223

Operation of Probate Code section requiring all claims against estate to be presented within six months of first publication of notice to creditors so as to include actions of injuries to person who has not discovered injuries is not unconstitutional. West's Ann.Civ.Code, § 956; West's Ann. Code Civ.Proc. § 340, subd. 3; West's Ann. Prob.Code, §§ 707, 716.

8. Executors and Administrators ⇐228(5)
Limitation of Actions ⇐13

A physician's executor against whom action was brought predicated upon alleged malpractice of such deceased physician could not be estopped from raising bar of year limitation or bar arising because claim was not presented with time prescribed by Probate Code, on any theory of fiduciary relationship between physician and plaintiff patient. West's Ann.Code Civ.Proc. § 340, subd. 3; West's Ann.Prob.Code, § 707.

9. Executors and Administrators ⇐213, 228(5)

An executor has no power to waive due presentation of claim or to waive statute of limitations. West's Ann.Code Civ.Proc. § 340, subd. 3; West's Ann.Prob.Code, § 707.

Paul Friedman, San Francisco, for appellants.

John Francis Digardi, San Francisco, Peart, Baraty & Hassard, Robert D. Huber, San Francisco, for respondents.

FRED B. WOOD, Justice.

This is an action against the executor of the will of Dr. Modesto A. Giordano, brought by Helen Hurlimann and her husband Armin Hurlimann for damages allegedly caused by negligent medical treatment of Helen in 1951, the true nature of which, the complaint avers, was not discovered by plaintiffs until she underwent an operation performed by other physicians on the 23rd day of March, 1954.

Meanwhile, Dr. Giordano died on the 18th of August, 1953. His will was probated and an executor appointed. The first notice to creditors was published on September 22, 1953.

Plaintiffs filed their respective claims against the estate on the 6th of May, 1954, several weeks after the expiration of the six months' period prescribed by section 707 of the Probate Code.

Defendant demurred upon the asserted grounds that the complaint did not state a cause of action and that the alleged cause was barred by the provisions of section 707 of the Probate Code and subdivision 3 of section 340 of the Code of Civil Procedure. The demurrer was sustained without leave to amend. Judgment was rendered thereon and the plaintiffs have appealed.

[1, 2] The applicable statute of limitations prescribes one year as the period within which "an action * * * for injury to * * * one [person] caused by the wrongful act or neglect of another" may be brought. Code Civ.Proc., § 340, subd. 3. In malpractice cases this one year period does not start to run until the date of discovery of the wrongful act or the date when by the exercise of reasonable diligence the plaintiff should have discovered it. Stafford v. Schultz, 42 Cal.2d 767, 776–778, 270 P.2d 1; Costa v. Regents of University of California, 116 Cal.App.2d 445, 454–455, 254 P.2d 85; Bowers v. Olch, 120 Cal.App.2d 108, 117, 260 P.2d 997; Myers v. Stevenson, 125 Cal.App.2d 399, 270 P.2d 885; Hemingway v. Waxler, 128 Cal.App. 2d 68, 274 P.2d 699; Wohlgemuth v. Meyer, 139 Cal.App.2d 326, 293 P.2d 816. In such a case the complaint must state when the discovery was made, the circumstances under which it was made, and facts to show that the plaintiff is not at fault for not having made an earlier discovery, and that he had no actual or presumptive knowledge of facts sufficient to put him on inquiry. Myers v. Stevenson, supra, 125 Cal.App.2d 399, 270 P.2d 885; Wohlgemuth v. Meyer, supra, 139 Cal.App.2d 326, 293 P.2d 816.

In the instant case plaintiffs alleged the date of discovery (March 23, 1954) and the circumstances under which the discovery was made (operation performed by other physicians). Concerning lack of actual or presumptive knowledge, they allege that certain thyroid treatments negligently administered by Dr. Giordano in 1951 resulted in a disfiguring scar on Mrs. Hurlimann's throat and large amounts of tissue which she later discovered had to be removed, but that plaintiffs continued at various times during the years 1951, 1952 and 1953 to consult with the doctor "in reference to general checkup, and although advised by said decedent on those visits that plaintiff Helen Hurlimann had a tonsil condition that would require a tonsillectomy, were never advised that there was any danger connected with the white scar left by the radium exposure, and were lulled into a false sense of security by said decedent's representations to them that the scar on the throat of plaintiff Helen Hurlimann was insignificant and harmless and that its removal would be a routine and simple matter to be done when a tonsillectomy would be performed on said plaintiff. Said plaintiff[s] relied on these representations, believing the scar to be superficial and harmless, until an operation which was performed upon plaintiff Helen Hurlimann, on the 23rd day of March, 1954, by other physicians."

[3] This is meager statement of the circumstances under which the discovery was made and of the asserted lack of earlier actual or presumptive notice. In such a case as this the plaintiff must narrate the circumstances concerning his delayed discovery in such detail "that the court may determine whether the discovery * * * was within the time alleged * * *." Lady Washington C. Co. v. Wood, 113 Cal. 482, 487, 45 P. 809, 810, cited with approval

in Original Min. & Mill. Co. v. Casad, 210 Cal. 71, 74–75, 290 P. 456. However, as stated in Myers v. Stevenson, supra, 125 Cal.App.2d 399, 402, 270 P.2d 885, 887, likewise in our case, "If the allegations might be more explicit as to the reason for not discovering the cause of action sooner, it does not appear that they could not be amended to meet any such objection and this being so the sustaining of the demurrer without leave to amend would be reversible error, if it appears that a cause of action could be stated. Section 472, c. 5, Code Civ.Proc.; Wennerholm v. Stanford University School of Med., 20 Cal.2d 713, 128 P.2d 522, 141 A.L.R. 1358; Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 172 P.2d 867."

This presents for consideration the question whether certain provisions of section 707 of the Probate Code * operate as a bar to this action even if the statute of limitations has not commenced to run. Section 707 declares that "all claims for damages for physical injuries * * * must be filed or presented within the time limited in the notice or as extended by the provisions of Section 702 of this code; and any claim not so filed or presented is barred forever, unless it is made to appear * * that the claimant had not received notice, by reason of being out of the State * *." (There is no allegation that either of the plaintiffs herein was at any time out of the state.)

If literally construed, this "all claims" provision of section 707 would include the cause of action of an injured person who has not yet discovered the wrong. It is argued that such an interpretation is so inconsistent with the policy of not having the statute of limitations run until discovery, the Legislature could not have intended thus to terminate the right of action before discovery. It has further been suggested that a literal construction and application of this "all claims" provision would be equally inconsistent with the main purpose of the very act which amended section 707, Stats.1949, ch. 1380, pp. 2400, 2402, the survival of tort actions, including personal injury actions.

Such a purpose is expressed in the title of the 1949 act and in section 956 which it added to the Civil Code, the latter declaring that a "thing in action arising out of a wrong which results in physical injury to the person or out of a statute imposing liability for such injury shall not abate by reason of the death of the wrongdoer or any other person liable for damages for such injury, nor by reason of the death of the person injured or of any other person who owns any such thing in action. * *" Stats.1949, ch. 1380, p. 2400.

[4] If this were the only legislative purpose and policy involved, we would be confronted with the problem of reconciling section 707 with section 956, for section 707 does seem to undo (in the type of case here under consideration) what section 956 seeks to accomplish. In such a situation, the cardinal rule of construction would require such a reconciliation if at all possible. That rule "must accord to language the legislative intention; that such legislative intention controls, indeed, it is the law itself; that where the legislature has clearly set forth the purpose of the acts and has enacted a plan or design for its accomplishment, the implemental portions of the act must be construed so as to achieve the objective, * * *." California Toll Bridge Authority v. Kuchel, 40 Cal.2d 43, 53, 251 P.2d 4, 9.

[5] But the "all claims" provision of section 707 is not a mere "implementation" of the intent expressed in section 956. It implements the long established policy of requiring prompt presentation of claims against the estate of a decedent. When a man dies the state intervenes and administers the estate through its probate court

* Section 716 of the same code declares that "No holder of a claim against an estate shall maintain an action thereon, unless the claim is first filed with the clerk or presented to the executor or the administrator," save for a single exception not here involved.

The word "claim" as used in section 716 has the same meaning as in section 707. National Auto & Cas. Ins. Co. v. Ainge, 34 Cal.2d 806, 808–810, 215 P.2d 13.

and an executor or administrator for the protection of the creditors and the heirs. See Verdier v. Roach, 96 Cal. 467, 31 P. 554, and National Auto & Cas. Ins. Co. v. Ainge, supra, 34 Cal.2d 806, 808–809, 215 P.2d 13, reviewing the history of section 707 and its predecessor statutes; also, Fontana Land Co. v. Laughlin, 199 Cal. 625, 636, 250 P. 669, 674, 48 A.L.R. 1308, concerning "the duty of probate courts to guard the interests of heirs and creditors."

[6, 7] Accordingly, the Legislature, when it provided for the survival of tort actions, quite naturally implemented this policy of the probate statutes by requiring the timely filing or presentation of claims "for damages for physical injuries" § 707, and did so by applying the traditional formula, "within six months after the first publication of the notice" to creditors, § 700, Prob.Code. It would be pure speculation to undertake to say that the Legislature did not have its attention directed to the injured person who has not yet discovered he has a cause of action and that, if it had, it would have prescribed a different period of time and what period of time it would in that case have prescribed. Incidentally, in respect to a claimant who because of absence from the state has not received notice of the time limited, the Legislature extends the time for the presentation of his claim until the rendition of a decree of distribution, § 707, which could occur and not infrequently does occur soon after the expiration of the traditional six months' period. In other words, by its 1949 amendment of section 707, the Legislature has prescribed the traditional six months' period for the type of case here involved, and we are aware of no constitutional inhibition against its so prescribing. We do not deem the situation here presented truly analogous to that which obtains when the Legislature shortens a statutory period of limitation and retroactive application of the abbreviated period would unduly curtail the bringing of an action against which the statute has commenced to run, in which case the litigant is given a reasonable time within which to bring his action (see cases collected in 11 Cal.Jur.2d 652, § 229, and 16 Cal.Jur. 398, § 9).

[8, 9] Plaintiff's remaining argument is to the effect that the decedent's alleged conduct, in view of his fiduciary relationship, lulled them into a false sense of security and should operate as an estoppel to the pleading of the bar of section 340, subdivision 3 or of section 707. However that might be, were he still living, we do not see how it can estop the executor who is an officer of the probate court charged with the administration of the estate and the protection of creditors and heirs. It is well established that an executor has no power to waive due presentation of a claim which the statute declares must be presented, Harp v. Calahan, 46 Cal. 222, 233; In re Estate of Erwin, 117 Cal.App.2d 203, 255 P.2d 97; nor has he power to waive the bar of the statute of limitations. In re Estate of Lucas, 23 Cal.2d 454, 466, 144 P.2d 340, and cases there cited. The rationale of these cases would seem to rule out any basis for estoppel of the executor predicated upon the conduct of the decedent.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; TRAYNOR, J., dissenting.



Guy HALL, Plaintiff and Respondent,

v.

The CITY OF TAFT, a Municipal Corporation, Glen Black, Jack Kirsher, Ted Pheal, William O. Erickson, Dale Huey, as members of the City Council thereof, and Walter McKee, as Chief of Police thereof, Defendants and Appellants.*

Civ. 5339.

District Court of Appeal, Fourth District, California.

May 28, 1956.

Hearing Granted July 24, 1956.

Action by contractor to enjoin municipality from enforcing its ordinance requiring a building permit for construction

* Opinion vacated 302 P.2d 574.

of a school building. The Superior Court, Kern County, W. L. Bradshaw, J., entered judgment for contractor and municipality appealed. The District Court of Appeal, Conley, J. pro tem., held that statutes prescribing certain regulations for construction of school buildings were intended only to prescribe and enforce general standards and requirements with respect to safety of design and construction of new school buildings and major repair of old school buildings, with particular reference to earthquakes and high winds, and while state supervision is supreme in these fields, such statutes did not deprive municipalities of right to supervise and control construction of buildings within their corporate limits in other particulars.

Judgment reversed with instructions to enter judgment for defendants.

1. Schools and School Districts ⇐71, 73

A state has the power to take sole jurisdiction over the supervision and control of construction and repair of school buildings.

2. Municipal Corporations ⇐592(1)

In order to exclude municipalities from exercising regulatory functions in the legitimate realm of police power, state must completely and exclusively occupy the whole field.

3. Municipal Corporations ⇐592(1)

Where the legislature has adopted statutes governing a particular subject matter, determination of whether it has undertaken to occupy such subject matter to exclusion of local regulation depends upon an analysis of the statute, and a construction of the facts and circumstances upon which it was intended to operate.

4. Municipal Corporations ⇐592(1)

Statutes prescribing certain regulations for construction of school buildings were intended only to prescribe and enforce general standards and requirements with respect to safety of design and construction of new school buildings and major repair of old school buildings, with particular reference to earthquakes and high winds, and while state supervision is supreme in these fields, such statutes did not deprive municipalities of the right to supervise and control construction of buildings within their corporate limits in other particulars. West's Ann.Const. art. 11, § 11; West's Ann.Education Code, §§ 18191–18205; West's Ann. Health and Safety Code, §§ 19100–19170, 19151.

Henry G. Baron, Taft, and Allen Grimes, Modesto, for appellants.

Mack, Bianco, King & Eyherabide, Bakersfield, for respondent.

CONLEY, Justice pro tem.

The plaintiff and respondent, Guy Hall, a general licensed contractor, was awarded a contract to build the Taft College building in the city of Taft by Taft Union High School and Junior College District, for the sum of $641,113. He started work on the project on May 2, 1955, but officials of the city of Taft, a city of the sixth class, threatened to cause his arrest as a violator of city ordinance No. 197 (New Series), which, through incorporation by reference of the Uniform Building Code, 1952 Edition, requires all persons who erect any building in the city to take out a permit and pay the fees specified therein. The plaintiff stood his ground and refused to apply for a permit. The work was closed down.

On May 18, 1955, plaintiff filed this suit to enjoin the city and its officials from enforcing the ordinance. His theory is that under the law, and particularly sections 18191 et seq. of the Education Code, the state has fully occupied the field of supervising and controlling the erection of school buildings wherever they may be situated, to the complete exclusion of municipalities, and that consequently, Taft is without right or authority to demand that plaintiff secure a city permit.

The case was tried on an agreed statement of facts and resulted in a judgment that the ordinance of the city "* * * (i)s unconstitutional and deprives the plaintiff of his property without due process of law in that said ordinance is not applicable to a school district or to a contractor work-

ing for a school district in this instance"; that plaintiff is not required to secure a building permit from the city for the erection of the building; and that the defendants should be and are permanently enjoined and restrained from demanding that plaintiff secure a permit from the city and from interfering with the construction of the building.

This appeal, filed by the defendants, is presented on an agreed statement of facts. Rule 6(a), Rules on Appeal. The case involves only one basic question: Under the law as it exists today, can a city of the sixth class by ordinance require a contractor, who has a contract with a school district to erect a school building within the corporate limits of such city, to secure a city building permit?

[1] There can be no question but that the state has the *power* to take sole jurisdiction over the supervision and control of the construction and repair of school buildings. This was decided in Pasadena School Dist. v. City of Pasadena, 1913, 166 Cal. 7, 12, 134 P. 985, 986, 47 L.R.A.,N.S., 892, where it was said:

> "The state undoubtedly might provide, in the exercise of its police power and under a general law, for a complete system of regulation for the protection of the public health, safety and comfort in the erection of school buildings."

The same case held that as the state had not so acted up to that time, the right remained in the city, in the exercise of its police power pursuant to section 11 of Article XI of the Constitution, to subject a school district erecting a building within its corporate limits to its regulatory building ordinances. The question is thus narrowed to an inquiry whether by any general law passed after the decision of the Pasadena school case, supra, the legislature has preempted the entire field of school building construction to the exclusion of the exercise by municipalities of regulatory and supervisory powers.

The legislation to be analyzed consists of an act of the legislature originally passed in 1933, known as the Field Act, Calif.Stats. 1933, Ch. 59, now incorporated in Div. 9, Ch. 3, Art. 3, § 18191 et seq. of the Education Code. It is suggested by counsel for appellants that the Riley Act, Stats.1933, Ch. 601, p. 1531, now found in the Health and Safety Code, §§ 19100 to 19170, enacted in the same year is *in pari materia* and should be helpful in indicating the legislative intent in passing the Field Act. Old Homestead Bakery, Inc., v. Marsh, 75 Cal. App. 247, 258–259, 242 P. 749; People ex rel. Paganini v. Town of Corte Madera, 97 Cal.App.2d 726, 729, 218 P.2d 810. These laws were both passed at a time when the people of the state were alarmed over recent earthquake damage to schools and other public buildings in southern California.

[2] At the outset of our inquiry, it should be noted that in order to exclude municipalities from exercising regulatory functions in the legitimate realm of police power, the state must completely and exclusively occupy the whole field. Pulcifer v. County of Alameda, 29 Cal.2d 258, 260–261, 175 P.2d 1; Ex parte Daniels, 183 Cal. 636, 192 P. 442, 21 A.L.R. 1172; Atlas Mixed Mortar Co. v. City of Burbank, 202 Cal. 660, 663, 262 P. 334; Ganley v. Claeys, 2 Cal.2d 266, 40 P.2d 817; Ex parte Grey, 11 Cal.App. 125, 104 P. 476; In re Murphy, 190 Cal. 286, 212 P. 30; In re Mingo, 190 Cal. 769, 214 P. 850; Natural Milk Producers Ass'n of California v. City & County of San Francisco, 20 Cal.2d 101, 109, 124 P.2d 25.

As is said in Pipoly v. Benson, 20 Cal.2d 366, 371, 125 P.2d 482, 485, 147 A.L.R. 515: "The difficult question in such cases is whether the state law was intended to occupy the entire field." This difficulty is obviated when the legislature expressly declares in its enactment that its regulations are not intended to be exclusive, In re Iverson, 199 Cal. 582, 588, 250 P. 681; Natural Milk Producers Ass'n of California v. City & County of San Francisco, supra, 20 Cal.2d 101, 110, 111, 124 P.2d 25, or when, on the other hand, the law making body of the state explicitly includes in the statute a statement of intention to occupy the whole field accompanied by a general plan for the implementation of such intention. Pipoly v. Benson, supra, 20 Cal.2d

366, 372, 125 P.2d 482, 147 A.L.R. 515; Ex parte Daniels, 183 Cal. 636, 641–642, 192 P. 442, 21 A.L.R. 1172.

[3] In situations in which there has not been such an outright declaration of intention, "(d)etermination of the question whether the legislature has undertaken to occupy exclusively a given field of legislation depends upon an analysis of the statute and a consideration of the facts and circumstances upon which it was intended to operate." Tolman v. Underhill, 39 Cal.2d 708, 712, 249 P.2d 280, 283. See also Mann v. Scott, 180 Cal. 550, 557–558, 182 P. 281.

In Tolman v. Underhill, supra, 39 Cal.2d 708, 712, 249 P.2d 280, 283, it is said:

> "Where the Legislature has adopted statutes governing a particular subject matter, its intent with regard to occupying the field to the exclusion of all local regulation is not to be measured alone by the language used but by the whole purpose and scope of the legislative scheme." Citing Eastlick v. City of Los Angeles, 29 Cal.2d 661, 666, 177 P.2d 558, 170 A.L.R. 225; Pipoly v. Benson, supra, 20 Cal.2d 366, 371–373, 125 P.2d 482, 147 A.L.R. 515; and Ex parte Daniels, supra, 183 Cal. 636, 642–643, 192 P. 442, 21 A.L.R. 1172.

With these guiding principles in view, let us traverse the Field Act itself, section by section, as amended and incorporated in the Education Code. Ed.Code, §§ 18191 to 18205. By section 18191, the Division of Architecture of the Department of Public Works is directed to "supervise the construction of any school building or, if the estimated cost exceed four thousand dollars ($4,000), the reconstruction or alteration of or addition to any school building, for the protection of life and property." Section 18192 defines "school building" as any building "used, or designed to be used, for elementary or secondary schools or junior college purposes and constructed, reconstructed, altered, or added to, by the State or by any city or city and county, * * * or by any school district of any kind within the State, or by the United States Government, or any agency thereof." Section 18193 defines "construction or alteration" in broad and inclusive terms.

The Division of Architecture "shall pass upon and approve or reject all plans for the construction or alteration of any school building" and the governing board of each school district is required by section 18194 to submit all plans for school buildings to the Division for approval before adopting them. The following section, 18195, requires written approval of the plans "as to safety of design and construction by the Division of Architecture", as a condition precedent to the letting of any contract for construction or alteration of any school building. Section 18196 provides for the submission of "plans and full, complete, and accurate specifications, and structural design computations, and estimates of cost, which shall comply in every respect with any and all requirements prescribed by the Division of Architecture" and section 18197 specifies a substantial filing fee based on the estimated cost of the project. All fees go to the state treasury to the credit of the Division of Architecture Public Building Fund by direction of section 18198.

Section 18199 provides that plans, specifications and estimates must be prepared by a certified architect or certified structural engineer, who shall supervise the work done, except that as to alterations or repairs which do not involve architectural or structural changes, a certified professional engineer may act. Section 18200 invalidates contracts in connection with construction work which do not comply with the foregoing requirements and forbids the expenditure of public moneys for any work which is not in conformity with the views of the Division of Architecture as evidenced by its written approval. Section 18201 provides for verfied progress reports by the architect, engineer, inspector and contractor upon demand of the Division. Section 18202 authorizes rule making by the Division. Section 18203 requires inspection by the Division of the buildings during construction and states "The school district, city, city and county, or the political subdivision within the jurisdiction of which any school building is constructed or altered shall provide for and require com-

petent, adequate, and continuous inspection during construction or alteration by an inspector satisfactory to the architect or structural engineer and the Division of Architecture." Section 18204 provides that "Any person who violates any of the provisions of this article or makes any false statement in any verified report or affidavit required pursuant to this article, is guilty of a felony."

Summarizing, the statute applies to all school buildings as originally built and to the reconstruction at a cost of more than $4,000 of any school building already existing; plans must be approved in writing by the Division of Architecture *as to safety of design and construction* before approval by school boards or the letting of any contract; continuing effective supervision is provided for and the sanctions for the enforcement of the act are serious and fully adequate. *Safety of design and construction* seem to be the key words of the enactment. The Attorney General was apparently of the same opinion when he said, as to the Field Act, "its chief objective" was "to insure that public school buildings within the state be constructed or remodeled so as to resist, insofar as is possible, damage by earthquake." (26 Op.Cal.Atty.Gen. 75, 76.)

As already pointed out, section 18202 of the Education Code authorizes the making of rules by the Division of Architecture. Let us examine these rules to see whether, considered with the code sections, they indicate the intent and purpose of the legislation. Armenta v. Churchill, 42 Cal.2d 448, 455, 267 P.2d 303.

Rules and regulations effective March 22, 1945, were adopted pursuant to section 18202 of the Education Code in implementing the Field Act. Section 2 of these original rules was as follows:

> "Nothing herein stated shall be construed to exempt the school board and its agents, or the contractor, from the provisions of local ordinances, regulations or building codes with reference to the issuance of building permits, inspection of construction, or from such protective and regulatory measures as may be in effect. Where local building authorities have jurisdiction, the approval of such authorities shall be obtained before final submission of the plans and specifications to the Division of Architecture for approval."

The rules were revised in 1953 (Reg. 53, No. 15–9–5–53.). Section 2 of the Revised Rules indicates that they were intended to establish reasonable standards and minimum requirements in the design, construction, reconstruction and alteration of, and addition to, school buildings in order to withstand wind and earthquakes and to insure safety of construction. Section 70, relating to requirements for design and construction, reads, in part: "It is not the intention to limit the ingenuity of the designer nor to interfere with the existing building rules and regulations where such rules and regulations are more stringent." Section 90, relating to stresses, under the heading "Group 2. Earthquake Protection for Buildings in General", provides: "The allowable stresses set forth in sections 101 to 1206, inclusive, following, are made applicable for the purposes of section 19151 of the Health and Safety Code (Riley Act) in localities which have no ordinance on the subject." Section 115 is as follows: "Regulations and design values established in these rules and regulations are minimum requirements. Nothing herein contained shall be interpreted to interefere with or to waive the requirements of applicable local or state building laws or ordinances where the requirements of these laws are more stringent than the requirements of these rules and regulations."

It would thus appear that the rules adopted by the Division of Architecture were prepared on the assumption that the powers of municipalities to supervise and control construction within their corporate limits in so far as they do not conflict with the general law are preserved and are still effective.

A note appended to section 1 of the Revised Rules states that they are promulgated under the Education Code sections above referred to and section 19151 of the

Health and Safety Code (a part of the original Riley Act hereinbefore referred to and now codified in sections 19100 to 19170, Division 13, Part 3, Chapter 2, "Earthquake Protection", of the Health and Safety Code.) The note supports the suggestion of counsel for the appellants that the Field Act and the Riley Act are *in pari materia* and that as the codification of the Riley Act clearly recognizes the power of a city to prescribe construction standards higher than those set forth in the Riley Act, Health and Saf. Code, § 19101, and otherwise recognizes the continued existence of local building ordinances (e. g. Health and Saf. Code, sec. 19151), it must be assumed that the same legislative intent with respect to local building ordinances applies also to the codified Field Act. Counsel for respondent argues to the contrary that a reading of the two enactments shows on the face of the record a legislative intent to differentiate between the two kinds of buildings treated by the two laws. In any event, the history of the Field and Riley acts shows that they were passed at a time of crisis for the purpose of protecting the public from the hazard of injury or death from buildings subjected to the unusual stresses incidental to earthquakes. Both enactments were primarily safety measures to insure adequate building construction to prevent casualties resulting from temblors. This fact is further and conclusively established by section 9 of the original Field Act, which reads as follows:

"The facts constituting the necessity are as follows: The series of earthquakes occurring in the southern portion of the State has caused great loss of life and damage to property. The public school buildings, constructed at public expense, were among the most seriously damaged buildings. Much of this loss and damage could have been avoided if the buildings and other structures had been properly constructed. The school buildings which will be erected, constructed and reconstructed to replace the buildings damaged or destroyed by the earthquakes should be so constructed as to resist, in so far as is possible, future earthquakes. These buildings will be erected, constructed and reconstructed at once and accordingly it is necessary that this act go into immediate effect in order that the lives and property of the people will be protected."

[4] It is our carefully considered conclusion from an examination of the foregoing diverse items that the legislature did not intend to, and did not, preempt the whole field of school building construction; that it intended only to prescribe and enforce general standards and requirements with respect to *safety of design and construction* of new school buildings and the major repair of old buildings, with particular reference to earthquakes and high winds, and that while such state supervision is supreme in these fields, it was never intended that municipalities should be deprived of their right to supervise and control construction of buildings within their corporate limits in other particulars. To the argument that duplicated or supplementary control of the construction of school buildings in cities may lead to confusion and paralysis, the reply is two-fold: It should be possible in this field, as in so many other areas of our democratic government, for responsible officials to exercise self-restraint and willing cooperation for the public good; but if they fail to do so, the legislature has the power at any time to give sole authority to a state agency to control the construction of all school buildings.

The judgment is reversed, with instructions to the trial court, upon the giving down of the remittitur, to enter a judgment for the defendants.

BARNARD, P. J., and MUSSELL, J., concur.

141 Cal.App.2d 916

CONSOLIDATED COPPERSTATE LINES, a California Corporation, Plaintiff and Respondent,

v.

Isabelle F. FRASHER, Ernest E. Frasher, Gail H. Crawford, and Morris A. Atkins, as executors of the Estate of Harold B. Frasher, Deceased; Hattie Harm; George Robert Harm; Valley Express Company, a California Corporation; Valley Motor Lines, Inc., a California Corporation; United Motor Transport Lines, a California Corporation; Isabelle F. Frasher, Ernest E. Frasher, Gail H. Crawford, and Morris A. Atkins, as Executors of the Estate of Harold B. Frasher, Deceased, and Hattie Harm, copartners, doing business under the firm name and style of Terminal Warehouse, Does One through Thirty, inclusive, Defendants,

Isabelle F. Frasher, as Executrix, Ernest E. Frasher, and Morris A. Atkins, as Executors of the Estate of Harold B. Frasher, Deceased; Valley Express Company, a California Corporation; Valley Motor Lines, Inc., a California Corporation; United Motor Transport Lines, a California Corporation, Defendants and Appellants,

Hattie Harm and George Robert Harm, Defendants and Respondents.

Civ. 5327.

District Court of Appeal, Fourth District, California.

May 28, 1956.

Rehearing Denied June 19, 1956.

Hearing Denied July 24, 1956.

Action for specific performance of contracts for sale of stock shares by executors. From a judgment and order of Superior Court, Fresno County, Strother P. Walton, J., the executors and others appealed. The District Court of Appeal, Barnard, P. J., held that where approval of two regulatory commissions was required for the sale, and where prior approval by Probate Court was necessary in obtaining such approval, the Probate Court could, under section relating to probate sale of personalty, confirm sale of personalty though sale could not be closed in sense of passing title to the property until approval of such commissions had been given.

Judgment modified to include interest omitted inadvertently; as modified, judgment affirmed; order affirmed.

1. Executors and Administrators ⇐320

Purpose of statute relating to probate sale of personalty is to permit sale of personalty partially on credit, with security for deferred balance, and with court's approval of terms of security papers. West's Ann. Prob.Code, § 773.

2. Executors and Administrators ⇐364

Statute relating to probate sale of personalty was intended to permit not only completed sales but agreements to sell where the "time of sale", at which time the 25% must be paid, is to be subsequent to the "time of confirmation", at which time the terms of the note and pledge which are to be taken for the "balance" must be approved by the court. West's Ann.Prob. Code, § 773.

3. Executors and Administrators ⇐375

Language of Probate Code section relating to sale of personalty indicates that the requirement for approval of terms of note and pledge, rather than for approval of instruments themselves, was intended to permit approval of agreement to sell where closing date or "time of sale" is to take place at some time after order of confirmation is entered. West's Ann.Prob.Code, § 773.

See publication Words and Phrases, for other judicial constructions and definitions of "Time of Sale".

4. Executors and Administrators ⇐368

In Probate Code section relating to probate sale of personalty, words "time of sale" may well mean time at which title is delivered, and language used implies that the 25% is to be paid at the "time of sale," in sense of time when binding sale can be and is being made and title to property can be transferred to purchaser and a pledge given. West's Ann.Prob.Code, § 773.

5. Executors and Administrators ⇐375

Where approval of two regulatory commissions was required for sale of personalty by executors, and prior approval by Probate

Court was necessary to obtain such approval, Probate Court could, under section relating to probate sale of personalty, confirm sale of personalty though sale could not be closed in sense of passing title to the property until approval of such commissions had been given. West's Ann.Prob. Code, § 773.

6. Executors and Administrators ⇐368

Language used in Probate Code section relating to sale of personalty does not unequivocally require that not less than 25% of consideration be paid in cash before order of confirmation is made. West's Ann. Prob.Code, § 773.

7. Executors and Administrators ⇐375, 383

If, in making order confirming sale of personalty, Probate Court erroneously construed statute requiring that not less than 25% of purchase price be paid in cash at time of sale, such error was not jurisdictional and order was not void, and, on becoming final, could not be collaterally attacked in action for specific performance of contracts for sale. West's Ann.Prob.Code, § 773.

8. Executors and Administrators ⇐375
Specific Performance ⇐121(8)

Record of action for specific performance of contracts for sale of shares of stock by executors failed to sustain contention that contracts were not just and reasonable as to the executors and in any event contention was sufficiently settled by order confirming sale. West's Ann.Prob.Code, § 773.

9. Estoppel ⇐68(4)

Where executors entered into contracts for sale of personalty of estate and procured order confirming sale, by representing to Court that price was fair and reasonable, executors were estopped, in action for specific performance brought against them by purchaser, to contend that price was not fair and reasonable. West's Ann.Prob. Code, § 773.

10. Contracts ⇐121

In contracts for sale of corporate stock by executors, general provision that, pending closing of sale, sellers would not change manner of conducting business, increase compensation of directors or officers or declare dividends, or enter into any transaction outside ordinary course of business, was not ipso facto contrary to public policy or violative of duty of executors as corporate directors.

Leslie C. Gillen, John R. Golden, C. J. Goodell, San Francisco, for appellant executors.

James T. Barstow, Fresno, for appellant Corporations.

Lawrence W. Young, Fresno, Hill, Farrer & Burrill, Robert Nibley, Los Angeles, Lopez & Hyde, Floyd H. Hyde, Fresno, for respondents.

BARNARD, Presiding Justice.

This is an appeal from a judgment decreeing the specific performance of two contracts to sell personal property. The contracts were entered into on July 5, 1951, by the executors of the last will of Harold B. Frasher, Deceased, and provided for the sale to the plaintiff of all the stock owned by the testator in three corporations and also of the testator's half interest in a partnership known as "Terminal Warehouse", the other half of which was owned by defendant Hattie Harm. These contracts were a part of a single transaction by which these executors and the Harms agreed to sell to the plaintiff practically the entire business being conducted by the corporations and the partnership. Three of the four executors later sought to avoid enforcement of the agreements and are appealing while the Harms, although named as defendants, have at all times sought enforcement of the agreements.

The three corporations, which will be referred to as the "Valley" corporations, were the outgrowth of a business started by Harold B. Frasher and George B. Harm. They became the principal stockholders of the three corporations and also the owners of the Terminal Warehouse business. Mr. Harm died first and Mr. Frasher died on February 23, 1949, leaving a will in which he authorized his executors to sell the property of his estate.

The Valley corporations and the Terminal Warehouse partnership are interrelated, being operated as one organization, and the sellers in this transaction represent all of the ownership therein except for 14.30% of the stock of one of the corporations. Valley Motor Lines, Inc. operates as a common carrier in hauling freight on certain highways. Its stock was owned as follows: 32.35% by Valley Express Company, 34.22% by the Frasher Estate, 19.13% by the Harms, and 14.30% by a few other stockholders who are not parties to this sale or to this litigation. Valley Express Company operates entirely within cities and towns, picking up freight to be hauled by Valley Motor Lines, Inc. All of the stock in Valley Express Company was owned by the Frasher Estate and the Harms. United Motor Transport Lines merely holds the legal title to certain property used by the other two corporations, and all of its stock is owned by Valley Motor Lines, Inc.

After the death of Mr. Frasher unsuccessful negotiations were carried on by the Frasher Estate with various motor truck companies for the sale of all of the estate's stock in the Valley corporations, and also its interest in Terminal Warehouse. In the spring of 1951, negotiations were begun by the plaintiff with the executors of the Frasher Estate and the Harms which resulted in the execution of three contracts on July 5, 1951. In the first of these contracts (Exhibit 1) the Frasher executors agreed to sell to the plaintiff all of the estate's stock in the Valley corporations for $518,353.15. In the second contract (Exhibit 2) the Harms agreed to sell to the plaintiff all of their stock in the Valley corporations for $300,659.65, on substantially the same terms. In the third contract (Exhibit 3) the Frasher executors and the Harms agreed to sell to the respondent the business and assets of Terminal Warehouse for $100,000. While only the first and third of these contracts are directly involved here, all three constitute in effect a single agreement to sell since by their terms if one fails for any reason all must fail. In summary, the Frasher Estate agreed to sell its interest in this business to the plaintiff for a total of $568,353.15; and the Harms agreed to sell their interest therein for a total of $350,659.65.

The Frasher agreement (Exhibit 1) provided that the purchase price was to be paid as follows: On the signing of that agreement $25,917.66 was to be delivered to the attorney for the sellers, to be held in escrow, one of the conditions being that it should be deposited in an interest-bearing account in a certain bank, the interest earned to eventually go with the principal. When title to the shares was transferred, on the closing date provided for in the agreement, the buyer was to pay another $113,533.39 which, with the original deposit, makes a down payment of $139,451.05 or 26.9% of the entire purchase price. The balance of the purchase price, $378,902.10, was to be paid in six equal annual instalments, the first instalment to be due on or before one year from the closing date, with 5% interest on the deferred payments to be paid annually. It was further agreed that the buyer would execute and deliver to the executors a negotiable note for the balance of $378,902.10, payable on those terms and dated as of the closing date; the note to be secured by a pledge of the corporate stock executed at the closing date, in the form attached to the agreement. The buyer reserved the right to prepay any or all of said instalments at any time.

The Valley companies are subject to regulation by the Interstate Commerce Commission and the Public Utilities Commission, and the contract provided that it was subject to the conditions precedent that the transaction should be approved by those two Commissions, and by the probate court. In this connection it was agreed that it was the responsibility of the buyer to procure the approval of the two Commissions, and of the sellers to procure the approval of the probate court; and that both parties would cooperate fully to that end.

It was further provided that this transaction should be closed concurrently with the closing of the sales under the other two contracts (Exhibits 2 and 3); that the closing date should be the second Wednesday after all three of these approvals had been secured; and that "the order of the Court

or of either Commission which last becomes final shall determine the closing date." It was also agreed that, in the event of a longer delay in the closing date, the buyer should pay the seller 5% interest on the purchase price, beginning nine months after the date of the agreement and running to the closing date.

The executors agreed that pending the closing of the sale it would not cause or permit the corporations to make any changes in their corporate structure; to declare a dividend or make any payment in respect to their capital stock; to enter into any transaction other than in the ordinary course of business; to increase the rate of compensation of their officers or directors; or to default in the filing of any reports or returns due to any federal, state or municipal authority.

In accordance with the terms of the various contracts $50,917.66 was deposited with the seller's attorney when the agreements were executed on July 5, 1951. The buyer immediately filed an application with the Interstate Commerce Commission for approval of the transaction. That proceeding was strongly contested by competing carriers, but approval was finally obtained on April 19, 1954. The approval of the Public Utilities Commission was finally obtained on August 18, 1954. In September, 1951, the executors filed a petition in the probate court seeking an order approving the agreements and authorizing the executors to complete the transaction in accordance therewith. Notice was given of the hearing at which the attorney for the executors appeared, and Isabelle F. Frasher testified on behalf of the executors. On October 5, 1951, the probate court made its order confirming and approving these sales in accordance with the terms set forth in the agreements, directing the executors to execute and deliver the necessary instruments of transfer "and to accept from the purchasers the purchase price in the form and in accordance with the terms and provisions of said (agreements)". No appeal was taken from that order and it became final.

When the contracts were signed in 1951 the Fresno terminal used by the Valley companies occupied most of a city block in Fresno. Thereafter, the State Division of Highways required a large part of this property for a new freeway, and the plaintiff consented in writing to the sale of this property to the state for $160,000 and to the purchase for $43,000 of a nine-acre parcel farther from town as a new terminal site. Later, a dispute over the erection of buildings and facilities on the new terminal site arose, which brought on this litigation. The Valley corporations were preparing to build in a certain manner, and the plaintiff took the position that if and when it acquired title to the stock it desired a somewhat different type of facilities.

The respondent filed this action on February 15, 1954. The complaint was for declaratory relief asking the court to construe the agreements of July 5, 1951, to instruct the parties as to their rights and duties thereunder, and to restrain the defendants from proceeding with the proposed building operations in the event it should be determined that they were not authorized to do so. The complaint alleged, among other things, that the defendants were about to let contracts for the construction of terminal buildings costing about $325,000; that the consummation of the transfer of the Valley companies to the plaintiff could reasonably be anticipated in the very near future; that the proposed construction would be unsuitable for plaintiff's operation when the transaction was completed; and that said proposed construction was not a matter within the ordinary course of business. The defendant executors filed an answer alleging, among other things, that the approval of the Interstate Commerce Commission had not become final; that the construction of said terminal buildings was necessary in carrying on the business of the Valley corporations; and that "the construction of said terminal is an act within the ordinary course of business" under the provisions of said agreements. The prayer was for a decree construing said agreements, and declaring the rights and duties of the parties thereunder. The defendant corporations filed a separate answer, praying for a declaration as to whether or not the sale agreements were binding on the corporations; and that, in the event it be held that they were, that

the court construe the rights and duties of the parties.

After six days of trial in June, 1954, the court signed and filed an "order for interlocutory judgment" directing that the attorneys for plaintiff and for defendants Harm prepare findings and a proposed interlocutory judgment. It was further ordered that the findings should include, among other things specified, provisions to the effect that the agreements are valid and in full force and effect; that the plaintiff is entitled to performance thereof; that the court reserves jurisdiction to later determine other questions and to make such orders from time to time as may be necessary to the completion of said transaction; and that the plaintiff is entitled to a preliminary injunction restraining the defendants from expending any funds in constructing a terminal, except as ordered by the court upon stipulation of the parties or after a hearing.

In October, 1954, before findings were filed, the plaintiff moved for an order vacating the previous order of submission, reopening the cause and permitting the plaintiff to file a supplemental and amended complaint, which was presented therewith. After argument, the court granted this motion. This supplemental complaint alleged, among other things, that the Public Utilities Commission had on August 18, 1954, approved the transactions in question; that this was the last of the approvals required by the agreements; that the plaintiff had notified the defendants that it would be ready to close the transactions on September 1, 1954, the closing date as fixed by the agreements, and had further offered to pay the full amount of the purchase price, with all interest, in lieu of giving a note and pledge covering a deferred balance; that none of the executors appeared at said time and place, as a result of which the transactions could not be consummated; that the defendants Harm and the defendant executor Crawford have expressed their willingness to complete the transaction; and that the other defendant executors have refused to do so. The prayer was for specific performance of the sale agreements, and that the defendants be ordered to consummate the transactions.

On December 1, 1954, a substitution of attorneys for the defendant executors was made. On the same day the defendant executors, other than Crawford, filed an answer to the supplemental complaint admitting that they had refused to consummate the transactions, and alleging that their refusal was based upon inadequacy of consideration and fraud in obtaining the agreements, the details of which would be pleaded in an amended answer later to be filed. The defendant corporations filed an answer on December 2 alleging that three of the executors had refused to consummate said agreements, and denying that a decree of specific performance is necessary or proper. On January 5, 1955, the defendant executors, other than Crawford, filed an amended answer alleging that the Public Utilities Commission's order of approval was not valid, since it was based upon a mistake of law and fact, in that it was stated therein that in an action pending in the superior court of Fresno County the court had held that these agreements are in full force and effect, whereas no findings or judgment had been entered in that action and the action was still pending. On April 1, 1955, the defendant executors, other than Crawford, filed another amended answer in which it was realleged that the approval of the Public Utilities Commission was based upon a misapprehension of law and fact, and further alleged that in filing the return of sale and petition for confirmation in September, 1951, the executors had stated that the sale was legally made and fairly conducted, that the price was fair and reasonable, and that it was for the best interest of the estate that the property be sold to relieve the estate of the hazards of operating such a commercial enterprise; that, in fact, those statements were not true; and that while the court had found these facts to be true in its order confirming the sale entered on October 5, 1951, the actual facts are that the price was not fair or reasonable, that it was not for the best interest of the estate that such property be sold, and that the purported sale was not legally made or fairly conducted.

The cause again went to trial before the same judge on June 20, 1955, and on that date the attorneys for the defendant executors, other than Crawford, filed a brief raising for the first time the contention that the order of October 5, 1951, was a void order, since the petition for confirmation of the sale showed on its face "that 25% was not paid down as required by Section 773" of the Probate Code, and the court had no jurisdiction to confirm the sale. That trial lasted six days and on June 27, 1955, the court ordered judgment in favor of the plaintiff and that the plaintiff prepare findings.

The court found in all respects in favor of the plaintiff buyer. It was found, among other things, that on October 5, 1951, after proceedings regularly had the probate court made an order confirming the sale, and approving the transactions, in accordance with the terms set forth in the agreements (Exhibits 1 and 3); that the terms of the note and pledge provided for in the agreement were before the probate court at that time and were approved by the court; that the order confirming the sale as set forth in the agreements has become final, and is not void or voidable; that orders approving the transaction had also been made by the Interstate Commerce Commission and by the Public Utilities Commission; that of the three orders of approval required that of the Public Utilities Commission became final on August 18, 1954, and was the last to become final; that September 1, 1954, was the proper closing date for said transactions as defined by the agreements; that the selling prices provided for in the agreements were the fair market values of the properties as of July 5, 1951; that the agreements are fair, just and reasonable; that the defendant executors acknowledged that these agreements were just and reasonable, and the consideration fair and adequate, and none of them claimed any unfairness, unreasonableness or inadequacy of consideration until after the commencement of this action; that the terms of these agreements are sufficiently certain and definite to make the precise acts to be done by the buyer and sellers clearly ascertainable; that the plaintiff has fully performed and is ready, willing and able to perform all its obligations under the agreements; and that the plaintiff is entitled to have these agreements specifically performed. Judgment was entered accordingly and the defendant executors, other than Crawford, and the defendant corporations, have appealed. The executors, other than Crawford, have also appealed from an order denying their motion to vacate the judgment and enter a different judgment on the findings.

The main contentions of the appellant executors are that they exceeded their authority in entering into these contracts since they did not provide for the payment of 25% of the purchase price "in cash at the time of sale", as required by Section 773 of the Probate Code; that for the same reason the probate court had no jurisdiction to entertain the proceedings for confirmation; that the order of October 5, 1951, confirming the sale was void and of no effect; and that contracts which violate statute law cannot be enforced in equity. It is argued that the order confirming the sale, being void, may be thus collaterally attacked; that the statutory requirement that at least 25% of the purchase price must be paid "at the time of sale" means that this amount must be paid "when the agreement of sale is entered into or, at the latest, before the order of confirmation is made"; that this must be true since it is further provided that "the terms of said note and pledge" securing the balance are to be approved by the court at the time of confirmation, and the "balance" required to be secured by a note and pledge can only mean the amount remaining after not less than 25% has been paid in cash; that the requirement for the court's approval of said note and pledge clearly "requires the court's approval of documents already *executed* when confirmation is made"; that the court could not approve the terms of the note here to be given because that note was to be dated as of the "closing date" which could not be known at the time of confirmation; that a contract which does not comply with statutory requirements cannot be held to be just and reasonable; that this violation of the statute was detrimental to the estate in that instead of having $139,451.05 and a

note approved by the court, on October 5, 1951, it then had only a promise on paper for something at an indefinite date in the future; that further prejudice appears in that the estate would lose its share of any profits made by the corporations in the meantime; and that Section 773 is unambiguous, and unequivocally requires that not less than 25% of the purchase price be paid before the order of confirmation is made.

[1–5] The main question presented is as to the intent and meaning of Section 773 of the Probate Code. The obvious purpose of that section is to permit the sale of personal property partially on credit, with security for the deferred balance, and with the court's approval of the terms of the security papers. So far as material here, all that this section requires is that 25% of the purchase price shall be paid "at the time of sale"; that the executors "shall take" a note for the balance secured by a pledge of the property sold; and that the terms of the note and pledge are to be approved by the court "at the time of confirmation of sale". There are many meanings of the word "sale" in common use and, in accordance with the context, the word may refer to a completed sale or to an agreement of sale. As we view Section 773 it was intended to permit not only completed sales but agreements to sell where the "time of sale", at which the 25% must be paid, is to be subsequent to the "time of confirmation", at which time the terms of the note and pledge which are to be taken for the "balance" must be approved by the court. If it had been intended that the words "at the time of sale" should refer to "the time of confirmation of sale" it would have been easy to so state, and this would probably have been done. The language used indicates that the time of sale may well be different from the time of confirmation; that the payment of 25% and the taking of a note and pledge for the balance shall occur at the same time, which is the time of sale; and that the requirement for the approval of the terms of the note and pledge, rather than for the approval of the instruments themselves, was intended to permit the approval of an agreement to sell where the closing date or "time of sale" is to take place at some time after the order of confirmation is entered. The words "at the time of sale" may well mean the time at which title is delivered, especially under such circumstances as here appear. The requirement for taking a pledge of the property sold, as security, would indicate that title to the property was then being passed to the purchaser, and strongly implies that this is the "time of sale" mentioned in the preceding sentence. The language used implies that the 25% is to be paid at the time of sale, in the sense of a time when a binding sale can be and is being made, and title to the property can be transferred to the purchaser and a pledge given. This could not occur here until the sale was approved by the two regulatory commissions. It would be unreasonable to require a buyer to pay 25% of the purchase price before it could be known whether or not the sale could legally be made, or to pledge property at a time when title thereto had not been and could not be transferred to him. It would be equally unreasonable to construe this section as having been intended to have an effect which would absolutely prevent the sale of such property as is here in question, since the approval of the two Commissions was required, and the obtaining of that approval would naturally require the prior approval of the probate court. As we view it, a sufficient compliance with Section 773 here appears. As thus construed, the procedure thereunder is consistent with the other provisions of that code governing the sale of stock in corporations and sales of realty.

[6–9] Whether or not the meaning of Section 773 is as we have indicated, it does not clearly appear from the language used that the section unequivocally requires not less than 25% of the consideration to be paid in cash before the order of confirmation is made. The most that could be said is that the language used is ambiguous with respect to what is meant by the words "at the time of sale". In that situation the court was called upon to construe the statute, in considering the application for confirmation of the sale. If it be assumed that the court misconstrued the section in

making its order confirming the sale on October 5, 1951, this was an error in passing upon something within the court's jurisdiction and not an act in excess of jurisdiction. That order became final and could not be here collaterally attacked. Estate of Keet, 15 Cal.2d 328, 100 P.2d 1045. The order confirming the sale was not a void order, and this case does not come within the cited cases holding that a void order may be attacked at any time. In view of our holding in this respect, it is unnecessary to consider other points incidentally raised by these appellants, and the many cases cited in connection therewith. The plaintiff's pleadings were sufficient to state a cause of action for specific performance, and they cannot now be collaterally attacked. The contention that these contracts were not just and reasonable as to the appellants is not sustained by the record, and is sufficiently settled by the order confirming the sale. Moreover, the facts warrant the application of the principles of estoppel as against these appellants.

[10] The appellant corporations raise the further point that the agreements in question are invalid, as contrary to public policy, and that the judgment, as it affects these corporations, should be reversed. It is argued that the executors signing the agreement as sellers were the directors, and all of the directors, of these corporations; that they violated their duties as directors by furthering their own interests in promoting a sale of their own shares without considering the best interest of the corporations; and that certain restrictions contained in the agreements relating to issuing stock, declaring dividends, increasing the compensation of officers of the corporation, and entering into transactions other than in the ordinary course of business, were calculated to interfere with the orderly conduct of business by the corporations and to impair their ability to fulfill their duty to the public under their franchises.

These corporations, as such, have no real interest in the controversy here involved, and are in no way affected or prejudiced by the judgment. The corporations were not parties to these agreements and in executing the agreements the executors were acting as such, and not as directors of the corporations. The provisions objected to were a part of a general provision requiring the sellers to make reasonable efforts to preserve the business of the corporations intact, including such matters as good will and not changing the manner of conducting the business. There is nothing to indicate that the controlling stockholders were not acting for what they considered to be the best interest of the corporations as a going business; and any possible illegality in this connection was not only severable but was a matter concerning which other means of relief could have been pursued if this was deemed necessary. It was understood and intended that the transaction could be closed within a few months, and the delay which occurred was caused by unforeseen conditions which delayed the obtaining of the required approvals by the respective commissions. The contracts involved no breach of duty to the public. The restriction on the payment of the dividends may be interpreted as applying to the signing stockholders only, and no minority stockholder has complained or is now complaining. Moreover, the record indicates that one of the corporations, Valley Motor Lines, Inc., had not paid a dividend since 1939. Assuming that the appellant corporations are appealing in good faith and not merely in the interest of the appellant executors, we are pointed to no evidence indicating any harm or prejudice to the corporations as such, or to any minority stockholder. Incidentally, the order of the Interstate Commerce Commission approving the transaction required the plaintiff to purchase, within a limited time after the consummation of the sale, any outstanding stock of Valley Motor Lines, Inc. which might be offered for sale to it, and at the price per share called for by these agreements. The plaintiff has written to each such shareholder offering to so purchase such stock upon the consummation of the transaction, and 84.30% of the minority interests have responded that they desired to sell. No reversible error appears in this connection.

The parties agree that by oversight the matter of interest was omitted from the portion of the judgment disposing of the

$50,950.64 which was originally deposited in escrow with the seller's attorney. The judgment is modified by providing that subparagraph (5) (c) thereof shall be amended to read as follows:

"(c) The defendant executors shall be entitled to receive the sum of $30,-917.66, together with interest earned thereon, and the defendants Harm, the sum of $20,032.98, together with interest earned thereon, from the initial deposit of $50,950.64 made by plaintiff at the time of execution of the said agreements, Exhibits 1, 2 and 3."

As so modified the judgment is affirmed, and the order is affirmed, the respondents to recover their costs.

GRIFFIN and MUSSELL, JJ., concur.



142 Cal.App.2d 8

John G. OPPENHEIMER, Plaintiff and Appellant,

v.

UNION PACIFIC RAILROAD COMPANY, a corporation, Defendant and Respondent.

Civ. 21477.

District Court of Appeal, Second District, Division 1, California.

May 29, 1956.

Hearing Denied July 24, 1956.

Action for damages for assault and battery. The Superior Court, Los Angeles County, Louis H. Burke, J., entered judgment for plaintiff in sum of $500. Plaintiff filed subsequent motion to have judgment vacated on grounds no findings were made on so called first cause of action and therefore judgment as to second cause of action was void but such motion was denied. Plaintiff appealed from judgment insofar as it failed to adjudicate any relief on plaintiff's first cause of action, failed to make findings thereon and from order denying plaintiff's motion to vacate judgment and to make findings on first cause of action. The District Court of Appeal, Fourt, J., held that where such an appeal was based upon judgment roll alone, omission of court to make findings was not ground for reversal and also that order denying motion to vacate judgment was not appealable.

Judgment affirmed.

1. Appeal and Error ⇐544(2)

Where appeal from judgment was based on contention that court failed to make findings on material issues and that therefore judgment was void was based upon judgment roll alone, failure to make findings on such issues was not ground for reversal.

2. Appeal and Error ⇐1071(6)

In order to warrant reversal of judgment for failure to find on an issue, it must be shown by the record on appeal that evidence sufficient to sustain a finding for complaining party was introduced.

3. Appeal and Error ⇐704(2)

If evidence is not set forth in record an appellate court will not consider an objection that the court below failed to make finding upon material issue.

4. Appeal and Error ⇐544(1), 907(3)

Even though omitted issue would have affected judgment rendered, failure to find thereon is not ground for reversal, unless submission of evidence in relation to such issue is shown by statement of bill of exceptions, because upon appeal from the judgment roll alone an appellate court will not presume there is evidence as to an issue upon which there is no finding where other findings are sufficient to support judgment.

5. Appeal and Error ⇐113(1)

Order denying plaintiff's motion to vacate judgment was not appealable.

John G. Oppenheimer, in pro. per.

E. E. Bennett, Edward C. Renwick, Malcolm Davis, Jack W. Crumley, Donald M. Ladd, Jr., Los Angeles, for respondent.

FOURT, Justice.

This is an appeal by the plaintiff from a judgment in his favor, in an action for damages for assault and battery.

In his original complaint plaintiff alleged that defendant, by and through its agents, servants and employees, acting in the course and scope of their employment wilfully, unlawfully, forcibly and violently, beat, struck and assaulted plaintiff about his head and face with a deadly weapon. At the time of the incident plaintiff was an employee of defendant. However, there was no such allegation in the complaint. The trial of the action resulted in a judgment for defendant. Thereafter, plaintiff filed a notice of intention to move for a new trial. His motion was denied, but the court made an order setting aside the findings and judgment and reopened the cause for further proceedings. The court then granted plaintiff permission to file an amended complaint to conform to the proof and state a cause of action under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

Plaintiff then filed what was titled "Amendment to Complaint to Conform to Proof," and in the body of the instrument set forth that it was a second, separate and distinct cause of action against defendant. In this document plaintiff alleged that defendant was a common carrier engaged in interstate commerce; that plaintiff was a yard clerk employed by defendant to check numbers on freight cars used in interstate commerce; that Grant Fraley and others employed by defendant were engaged in switching operations of defendant's railroad cars; that defendant negligently failed to provide plaintiff with a safe place to work and to properly protect the health and safety of the plaintiff while on duty in that Fraley, while acting within the course and scope of his employment in interstate commerce, commenced an argument with plaintiff about the mode and method of performing railroad work of clerks and switchmen and thereupon wantonly and with disregard for the health of the plaintiff, struck plaintiff with a railroad lantern about the face and inflicted wounds to the plaintiff's damage in the sum of $7,000; that defendant assumed all medical expenses except for an incidental travel allowance.

An answer to the amendment to the complaint was filed wherein defendant denied that plaintiff had been struck by any employee of the defendant in the course and scope of employment, and further, affirmatively set up that plaintiff was guilty of contributory negligence in arguing and getting into the fight in the first place.

The court then ordered the case reopened for the limited purpose of permitting the parties to produce additional evidence which they might desire to introduce bearing upon the issues established by the amendment to the complaint and answer thereto, and for further argument. When the cause came on for further hearing no further testimony was taken and the case was argued and judgment ordered for the plaintiff in the sum of $500.

Findings of fact and conclusions of law and judgment were prepared by plaintiff and were signed and filed. Judgment was entered and satisfied by payment to the appellant and a satisfaction of the judgment was filed. About a month later plaintiff commenced proceedings to have the judgment vacated on the grounds that no findings were made on the so-called first cause of action and, therefore, the judgment as to the second cause of action was void. Plaintiff's motion to vacate the judgment was denied.

Plaintiff has appealed from the judgment "insofar as it denies and fails to adjudicate any relief to plaintiff on his first cause of action herein, and fails to make findings thereon, and from the order denying plaintiff's motion to vacate said judgment and to make findings on the said first cause of action, * * *."

[1, 2] Plaintiff contends that the court has failed to make findings on material issues and that therefore the judgment is void. The appeal, however, is based upon the judgment roll alone and it is the rule that the omission of the court to make findings upon such issues is not a ground for reversal where the appeal is based upon the judgment roll alone. Lincoln v. Averill, 47 Cal.App.2d 335, 341, 117 P.2d 913.

In order to warrant the reversal of a judgment for failure to find on an issue it must be shown by the record on appeal that evidence sufficient to sustain a finding for the complaining party was introduced. Brown v. Republic Productions, Inc., 26 Cal.2d 867, 870, 161 P.2d 796; Rhodes v. Newby, 77 Cal.App.2d 580, 584, 175 P.2d 893.

As stated in Rhodes v. Newby, supra, 77 Cal.App.2d at page 584, 175 P.2d at page 895: "We therefore are required to assume, in the absence of a reporter's transcript or other proper record of the testimony, that failure of the trial court to find facts favorable to defendants' contention was due to the fact that no evidence was produced which would justify such finding. Ouzoonian v. Vaughan, 194 Cal. 139, 145, 228 P. 8; Bowers v. Union Trust Co., supra, 117 Cal.App. [259, at] page 264, 3 P.2d 614.

"In Calkins v. Berliner, 26 Cal.App. 601, 603, 147 P. 985, defendant filed a counterclaim and the court omitted finding upon and also *ignored in the judgment* the issue thus presented by the counterclaim. The court said, at page 603 of 26 Cal.App., at page 986 of 147 P.: 'As the evidence is not presented on this appeal, we should assume, in favor of the judgment, that the defendants offered no evidence concerning this counterclaim, and the omission of the court to find upon the issue thus raised by defendants' pleading is not a sufficient ground for reversal of the judgment.' Citing Roberts v. Hall, 147 Cal. 434, 82 P. 66."

[3, 4] If the evidence is not set forth in the record an appellate court will not consider an objection that the court below failed to make a finding upon a material issue, and "'* * * Even though the omitted issue would have affected the judgment rendered, the failure to find thereon is not ground for reversal, unless it is shown by statement or bill of exceptions that evidence was submitted in relation to such issue, for upon appeal from the judgment roll alone the appellate court will not presume there was evidence as to an issue upon which there is no finding where the other findings are sufficient to support the judgment.'" Cavagnaro v. Delmas, 29 Cal.App.2d 352, 356, 84 P.2d 274, 277.

[5] The judgment is affirmed. The purported appeal from the order denying plaintiff's motion to vacate the judgment, such order being nonappealable, is dismissed.

WHITE, P. J., and NOURSE, Justice pro tem., concur.



142 Cal.App.2d 81

VALLEY ELECTRIC CO. OF SACRAMENTO, a corporation, Plaintiff and Respondent,

v.

A. D. SLAGLE et al., Defendants,

Central Surety and Insurance Corporation, a corporation, Defendant and Appellant.

Civ. 8829.

District Court of Appeal, Third District, California.

June 4, 1956.

Action wherein the Superior Court, Sacramento County, J. O. Moncur, J., rendered judgment in favor of plaintiff on contract bond, and the surety appealed. The District Court of Appeal, Peek, J., held that mere fact that Government Code, § 4205, requiring that labor and materials bond inure to benefit of persons entitled to file claims under Code of Civil Procedure, § 1184e, was not corrected until 1953 to show that § 1184e had been renumbered in 1951 as § 1192.1, did not preclude recovery on contract bond reciting that it had been filed by contractor to comply with provisions of Government Code, §§ 4200–4208 and that liability thereunder was subject to provisions of those sections, and acts amendatory thereof, and sections of other codes referred to therein, and acts amendatory thereof.

Affirmed.

1. Schools and School Districts ⇐81(2)

In action against surety on contract bond, evidence sustained findings of trial court as to amount and value of materials shown to have been furnished by plaintiff to subcontractor and that such materials had actually been used in construction of school.

2. Schools and School Districts ⇐81(2)

That Government Code, § 4205, requiring that labor and materials bond inure to benefit of persons entitled to file claims under Code of Civil Procedure, § 1184e, was not corrected until 1953 to show that § 1184e had been renumbered in 1951 as § 1192.1, did not preclude recovery on school contract bond reciting that it had been filed by contractor to comply with provisions of Government Code, §§ 4200–4208 and that liability thereunder was subject to provisions of those sections, and acts amendatory thereof, and sections of other codes referred to therein, and acts amendatory thereof. West's Ann.Code Civ.Proc. §§ 1192.1, 2055; West's Ann.Gov.Code, §§ 4200–4208, 4205, 9604; St.1951, p. 2958, § 5.

Busick & Busick, Sacramento, for appellant.

Devlin, Diepenbrock & Wulff, Sacramento, for respondent.

PEEK, Justice.

This is an appeal by defendant Central Surety and Insurance Corporation from a judgment in favor of plaintiff on a contract bond wherein one Harlan, a contractor, was designated as principal and defendant as surety. The judgment represented the balance due for materials furnished by plaintiff to the subcontractor, defendant Slagle doing business as Slagle Electric Company, together with interest, costs and a reasonable attorney's fee. Defendant's appeal presents two contentions: First, that the evidence is insufficient to support the finding of the trial court as to the balance found to be due; and second, that the court was without jurisdiction to hear the matter by reason of certain legislative enactments. From our examination of the record, we have concluded that the judgment of the trial court should be sustained.

Summarizing the evidence as we must, in favor of the conclusion of the trial court, it appears that the defendant Slagle was the electrical subcontractor under a general contract let to Harlan for the building of the Woodlake School in Sacramento County. At the request of Slagle, plaintiff furnished materials used in the construction of the school in the aggregate value of $12,851.51. The electrical installation for the school was covered by detailed plans and specifications as to the type and quantity of materials to be used. Slagle and certain of his employees, called under section 2055 of the Code of Civil Procedure, testified that other electrical jobs were then under construction, and because of its central location the Woodlake School was used to warehouse certain bulky items; that all merchandise was earmarked for a particular job and was separately ordered, invoiced, billed, used and paid for without diversion; and that every item of merchandise delivered to the Woodlake School for use or installation therein was checked against the actual merchandise on receipt with the exception of three lots purchased under three separate inventories. However, since we are interested only in the balance of $5,415.15 representing the value of materials delivered subsequent to February 10, 1953, and since each of the three lots was delivered prior to that time, such items may be disregarded. Slagle and his employees further testified to the actual physical installation of many identifiable items. The remaining items were, in each instance, referred to as something which the job required and were of a type and quantity actually installed, but the witnesses were not able to identify them specifically as against a particular invoice, as the same comprised standard equipment. In this regard plaintiff has set forth in its brief a schedule showing $4,881.91 of the $5,415.45 (the amount of the judgment) as being specifically identified as having been

delivered to and used in the Woodlake School. It was further shown that the remaining invoices, totaling $533.04, were for merchandise which was of the type and quantity needed for the job; that it was delivered to the job; that the job was completed according to specifications; and that none of such merchandise was diverted elsewhere with the exception of possible minor leftovers.

[1] It is readily apparent from the evidence so summarized that, contrary to defendant's contention, it was amply sufficient to sustain the findings of the trial court as to the amount and value of the materials shown to have been furnished by plaintiff to Slagle and that such materials were actually used in the construction of the school. San Pedro Lumber Co. v. Kries, 111 Cal. App. 466, 295 P. 890.

[2] Defendant's second contention is stated to be that plaintiff's complaint was "* * * founded on a statute which was repealed by the Legislature in 1951, prior to the execution of the contract for the construction of the Woodlake School and prior to the execution of the bond in question." And since that section, 1184e of the Code of Civil Procedure, "was not reenacted until 1953," the complaint failed to state a cause of action. The legislative history of the statutes in question shows that prior to 1951, section 4205 of the Government Code required that a labor and materials bond "shall by its terms inure to the benefit of any and all persons entitled to file claims under Section 1184e of the Code of Civil Procedure." Said section 1184e was repealed by Chapter 1159 of the Statutes of 1951, and reenacted as section 1192.1 of the Code of Civil Procedure. However the reference in section 4205 to section 1184e was not amended accordingly. In 1953 section 4205 of the Government Code was amended so as to reflect the change in the section numbering in the Code of Civil Procedure. In other words, two years elapsed between sessions of the Legislature before the error in such numbering was corrected.

It is specifically provided in section 9604 of the Government Code that,

> "When the provisions of one statute are carried into another statute under circumstances in which they are required to be construed as restatements and continuations and not as new enactments, any reference made by any statute, charter or ordinance to such provisions shall, unless a contrary intent appears, be deemed a reference to the restatements and continuations."

Here the two sections, 1184e and 1192.1, are identical in every respect. The very wording of the statute affecting the change, Statutes of 1951, Chapter 1159, page 2958, section 5, provides in particular: "It is the intent of the Legislature to accomplish by this act only a formal revision of the law relating to mechanics' liens. Nothing in this act contained shall be construed as an alteration in the public policy or legislative intent regarding such law, nor in the meaning or substance thereof."

Even assuming that defendant's contention is correct, that section 1192.1 is separate and distinct from the former section 1184e and that section 9604 of the Government Code and the quoted provisions of Chapter 1159 of the Statutes of 1951, do not apply, it would in no way alter the conclusion of the trial court. By the express language of the bond itself, it is provided that "* * * this bond is filed by the Principal to comply with the provisions of sections 4200 to 4208; inclusive of the Government Code of the State of California and liability hereunder is subject to the provisions of said sections and acts amendatory thereof, and sections of other codes of the State of California referred to therein and acts amendatory thereof." Accordingly, since section 4205 had been amended to make reference to section 1192.1 at the time the original complaint was filed, the issue raised by defendant is without merit.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

SOUTHERN PUBLIC UTILITY DISTRICT, a public corporation, Plaintiff and Appellant,

v.

Jean J. SILVA, Lorraine Townsend, Neal Townsend, Meridian Homes, Inc., a corporation, Scherer-Hobart Co., an unincorporated association, Charles P. Tyson, etc., et al., Defendants and Respondents.*

No. 16746.

District Court of Appeal, First District, Division 1, California.

May 28, 1956.

Hearing Granted July 24, 1956.

Proceeding in eminent domain by a public utility district to acquire improvements and rights of way for its power system. The Superior Court, Contra Costa County, Harold Jacoby, J., entered an order denying plaintiff's motion for an order of abandonment and dismissal of proceeding, and plaintiff appealed. The District Court of Appeals, Fred B. Wood, J., held that condemnation proceeding could not be voluntarily abandoned by public utility district more than 30 days after judgment, notwithstanding extension of the time allowed by statute for payment of award as authorized by statute where the state or a public corporation is the condemner.

Order affirmed.

1. Eminent Domain ⇐246(2)

Extension of the time allowed by statute for payment of award by filing affidavit pursuant to statutory provision for extension of such time to one year, where the state or a public corporation is the condemner, did not extend the time allowed by statute for abandonment of proceeding by condemner and, notwithstanding such extension of time for payment of award, condemnation proceeding to acquire improvements and rights of way for its power system could not be abandoned by public utility district more than thirty days after judgment. West's Ann.Code Civ.Proc. §§ 1251, 1255a.

2. Eminent Domain ⇐246(2)

The time within which a condemner may voluntarily abandon condemnation proceedings is not tolled during the pendency of an appeal by condemner. West's Ann.Code Civ.Proc. § 1255a.

3. Eminent Domain ⇐246(3)

Under statute providing that failure to pay condemnation award within the time limited by statute shall constitute an implied abandonment of proceeding, condemnee has the option to either enforce judgment as best he may or treat such nonpayment of award as implied abandonment of proceeding, but such statute does not give condemner, who has not abandoned proceeding within the time limited by statute, the privilege of treating its own default in payment of award as an abandonment of proceeding, particularly in view of remedies afforded condemnee by statute where condemner fails to pay award within the time required. West's Ann.Code Civ. Proc. §§ 1252, 1255a.

John A. Nejedly, Walnut Creek, King Crosno, Walnut Creek, of counsel, for appellant.

Breed, Robinson & Stewart, Oakland, for respondents.

FRED B. WOOD, Justice.

In this proceeding in eminent domain judgment was rendered authorizing the plaintiff to acquire certain improvements and rights of way for its sewer system upon payment of $62,000 and interest to defendant Scherer-Hobart Co. Neither party appealed.

Within 30 days from the date of the judgment, plaintiff filed an affidavit pursuant to section 1251 of the Code of Civil Procedure, declaring that to provide money necessary to pay the award bonds of the district must be issued and sold. That, of course, extended to one year from the date of the judgment the period of time within which to pay the award.

Six months later (nearly seven months after the date of the judgment) plaintiff filed a notice declaring that it "hereby abandons the proceeding on file herein," and moved for an order of abandonment and for judgment dismissing the proceeding.

* Opinion vacated 301 P.2d 841.

This motion was denied and plaintiff has appealed from the order of denial.

[1] The order must be affirmed. The purported abandonment was without authority in law. It came too late. The applicable statute authorizes a plaintiff to "abandon the proceedings at any time after filing the complaint and before the expiration of thirty days after final judgment." Code Civ.Proc. § 1255a.

Plaintiff's main argument is that sections 1251 and 1255a are to be read together with the result, it claims, that extension of the time within which to pay (by filing the affidavit sanctioned by § 1251) extends the time within which to abandon (by filing the affidavit prescribed by section 1255a).

There is no such interlacing of the provisions of these two sections. They deal with different subjects (payment and abandonment, respectively) and have different purposes and objectives. Section 1251 has been in the code ever since 1872. Originally, it prescribed 30 days after final judgment as the period of time within which the condemner must pay the sum of money assessed, without any provision for extension of that period. Commencing in 1911, Stats. 1911, ch. 80, p. 92, the section has been amended from time to time to provide, as it now does, that this 30 day period may be extended to enable the raising of money by issuing bonds if the state or a public corporation is the condemner.

In January of 1911, the decision in Southern Pacific R. Co. v. Reis Estate Co., 15 Cal.App. 216, 114 p. 808, was rendered, in which the court stated that a condemnor "is entitled to abandon the claim to the property and ask a dismissal before the expiration of thirty days from the entry of the judgment", 15 Cal.App. at page 218, 114 P. at page 809, and held that in such a case the costs to which the condemnee was entitled did not include "necessary and reasonable expenses in preparing for and defending this action", 15 Cal.App. at page 217, 114 P. at page 809, such as expenses incurred for "surveying and engineering work and maps thereof and * * * attorney's fees", 15 Cal.App. at page 218, 114 P. at page 809. By a legislative bill introduced and passed that session and approved by the Governor March 17, 1911, the Legislature added section 1255a to the code, using therein language so similar to that used by the court in the case cited that it is a fair inference that the Legislature had that decision before it and was considering solely the subject of abandonment and costs upon abandonment and was not considering any other subject such as the time within which an award must be paid by a condemner as prescribed in section 1251.

[2] Furthermore, it is now well established that the time within which a condemner may voluntarily abandon pursuant to the sanction accorded by section 1255a, is not tolled during the pendency of an appeal, at least when the condemner appeals. City of Los Angeles v. Deacon, 3 Cal.2d 641, 46 P.2d 165; City of Los Angeles v. Aitken, 32 Cal.App.2d 524, 90 P.2d 377, 94 P.2d 1045. The opinions in these two cases conclusively demonstrate the separate and distinct objectives and independent operation of sections 1251 and 1255a.

Moreover, even if the pendency of an appeal (such as an appeal by a condemnee) were to extend the time limited by section 1255a for abandonment by the condemner, that would not aid the plaintiff's argument herein. There is no appeal pending. The judgment of award to the defendant has become final. The extension, from 30 days to one year, of the time within which the plaintiff must pay the award is for the convenience of the plaintiff in seeking to obtain the money through the medium of a bond issue. Its obligation to pay is fixed and is not subject to diminution or modification by the lapse of time.

[3] Plaintiff makes an additional argument based upon that provision of section 1255a which declares that "failure to comply with section 1251 of this code shall constitute an implied abandonment of the proceeding." That simply means that if the condemner (not having abandoned within the time limited therefor by section 1255a) fails to pay the amount of award (either directly to the defendant or by deposit in court for his benefit) within the time lim-

ited therefor, the condemnee has the option of enforcing the judgment as best he may or of treating such nonpayment as an implied abandonment. It would be unreasonable to ascribe to the Legislature, as plaintiff would have us do, an intent to authorize voluntary abandonment not later than 30 days after entry of judgment and then give the condemner the privilege of treating his own default as an abandonment, especially in view of the remedies accorded the condemnee by the provisions of section 1252 of the Code of Civil Procedure when the condemner fails to pay within the time required.

The order appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.



142 Cal.App.2d 21

Robert G. PEARSON and Marjorie M. Pearson, Plaintiffs and Respondents,

v.

Max BAUM and Evelyn I. Baum, Defendants and Appellants.

Civ. 8838.

District Court of Appeal, Third District, California.

May 29, 1956.

Hearing Denied July 24, 1956.

Action for declaratory relief to construe meaning of certain provisions of note, secured by deed of trust. From adverse judgment entered in the Superior Court, Yuba County, E. T. Manwell, J., the defendants appealed. The District Court of Appeal, Schottky, J., held that the phrase "net income", as used in note, secured by deed of trust, to describe amount of installment to be paid on principal and interest of note, does not intend that realty taxes could be deducted from gross income in arriving at the net income.

Affirmed.

Exchange of Property ⇐4

Where plaintiffs exchanged ranch for rental property of defendants, and defendants, in addition to rental property exchanged, executed installment note payable to plaintiffs, secured by deed of trust, which note contained provision that principal and interest were payable in installments of 33⅓ per cent of net income from lease or operation of the ranch land, taxes on the ranch property could not be deducted from gross income in arriving at meaning of the phrase "net income" in the note. West's Ann.Civ.Code, §§ 1643, 1654, 1655: West's Ann.Code Civ.Proc. § 1860.

See publication Words and Phrases, for other judicial constructions and definitions of "Net Income".

Robert W. Steel, Marysville, for appellants.

Rich, Fuidge & Dawson, Marysville, for respondents.

SCHOTTKY, Justice.

Plaintiffs commenced an action against defendants for declaratory relief to construe the meaning of certain provisions of a promissory note.

The following facts are admitted by the pleadings:

In March of 1953 respondents, the Pearsons, exchanged a ranch in Yuba County, California, for rental property of the appellants, the Baums, in the southern part of the state. In addition to the rental property exchanged and as consideration for the ranch, appellants executed a note payable to respondents, secured by deed of trust, on the Yuba County ranch property.

The note was in the principal sum of $49,828.02, bearing 5 per cent interest from date.

The note, deed of trust and the escrow agreement covering the transaction all bear the same terms which read:

> "Principal and interest payable in installments of 33⅓ per cent of net income from lease or operation of the land described in trust deed or more."

The transaction was consummated and the appellants took possession of the ranch

and in early 1954 paid respondents the sum of $1,500.04 as moneys due on the 1953 installment of the note.

Accompanying the installment payment was a statement of appellants showing how the $1,500.04 was computed. (Plaintiffs' Exhibit B.)

The statement shows the income from the ranch in 1953 to be as follows:

Sale of Prunes.....	$2,380.46	
Share of Crop Rent...	4,902.71	
Total		$7,283.17

The statement then claimed the following expenses as deductible from the gross income to arrive at net income:

Labor	$ 74.00	
Spraying	154.53	
Fuel Oil	4.50	
Bean Cleaning and Storage	167.90	
Taxes	832.75	
Insurance	16.04	
Depreciation on 20 acres of prunes....	1,333.33	
Depreciation on well and pump	200.00	
Total		$2,783.05

The statement proceeded to subtract the listed expenses from the above income and arrived at a total income of $4,500.12 for the year 1953. Taking one-third of this, the statement arrived at the figure of $1,-500.04 as the amount due on the note in the year 1953.

Plaintiffs objected to the deduction by defendants of $832.75 taxes, $16.04 liability insurance and $1,533.33 depreciation as costs in computing the "net income", and this action for declaratory relief was filed. The trial court gave judgment for plaintiffs and concluded that the words "principal and interest payable in installments of 33⅓ per cent of the net income from lease or operation of the land" meant:

> "Gross income from the operation of the land, the subject of said agreement and note, after deducting therefrom expenses necessarily incurred to produce such income. That said expenses do not include taxes or liability insurance amongst other things."

Defendants have appealed from that portion of the judgment which decrees:

> "That said expenses do not include taxes.
>
> "That plaintiffs have judgment against the defendants in the sum of $282.93 with interest thereon. * * *"

Plaintiffs have not appealed, so the sole issue upon defendants' appeal is whether or not taxes on real property can be deducted from gross income in arriving at the meaning of net income under the note, deed of trust and escrow agreement in the instant case.

Appellants contend that "There is no substantial evidence to support the finding of the trial court that the cost of taxes is not deductible, under the contract of the parties, from gross income in order to ascertain net income." Appellants urge that the conversations of the parties demonstrate that they intended that taxes would be deducted. They state that the formula originally embodied in the exchange agreement, which specified a fixed maturity date for the loan and fixed annual payments, was flatly rejected by Baum at the Title Company and a week previously upon the occasion of Dr. Pearson's visit to Baum's home in Arcadia, and that on both occasions Baum specifically mentioned as objection to such a formula the possibility that there might not be enough income from the property to pay taxes; that replacement of trees in the prune orchard would be required; that he would not undertake any obligation that might put him in the position of facing foreclosure.

Respondents deny that the conversations of parties demonstrate any such agreement and a careful reading of the record reveals a substantial conflict upon the issue. It is true that appellant Mr. Baum objected to any fixed interest or principal payments but there is a conflict as to whether or not respondents agreed to any deduction of taxes from gross income. The language

"Principal and interest payable in installments of 33⅓ per cent of net income from lease or operation of the land described in deed or more" was dictated by appellant Mr. Baum, and respondents cite the portion of Section 1654 of the Civil Code which reads:

> "In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party; * * *."

Appellants argue also that in every day acceptance the phrase "net income" is construed to mean that which remains after expenses of an operation including taxes have been deducted from gross income. That this is true may be conceded, but the written agreement in the instant case is so unusual that it is difficult to apply ordinary rules of construction to it. As a result of an exchange of property a 280 acre farm valued at considerably in excess of $100,000 was to be conveyed to appellants subject to a note in the sum of $49,828.02 bearing 5% interest and secured by a deed of trust. Appellants did not wish to be subject to fixed payments, so at their suggestion and insistence the note was to be payable "in installments of 33⅓% of net income from lease or operation of the land." It must be borne in mind that the principal was approximately $50,000 and that the annual interest would be approximately $2,500.

Section 1643 of the Civil Code provides:

> "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."

Section 1655 of the Civil Code provides:

> "Stipulations which are necessary to make a contract reasonable, or conformable to usage, are implied, in respect to matters concerning which the contract manifests no contrary intention."

And Section 1860 of the Code of Civil Procedure provides:

> "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the Judge be placed in the position of those whose language he is to interpret."

Under all of the circumstances of the instant case there is considerable force in respondents' argument that while the contract does not anticipate an early retirement, it must have contemplated that the indebtedness would be repaid some day and $1,500 would not even meet the interest payment for the year 1953, and to agree with appellants' contention that taxes on the land could be deducted from the gross proceeds of the operation of the land would be unreasonable and unrealistic. We are inclined to agree with respondents' argument that the words "from lease or operation of the land" limits the type of deductions meant by the parties to those expenses actually incurred in the production of crops or in connection with lease operations.

The trial court was confronted with a very unusual contract and with highly conflicting testimony as to the intention of the parties. Bearing in mind the code sections hereinbefore quoted, we believe that the construction of the trial court that the language "net income from lease or operation of the land" was not intended to mean and did not mean that appellant owners of the land could deduct the taxes on the land from said "net income", was not only entirely reasonable, but is sustained by the evidence and the law.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

141 Cal.App.2d 841

BERKELEY UNIFIED SCHOOL DISTRICT OF ALAMEDA COUNTY, State of California, a public corporation, Petitioner,

v.

CITY OF BERKELEY, a municipal corporation, Claude B. Hutchison, as Mayor of the City of Berkeley, Arthur K. Beckley, Jeffery Cohelan, John K. DeBonis, Arthur Harris, Donald H. Parce, George A. Pettitt, Weldon L. Richards and Mrs. Lee Breckinridge Thomas, as Councilmen thereof, and Mabel W. Jensen, as Auditor of the City of Berkeley, a municipal corporation, Respondents.

Civ. 17177.

District Court of Appeal, First District, Division 2, California.

May 28, 1956.

Original proceeding for a writ of mandamus ordering municipality to levy school tax, and ordering municipal treasurer to pay over for school use certain school tax money previously collected. The District Court of Appeal, Devine, J. pro tem., held, inter alia, that section of municipal charter providing for mandatory assessment of school tax by city council at request of school board was constitutional and valid, and funds collected pursuant to a prior tax levy thereunder would be ordered turned over to county treasurer for school use.

Judgment in accordance with opinion.

1. Mandamus ⇐14(1, 3)

Ordinarily the writ of mandamus does not lie to direct the performance of an act because of a merely anticipated demand and refusal, but under extraordinary circumstances an actual refusal may be excused and the writ may be issued if the attitude of a respondent shows that if a demand were made it would be refused.

2. Mandamus ⇐182

Courts will not issue mandamus to become effective only if a school board acts in a certain way.

3. Mandamus ⇐112

Where question of whether school board would request city of Berkeley city council to levy a tax in accordance with a provision of charter was uncertain because of other possible resources at board's disposal, a writ of mandamus would not be issued to command council members to perform that which under eventualities they might never be obliged by law to do. St. 1951, p. 4448, § 57.

4. Mandamus ⇐63

Mandamus may be issued to a board or person to compel performance of an act which the law specifically enjoins as a duty resulting from an office. West's Ann.Code Civ.Proc. § 1085.

5. Mandamus ⇐63

It is a proper office of the writ of mandamus to force a particular action by an officer when the law clearly establishes petitioner's right to such action, and in particular to compel an act to be done by an officer who refuses to perform because of an erroneous conception of his duties.

6. Mandamus ⇐100

If auditor of city of Berkeley was withholding school district's funds under erroneous belief that section of city charter under which such taxes were levied and collected was unconstitutional, writ of mandate upon petition of school district was appropriate remedy to secure delivery of funds rather than simple action for money. St.1951, p. 4448, § 57.

7. Schools and School Districts ⇐99

Taxes of school districts are governed by state law, but as to municipal taxes for the benefit of schools a chartered municipality is free to act in furtherance of the policy of the state in favor of diffusion of knowledge and intelligence. West's Ann. Const. art. 9, § 1.

8. Schools and School Districts ⇐99

Statutory provisions relating to school district taxes do not operate to appropriate the entire field of taxation for schools to the state and thus to exclude chartered cities from providing a more generous support to education. West's Ann.Education Code, §§ 6357–6361.

9. Schools and School Districts ⇐99

Section of city of Berkeley charter providing for mandatory assessment of

school tax by city council at request of school board is not rendered invalid merely because it takes discretion in the matter from the city council. St.1951, p. 4448, § 57.

10. Schools and School Districts ⇐99

A municipality operating under a charter may decide for itself to vest taxing authority in a board of education, either completely, or virtually, by taking discretion in the matter from its municipal council.

11. Municipal Corporations ⇐79

If a chartered municipality chooses to render financial assistance to education, that is a municipal affair, and therefore the choice of a plan of assistance, not in conflict with state statute, including the delegation of powers of government, as adopted by the voters in approving the charter provision, is within the powers of a chartered city.

12. Schools and School Districts ⇐103(1)

Section of city of Berkeley charter providing for mandatory assessment of school tax by city council at request of school board takes precedence over and therefore does not conflict with other parts of charter giving power to council to levy taxes, vesting the municipality's legislative power in a city council, and requiring boards, under budgetary provisions, to submit assessments to municipal manager. St.1951, p. 4448, § 57.

13. Statutes ⇐194

A particular expression in a statute takes precedence over one that is general.

14. Schools and School Districts ⇐103(1), 110

Section of city of Berkeley charter providing for mandatory assessment of school tax by city council at request of school board was constitutional and valid, and funds collected pursuant to prior tax levy thereunder would be ordered turned over to county treasurer for school use. St. 1951, p. 4448, § 57.

J. F. Coakley, Dist. Atty. of Alameda County, R. Robert Hunter, Chief Asst. Dist. Atty., Frank D. Parker, Agnes R. Polsdorfer, Asst. Dist. Attys., Richard J. Moore, Marjorie Nowell, Deputy Dist. Attys., Oakland, for petitioner.

Fred C. Hutchinson, City Atty. of City of Berkeley, Robert T. Anderson, Asst. City Atty., Berkeley, for respondent.

DEVINE, Justice pro tem.

We have before us an original process, the petition of Berkeley Unified School District of Alameda County for a writ of mandate to compel the City of Berkeley and the members of the city council thereof, to levy a tax for school purposes, and to compel the auditor of the City, Mabel W. Jensen, to deliver to the county treasurer for the use of the schools certain tax moneys heretofore collected. The law under which the writ is sought is section 57 of the Charter of the City of Berkeley, St. 1951, p. 4448. That section provides that, if requested by resolution of the board of education, it shall be mandatory for the council to assess and to collect an annual tax for school purposes in such amount as the board of education shall request, but not in excess of thirty-five cents per one hundred dollars assessed valuation of property within the city, and that the proceeds shall be deposited with the county treasurer.

The petition alleges that request was made by the board of education to levy a tax amounting to thirty-five cents per hundred dollars for the fiscal year 1955–56 for school purposes, and that the city council refused to do so, and that it will continue to refuse to levy any tax provided for in section 57 of the charter. The petition also alleges that request was made, pursuant to said section 57, by the board of education for the fiscal year 1954–55 for a levy that did not exceed the limitation; that the levy was made and that the sum of $515,000 was collected, all of which was turned over to the county treasurer except the sum of $38,823.62, which sum the city auditor is withholding under a claim that section 57 of the charter is invalid.

The first question before us is that of the propriety of the writ of mandate as a remedy, assuming that section 57 of the charter is valid, and this question to be

considered, first, as to the alleged expected refusal to levy the tax and, second, as to the refusal of the auditor to turn over the withheld amount.

No relief is sought by petitioner for the refusal of the city council to levy the tax for the year 1955–56, the board of education being content to resort to funds otherwise provided for that year, and the allegation of that refusal has been made as a basis for the allegation that the city council will continue to refuse to make the levy. Respondents have met the petition, so far as the propriety of the writ as to future levies is concerned, with a demurrer, in which they raise the point that it is not alleged that a request for a levy has been made for any coming year and, of course, no allegation of a refusal. Also they have filed an answer in which in addition to a denial that request or refusal has occurred for any year subsequent to 1955–56, it is alleged that on June 5, 1956, the voters of the City of Berkeley will have before them two propositions for increasing the maximum tax rate within the school district (presumably under section 6358 of the Education Code), and that if either of said propositions carries, petitioner will not need tax money to be levied under section 57 of the Charter.

[1] The writ of mandate does not lie to direct the performance of an act because of a merely anticipated demand and refusal. George v. Beaty, 85 Cal.App. 525, 531, 260 P. 386; Friedland v. Superior Court, 67 Cal.App.2d 619, 628, 155 P.2d 90; Palmer v. Fox, 118 Cal.App.2d 453, 455, 258 P.2d 30. Under extraordinary circumstances an actual refusal may be excused when the attitude of respondent shows that if a demand were made, it would be refused, Jensen v. McCullough, 94 Cal.App. 382, 389, 271 P. 568, and possibly we could infer that if a request were made under section 57, it would be refused. However, when we came to the question whether or not a request actually will be made, we are met with uncertainty.

[2, 3] We cannot know whether a request for a tax levy will be made for 1956–57 by the board of education, because the request, we may assume, would be made only after conscientious study of the needs of the schools, the board considering the resources at its disposal, at least some of which, in view of the approaching election, are quite uncertain. Courts will not issue mandamus to become effective only if a board acts in a certain way. McGinnis v. Mayor and Common Council of City of San Jose, 153 Cal. 711, 715, 96 P. 367. We shall not command respondent city councillors to perform that which under eventualities they may never be obliged by law to do.

In any case, because we do pass on the question of the validity of section 57 of the Charter, later in this opinion, and because that question is the only source of doubt of respondents as to their duties, there is ample declaration of the rights and duties of the parties to guide their future actions.

There is no denial by respondent city auditor that she withholds, against petitioner's demand, funds collected under section 57 and that she bases the withholding upon asserted invalidity of that section. However, it is argued by respondents that the remedy of the writ of mandate is unavailable to petitioner because there is a plain, speedy and adequate remedy at law, namely, a simple action for money.

[4–6] Mandamus may be issued to a board or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office. Section 1085, Code of Civ.Proc. It is a proper office of the writ to force a particular action by an officer when the law clearly establishes petitioner's right to such action, Inglin v. Hoppin, 156 Cal. 483, 491, 105 P. 582, and, in particular, to compel an act to be done by an officer who refuses to perform because of an erroneous conception of his duties. Consolidated Printing & Publishing Co. v. Allen, 18 Cal.2d 63, 66, 112 P.2d 884. It has been pointed out that mandamus against a public officer is a more adequate remedy than declaratory relief, because it commands performance, while a declaratory judgment simply pronounces the duty to perform them. Leahey v. Department of Water and Power of City

of Los Angeles, 76 Cal.App.2d 281, 285, 173 P.2d 69. As compared with an action at law for money, the writ of mandate not only better comports with the dignity of public officials who stand by their duties as they see them, but also carries through to conclusion by directing issuance of a warrant, Goldsmith v. Board of Education, 63 Cal.App. 141, 146, 218 P. 296, while a judgment at law, even when final, with its auxiliary, the issuance of a writ of execution, might well be inadequate and certainly would be inappropriate. We conclude that if the city auditor is withholding the funds erroneously, the writ of mandate is the appropriate remedy.

[7] This brings us to the question of substantive law, whether or not section 57 of the Charter of the City of Berkeley is valid. The section is perfectly clear and neither side disputes its meaning. If it is valid, the levy requested by petitioner, not in excess of the $.35 limitation, must be made. The first contention of respondents which we shall consider is, that the general laws of the state provide for the levying of taxes for school districts, and neither by these laws nor by the constitution of the state is the board of education given the right to require the imposition of a city tax for school purposes as distinguished from a school district tax. The statutes of the state do not expressly give such right, nor do they forbid it. However, section 2201 of the Education Code states that the powers and duties of boards of education in cities are as prescribed in the laws governing the respective cities; and the law governing the City of Berkeley municipal affairs is its charter. The constitution does not expressly give the power of taxation to city boards of education but it does allow a chartered city complete authority in municipal affairs. Constitution of California, Art. XI, sec. 8. Although education in general is a state affair, it may be made a municipal affair in part when the city acts in promotion and not in derogation of the purposes of the state. This proposition was firmly established in Whitmore v. Brown, 207 Cal. 473, 480, 279 P. 447. The court in that case distinguished, 207 Cal. at page 481, 279 P. at page 450, between taxes of the school districts and city taxes for the benefit of the schools. As to the former, the state law governs; but as to the latter, a chartered city is free to act in furtherance of the policy of the state in favor of diffusion of knowledge and intelligence. Constitution of California, Art. IX, sec. 1.

[8] Thus, the sections of 6357 to 6361, inclusive, of the Education Code, which are cited by respondents, do not operate to appropriate the entire field of taxation for the schools to the state and thus to exclude chartered cities from providing a more generous support to education.

[9] The next contention of respondent is that section 57 of the charter is invalid because it takes discretion in the matter from the city council. It is true that the section leaves no discretion in the matter to the council, but that does not render the section invalid. In Esberg v. Badaracco, 202 Cal. 110, 121, 259 P. 730, the court found no constitutional inhibition against the conferring by statute of the power to determine the amount of school tax upon the board of education, with an absolute requirement on the board of supervisors of the City and County of San Francisco to levy the tax in that amount.

The case of McCabe v. Carpenter, 102 Cal. 469, 36 P. 836, cited by respondents, was authority only for the proposition that delegation of taxation power to an executive officer, the superintendent of schools, was unconstitutional, as was pointed out in the Esberg case, supra, 202 Cal. at page 121, 259 P. at page 734.

[10, 11] In the Esberg case, the statute upheld was section 1612a of the Political Code, as it then existed (substantially the same provisions presently are in sections 6353 and 6355 of the Education Code) and that section referred to school district taxes within a county or a city and county, as distinguished from a city tax. Also, section 1612a of the Political Code was passed pursuant to constitutional mandate. Const. of Calif. Art. IX, sec. 6. However, we believe that a city operating under a charter may decide for itself to vest the taxing authority in the board of education, either completely, or virtually, by denying discre-

tion in the matter to the city council. At this point the distinction made in the Whitmore case, supra, comes into play again. Education, generally, is a state affair; but if a chartered city chooses to render financial assistance to education that is a municipal affair; and, therefore, the choice of a plan of assistance, not in conflict with state statute, including the delegation of powers of government, as adopted by the voters in approving the charter provision, is within the powers of a chartered city.

In Adams v. Wolff, 84 Cal.App.2d 435, 190 P.2d 665, a charter provision was upheld which required the legislative body of San Francisco to fix the pay of certain employees at a rate determined by the civil service commission to be that existing for the same crafts in private employment, as obtained by collective bargaining, even despite general laws of the state forbidding collective bargaining. The city's legislative body was left with no discretion in the matter.

Respondent contends that the Adams case is distinguishable in that it did not deal with the taxing power and that it was concerned with a municipal affair, the fixing of salaries, and not a state affair, such as is education. As to the latter of these arguments the distinction in the Whitmore case, supra, applies. It is true that the Adams case did not involve the taxing power, but it did recognize that it was wholly within the power of the electorate of a chartered city to compel the city's legislative body to adopt as a wage scale, rates agreed upon through collective bargaining by employers and unions entirely outside any governmental agency. These rates, of course, would be paid by taxes, so that, although the Adams case does not have to do directly with the taxing power, it does have to do with the incurring of municipal expenses and indirectly with taxes and it sustains a charter provision which takes discretion, in a matter otherwise of legislative nature, away from the legislative body.

Respondents cite the case of Board of Education of City of Sacramento v. Board of Trustees, 96 Cal. 42, 30 P. 838, decided in 1892, claiming that the case holds that an act (therein, the act incorporating the city), making it mandatory for a city council to levy a certain school tax would be invalid. If it did so hold, no doubt it would have lost its effect by the Esberg ruling in 1927, but we find that the earlier case simply held that the act, as it then existed, did allow discretion as to school taxes to remain with the city council. The case involved a question of interpretation, not a question of validity, of the act of incorporation.

[12, 13] Next, it is contended by respondent that section 57 conflicts with other parts of the Charter of the City of Berkeley. Section 49 of the charter, St.1909, p. 1236, gives power to the city council to levy taxes and section 38 vests the municipality's legislative power in the city council. Section 57 must be held to control over these upon the grounds, first, that section 57 was enacted later and second, that a particular expression takes procedence over one that is general.

Sections 52, 53 and 54 of the charter, St.1923, p. 1546, have to do with the budgetary provisions of the charter. It is argued that the board of education is one of the city's boards and that it must, as other boards are required to do under the budgetary provisions, submit its estimates to the city manager who will submit a tentative budget for the city council to consider and to act upon. Here, again, the section 57 must be held controlling as later and as specific. It is our conclusion that when the people of the City of Berkeley adopted section 57 in 1951, they intended it to set up an independent procedure for the board of education, so that its request for a tax levy would not be subject to the ordinary budgetary controls.

The annual tax levy is provided for in section 56 of the charter, St.1951, p. 4447, and refers only to taxation to raise amounts estimated to be required in the budget, but section 57 with its specific provision for the school tax levy which the section declares shall be "in addition to the tax for municipal purposes" is exclusive thereof.

[14] The petition for a peremptory writ of mandate to the city council and the members thereof is denied, without prejudice, solely on the ground that no request for a

tax levy for the fiscal year 1956–57 has yet been made; section 57 of the charter of the City of Berkeley is declared constitutional and valid; and it is ordered that a peremptory writ issue directing Mabel W. Jensen, as auditor of the City of Berkeley, to issue her warrant on the city treasury of all funds remaining therein which have been realized from tax levies for school purposes pursuant to section 57 of the Charter of the City of Berkeley, payable to the county treasurer of the County of Alameda.

NOURSE, P. J., and DOOLING, J., concur.



141 Cal.App.2d 891

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Charles CAHAN, Defendant and Appellant.

Crim. 5555.

District Court of Appeal, Second District, Division 3, California.

May 28, 1956.

Hearing Denied June 27, 1956.

Defendant was charged in two counts with robbery. From a judgment of conviction and an order denying his motion for new trial in the Superior Court of Los Angeles County, H. Burton Noble, J., the defendant appealed. The District Court of Appeal, Vallée, J., held that the evidence sustained the conviction as against the claim of alibi that there were no reversible errors in the rulings at trial, and that where person who was acting as committing magistrate had been judge of the municipal court and had been permitted to retire because of physical disability and with the consent of the chairman of the judicial council, had been assigned to sit in a municipal court, that defendant was legally committed by a magistrate.

Affirmed.

1. Criminal Law ⇐260(11), 1159(4)

It is the exclusive province of the trial judge or the jury to determine the credibility of a witness and the truth or falsity of the facts on which a determination depends.

2. Criminal Law ⇐1159(4)

A reviewing court cannot reject the testimony of a witness that has been believed by the trier of facts unless there exists either a physical impossibility that it is true or its falsity is apparent without resorting to inferences or deductions.

3. Criminal Law ⇐1159(2)

Even testimony which is subject to justifiable suspicion does not justify the reversal of a judgment.

4. Criminal Law ⇐1159(2)

A reviewing court will not hold unsupported a jury's finding of guilt merely because it might reasonably draw different inferences from those the jury reasonably drew or might not be convinced beyond a reasonable doubt of the guilt of the defendant.

5. Criminal Law ⇐339

On question of identification of defendant as perpetrator of an offense, when a witness states "I believe", he is not necessarily guessing.

6. Criminal Law ⇐566

To sustain a conviction, it is not necessary that identification of defendant be positive and free of inconsistencies.

7. Criminal Law ⇐1159(5)

If testimony of identifying witnesses is worthy of credence and convinces jury, latter's finding is final unless trial judge should upset the verdict.

8. Criminal Law ⇐553, 554

The jury is not compelled to believe the testimony of defendant and his alibi witnesses.

9. Criminal Law ⇐572
Robbery ⇐24(3)

Evidence sustained conviction of robbery as against claim of alibi and lack of identification of defendant as perpetrator of the offense. West's Ann.Pen.Code, § 211.

10. Judges ⇐7

The statute providing that retired judges so long as entitled to receive retirement allowances shall be judicial officers and that any such retired judge may with his own consent be assigned to sit in court of like or higher jurisdiction than that court from which he was retired is constitutional. West's Ann.Gov.Code, § 75081.

11. Criminal Law ⇐304(16)

The District Court of Appeal takes judicial notice of the records of the judicial council. West's Ann.Code Civ.Proc. § 1875, subds. 3, 5.

12. Criminal Law ⇐1144(5)

Where person who acted as a committing magistrate had been judge of the municipal court and had been permitted to retire under the Judges' Retirement Act because of physical disability, District Court of Appeal must assume, in absence of a contrary showing, that at the time judge was assigned recovery had been made from any disability that prevented service as a judge, and that the chairman of the Judicial Council, in performing his official duty in making the assignment, regularly performed that duty and determined that a recovery had been made. West's Ann.Gov.Code, §§ 75060, 75081; West's Ann.Code Civ.Proc. §§ 1875, subds. 3, 5, 1963, subds. 14, 15.

13. Judges ⇐7

Where person who acted as committing magistrate had been a judge of the municipal court and was permitted to retire under the Judges' Retirement Act because of physical disability and he had been assigned to sit in the municipal court by the chairman of the Judicial Council with the consent of the judge, defendant was regularly committed by a magistrate and his motion to dismiss the information must be denied. West's Ann.Gov.Code, §§ 75060, 75081; West's Ann.Code Civ.Proc. §§ 1875, subds. 3, 5, 1963, subds. 14, 15; West's Ann.Pen. Code, § 995.

14. Criminal Law ⇐1153(6)

A finding of the trial court that sufficient showing has been made that witness whose testimony has been taken before the committing magistrate cannot with due diligence be found within the state will not be disturbed on review unless his discretion has been abused, that is, unless it appears that the evidence is insufficient to support the findings. West's Ann.Pen.Code, § 686.

15. Criminal Law ⇐543(2)

Evidence established that the witness could not be found within the state so as to permit his testimony taken at defendant's preliminary examination to be read. West's Ann.Pen.Code, § 686.

16. Criminal Law ⇐594(1)

In robbery prosecution, record did not establish an abuse of discretion in denying a motion for a continuance for the purpose of taking the deposition of a witness who testified at defendant's preliminary examination and who was absent at trial. West's Ann.Pen.Code, §§ 1334–1334.6.

17. Constitutional Law ⇐266
Searches and Seizures ⇐7(1)
Telecommunications ⇐495

In robbery prosecution, permitting police officer to testify to what he heard of telephone conversation between witness whose property was taken and defendant was not violative of the statute proscribing an unauthorized connection with a telephone, proscribing interception of a communication and divulging the contents thereof and proscribing conduct of employees of telephone company and as amounting to an unlawful search and seizure and a denial of due process of law. West's Ann. Pen.Code, § 640; West's Ann.Public Util. Code, § 7903; Federal Communication Act, § 605, 47 U.S.C.A. § 605.

18. Criminal Law ⇐957(1)

Verdict of a jury cannot be impeached by affidavits of third persons which merely set forth substances of extrajudicial statements made by the jurors.

19. Criminal Law ⇐957(1)

A juror cannot impeach his own verdict except in the single case of verdict arrived at by chance or lot.

20. Criminal Law ⇐957(3)

In robbery prosecution, attempt to impeach the verdict of the jury through the use of hearsay statement as to what oc-

curred during the time the jury was deliberating and speculation on effect of newspaper publicity was not permissible.

21. Witnesses ⇐372(2)

In robbery prosecution, cross-examination of a police officer by seeking to read to witness a part of the decision of the Supreme Court and asking the officer whether he had read it and to show thereby that he was biased against the defendant was properly denied.

22. Witnesses ⇐277(1)

Where defendant testifies on cross-examination that he did not commit the offenses, permissible scope of cross-examination is very wide.

23. Witnesses ⇐277(4)

In robbery prosecution, where on direct examination defendant testified he did not commit the offenses charged, cross-examination directed to matter implicit in defendant's denial with respect to his occupation as a bookmaker was not improper where the prosecution was based on the theory that defendant was a bookmaker with whom another had placed bets with the victim and that he was the one who suffered the loss and that was why the defendant went to the victim's apartment for the purpose of robbery.

24. Witnesses ⇐277(2)

In robbery prosecution, where police officer testified to recordings of the defendant's voice over the telephone and defendant testified on cross-examination that he had known the officer for a couple of years and had talked to him several times, cross-examination whether defendant had heard recordings of his voice in the presence of the officer was not error.

25. Criminal Law ⇐1144(15)

The appellate court cannot assume that the jury disregarded the court's instructions to disregard a statement made by the district attorney.

Albert Jack Chotiner and Russell E. Parsons, Beverly Hills, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, and Norman H. Sokolow, Deputy Attys. Gen., for respondent.

VALLEE, Justice.

Defendant was charged in two counts of an information with robbery. He was convicted by a jury as charged in both counts. He appeals from the judgment and from the order denying his motion for a new trial.

On December 15, 1954 Lee Cobert was living in an apartment at 1455 North Hayworth, Los Angeles. The apartment consisted of one room, a bathroom, and a small bar. Sam London was living with Cobert and had been for about 2 months. Before December 15 London had been betting on horse races, but not at a track. He would call "Scottie" and make a bet and, so far as he knew, Scottie would place the bet with a bookmaker. On December 15 London owed Scottie and, through him, the bookmaker, about $1,200 which had accumulated over a period of 2 weeks. Scottie asked him for the money; he told Scottie when he got the money he would pay. Scottie never mentioned the name of the bookmaker.

On the night of December 15, 1954 London and Cobert retired close to midnight. About 1 a. m. on December 16 London was awakened by a knock on the door. He asked who was there. A voice said it was "Tony," to open the door or they would come through it. He did so and saw 2 men. He testified he believed one of them was defendant. He also testified he may have seen defendant prior to that time, he had heard him referred to as "Chuck" on a prior occasion. Defendant and the other person, who was unknown to London, entered the apartment. Cobert was still in bed but awake. The unknown person asked which one was London and the latter identified himself. That person said London owed $1,200 for a bookmaking debt and they had come to collect it. London said he did not have that kind of money at that time. On the headboard of Cobert's bed there was a wallet with $450 in it and a money clip with $50 or $60 in it. The unknown man removed the money from the

wallet and clip and placed it in his pocket. Defendant asked whether London had any money. London said all he had was about $2 which he took from his pocket and handed to defendant. London's watch, valued at about $150, was lying on the headboard of his bed. Defendant saw the watch and said he would take it. London asked him not to, saying it was a gift from a relative. Defendant said that when the balance of the money was paid the watch would be returned, and he took London's watch. The unknown man said they would be back Saturday for the rest of the money. London and Cobert were in fear and the property of each was taken against his will. Pen. Code, § 211. Defendant and the unknown person were in the apartment not more than 10 minutes.

Wooters, Phelps, and Horrell, members of the Los Angeles Police Department, went to the apartment about 5 p. m. on December 16; they identified themselves and Cobert invited them in. Wooters asked Cobert if he might put a recorder on Cobert's telephone. Cobert gave his permission. The officers installed an induction coil on the receiver of the telephone and ran wires to a recording device which was plugged into an electrical outlet in the wall. The device was placed on a couch. London called the apartment on the telephone and Wooters talked to him. London then went to the apartment, saw the recording device, and gave the officers permission to operate it. About an hour after Wooters arrived there was a telephone call and Cobert answered. When Cobert concluded his conversation Wooters suggested to London that the latter take the telephone and ask the party for his watch. Wooters said he would listen in. London took the telephone and talked into it. He held the earpiece at an angle from his ear with only the lower part touching his ear. Wooters stood at London's side with his head close to London's ear. London made no objection to Wooters' listening in on the telephone conversation and he had no objection to Wooters' doing so. London said to the party at the other end that he would like to get his watch back. The party replied that he would get it back "on Saturday when the matter is taken care of." London stated the watch was a gift from a relative and he would like very much to have it returned. The party assured him he would get it back on Saturday "when the balance was taken care of."

Wooters testified he had known defendant about 3 years. When the call came into the apartment Cobert answered the telephone and talked for a short period, then London took the phone. He listened to the conversation. He had London's permission to do so. He recognized the voice on the other end as defendant's. London said, "Hey, Chuck, when am I going to get that watch back?" Defendant said, "You will get the watch back when you come up with the money. I will see you Saturday." Defendant is known throughout the city as Chuck.

The watch was returned to London the morning of Saturday, July 16, 1955 (the trial commenced July 21, 1955). London heard a knock on the door of the apartment and answered. A person he had never seen before handed him a package, stating it was a present for London. The person left immediately. The package contained London's watch.

The defense was an alibi. Defendant and Harold Coates testified they were together the night of December 15 and the early morning of December 16, that they left the Dutch Oven restaurant at Beverly and Vermont about 12:30 a. m. and arrived at the Candle Light restaurant and bar at Sunset and Laurel Canyon Boulevard about 1 a. m., remaining there until about 2:15 a. m. The manager of the Candle Light testified defendant and Coates arrived at the restaurant shortly before 1 a. m., December 16, and left a little after 2 a. m. The Candle Light was a quarter of a mile from the apartment house on Hayworth. Wooters testified he walked the distance in 2½ minutes.

[1–4] Defendant first contends the evidence is insufficient to support the verdicts. He attacks the credibility of London, asserts the evidence is woefully weak and neither clear nor good, challenges London's identification of defendant, and argues the convincing force of the alibi. It is the ex-

clusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which a determination depends. A reviewing court cannot reject the testimony of a witness that has been believed by the trier of fact unless there exists either a physical impossibility that it is true or its falsity is apparent without resorting to inferences or deductions. Even testimony which is subject to justifiable suspicion does not justify the reversal of a judgment. People v. White, 43 Cal.2d 740, 747, 278 P.2d 9. A reviewing court will not hold unsupported a jury's finding of guilt merely because it might reasonably draw different inferences from those the jury reasonably drew or might not be convinced beyond a reasonable doubt of the guilt of the defendant. People v. Whitehurst, 112 Cal.App.2d 140, 143, 245 P.2d 509.

[5–9] Defendant says London's identification of defendant is no evidence of identification because when asked if he recognized the men who entered the apartment on the morning of December 16 he said, "I believe the defendant is one of the individuals." When a witness says "I believe" he is not necessarily guessing. People v. Miller, 134 Cal.App.2d 792, 794, 286 P.2d 415. To sustain a conviction, it is not necessary that identification of the defendant be positive and free of inconsistencies. People v. Mazza, 135 Cal.App.2d 587, 598, 287 P.2d 798. "If the testimony of the identifying witnesses is worthy of credence and convinces the jury, the latter's finding is final unless the trial judge should with his intimate knowledge of the witness' behavior upset the verdict. [Citations.] It is not essential that the witness be free from doubt as to one's identity. He may testify that in his belief, opinion or judgment the accused is the person who perpetrated the crime. The want of positiveness goes only to the weight of the testimony." People v. Harris, 87 Cal.App.2d 818, 823, 198 P.2d 60, 63. Even though the alibi testimony sounds plausible on the cold record, it does not justify a reversal. The jury was not compelled to believe the testimony of defendant and the alibi witnesses. People v. Shivers, 139 Cal.App.2d 275, 293 P.2d 479; People v. Quijada, 124 Cal.App.2d 422, 425, 268 P.2d 745. The verdicts are supported by substantial evidence.

Defendant made a motion to dismiss the information under Penal Code, section 995. The motion was denied. He contended, and now contends, he was not legally committed by a magistrate. The person who acted as committing magistrate had been a judge of the Municipal Court, Los Angeles Judicial District. On January 1, 1947 this judge was permitted to retire under the Judges' Retirement Act because of physical disability. 2 Deering's Gen.Laws, Act 5849a, § 3. The substance of the physician's affidavit filed with the Certificate of Retirement in the office of the secretary of state is stated in the margin.[1] An affidavit of one of counsel for defendant filed in support of the motion stated that on inquiry at the Employees Retirement Board he stated on information and belief that the record failed to show the judge had ever been relieved from such disability. Prior to the preliminary examination in this case the Chairman of the Judicial Council, with the consent of the judge, assigned the retired judge to sit in the Municipal Court, Los Angeles Judicial District, from December 7, 1954 to March 4, 1955. The preliminary examination was held on January 24, 1955.

1. The judge "is incapacitated for judicial work due to the results of a small cerebral thrombosis which was a complication of a long standing generalized arteriosclerosis and an arteriosclerotic hypertensive disease: this cerebral thrombosis has resulted in persistent and bothersome tinnitus, a state of over-emotionalism with some loss of memory and mental acuity. There is also an associated early hypertensive arteriosclerotic heart disease, which at the present time is compensated and asymptomatic. Therefore, it is my opinion, based on the above mentioned examination and medical care over a thirty month period, that the said Judge * * * is unable to efficiently discharge the duties of [the office] by reason of the physical disabilities noted above and that such disabilities are, and at all times in the future likely to be, of a permanent character."

The judge retired under section 3 of the Judges' Retirement Act.[2] At the time of retirement the Act provided that any retired judge might, with his own consent and on stipulation of all counsel in the case or cases to which he was assigned to sit, be assigned by the Chairman of the Judicial Council to sit in any court; and while so assigned he had all the powers of a judge thereof. See Deering's Gen.Laws, Act 5849a, § 6. In 1951 the statute was amended to read:

> "Judges retired pursuant to this act, so long as they are entitled by its provisions to receive a retirement allowance, shall be judicial officers of the State, but shall not exercise any of the powers of a justice or judge except while under assignment to a court as provided in this section.
>
> "Any such retired judge may, with his own consent, be assigned by the Chairman of the Judicial Council to sit in a court of like jurisdiction as, or higher jurisdiction than, that court from which he was retired; and while so assigned shall have all the powers of a justice or judge thereof."

Gov.Code, § 75081. It will be noted that the requirement of a stipulation of counsel was omitted.

[10–14] The point made is that section 75081 is unconstitutional, that the retired judge was without power to sit because there was no showing the disability ever terminated, that in the absence of such showing it must be presumed the disability continues and consequently the commitment was void. Counsel do not point out wherein the statute is unconstitutional. Its constitutionality was settled by Pickens v. Johnson, 42 Cal.2d 399, 405 et seq., 267 P.2d 801, 805. When a retired judge is duly assigned to a municipal court under the retirement act he is a regular judge of that court. Id., 42 Cal.2d 409, 267 P.2d 807. In Pickens it is said that "it must be assumed that an assigned retired superior court judge is possessed of all of the qualifications otherwise required for service on that court." The same applies to an assigned, retired municipal court judge. It appears from the records of the Judicial Council, of which we take judicial notice, Code Civ.Proc., § 1875 (3) (5), that the retired judge had previously been assigned to the same court by the Chairman of the Judicial Council from April 1, 1952 to December 31, 1952 and from January 13, 1953 to July 31, 1953. We must assume in the absence of a contrary showing that at the time the judge in question was assigned recovery had been made from any disability preventing service as a judge. Further it must be presumed that a person acting in a public office was regularly appointed and that the Chairman of the Judicial Council, in performing his official duty in making the assignment, regularly performed that duty and determined that recovery had been made. Code Civ.Proc., § 1963(14), (15). Defendant was regularly committed by a magistrate.

Cobert testified at defendant's preliminary examination. The testimony was taken down in the presence of defendant, and he was cross-examined by defendant's counsel. He was absent at the trial and over defendant's objection the court permitted his testimony taken at the preliminary to be read. Pen.Code, § 686. Defendant claims a sufficient foundation was not laid for reading the testimony. On March 16, 1955 the cause was set for trial for April 27, 1955. On April 22, 1955 it was continued to June 8, 1955. On June 8 it was continued to July 19, 1955. On July 19 it was continued to July 20, and on July 20 to July 21, 1955, when the trial began.

It was shown that at the preliminary Cobert testified he then resided at 1306 Melville Street, Las Vegas, Nevada. On April 25, 1955 the chief of the record division of the Los Angeles district attorney's office wrote and mailed a letter to Cobert at Las Vegas. The letter was returned to her in an envelope postmarked "Las Vegas, Nevada, May 10, 1955." On the reverse side of the letter which was sent there was writing to the effect he was unable to be in Los Angeles, with the signature "L. Cobert" at the bottom thereof. On June 29, 1955 the chief

2. Now Gov.Code, § 75060.

of the record division wrote and mailed another letter to Cobert at Las Vegas. The letter said, "Your reply should bear your personal signature." That letter was returned to her in an envelope postmarked "Las Vegas, Nevada, July 6, 1955." On the reverse side of that letter there was writing stating he was unable to be in California, followed by the signature "L. S. Cobert." On July 19, 1955 the District Attorney of Los Angeles County sent a telegram to Cobert at Las Vegas. The telegram was delivered. The district attorney received an answering telegram from Las Vegas dated July 19, 1955, sent collect, with "L S Cobert" appearing as the sender, stating he would be unable to attend the trial. Subpoenas were issued for Cobert by the district attorney on March 23 and April 22, 1955. There were notations thereon that he was in Las Vegas.

[15, 16] The statute says the testimony of a witness taken before the committing magistrate may be read at the trial on its being satisfactorily shown to the court that he cannot, with due diligence, be found within the state. Pen.Code, § 686. A finding of a trial court that sufficient showing has been made will not be disturbed on review unless its discretion has been abused—that is, unless it appears the evidence is insufficient to support the finding. People v. Mueller, 168 Cal. 526, 529, 143 P. 750; 14 Cal.Jur.2d 371, § 140; 19 Cal.Jur.2d 222, § 460. We think it patent that due diligence was shown and that it conclusively appeared Cobert could not be found within the state. In fact, he was satisfactorily shown to be beyond the jurisdiction of the court.

[17] At the time the court ruled on the admission of Cobert's testimony, defendant requested a continuance for the asserted purpose of taking Cobert's deposition under the Uniform Act to Secure the Attendance of Witnesses from without the State in Criminal Cases. Pen.Code, §§ 1334–1334.6. The request was denied. Defendant claims error. Counsel for defendant at the trial represented him at the preliminary. If they had any ground for taking his deposition they had ample opportunity to interview him and to take it prior to the trial. They told the court they had learned only a day before the request was made that Cobert would testify he did not give the officers permission to install the recording device, and he had not been questioned on the subject at the preliminary, which latter was a fact. No affidavit was filed. No showing was made as to how the information was obtained or why counsel had not obtained it previously. They had listened to the recording prior to the trial. The recording was not admitted in evidence. Whether Cobert did or did not give the officers permission to install the recording device was of no particular consequence. The court did not abuse its discretion in denying a continuance.

[18] Over defendant's objection Wooters was permitted to testify to what he heard of the telephone conversation between London and defendant. Defendant claims the court erred in the ruling. It is argued that admission of the testimony violated Penal Code, section 640;[3] that it violated section 605 of the Federal Communications Act;[4] that it violated Public Utilities Code, section 7903;[5] and that it was in effect an unlawful search and seizure and amounted to a denial of due process of law. The point is without merit. Both London and Wooters testified to the substance of the conversation. Wooters testified he had London's permission to listen. London testified that Wooters suggested to him that he take the telephone and ask the party for his watch; Wooters said he would listen in; accordingly he took the telephone from

3. Proscribing the making of an unauthorized connection with a telephone wire or instrument, or the unauthorized learning of the contents of any communication passing over any telephone wire, or the communication of any information so obtained.

4. 47 U.S.C.A. § 605, proscribing the interception by any person not the sender of any communication and the divulging of the contents thereof.

5. Successor to Penal Code, § 639, proscribing certain conduct on the part of employees of a telephone company.

Cobert and talked into it; he made no objection to Wooters' listening in, nor did he have any objection to his doing so.

The point was settled in People v. Malotte, 46 Cal.2d 59, 292 P.2d 517. In Malotte 2 police officers registered in a hotel room, installed a device designed to overhear a telephone conversation without the necessity of making physical connection with the telephone electrical circuit, and connected it to an induction coil. One of the officers placed a call to a certain number and the defendant answered. The conversation was recorded and the recording was admitted in evidence. The court held the evidence was not obtained in violation of Penal Code, section 640, or in violation of section 605 of the Federal Communications Act; and that overhearing the telephone conversation was not a search or seizure within the meaning of the federal or state Constitutions, and that no constitutional rights of the defendant were violated. Public Utilities Code, section 7903, is not relevant. Instructions with respect to section 605 of the Federal Communications Act proffered by defendant were inapplicable to the facts and were properly refused.

[19, 20] Defendant's next specification of error is that the jury was guilty of misconduct. In support of his motion for a new trial defendant filed 2 affidavits: one by defense counsel told of photographs taken of defendant outside the courtroom prior to the beginning of the trial and published in Los Angeles newspapers during the course of the trial, of newspaper publicity surrounding the trial, and the employment of an investigator to interview the jurors after the trial; the other by the investigator related to an interview he had with one juror and stated what the juror had said to him. The attempt was to impeach the verdicts through the use of hearsay statements as to what occurred during the period the jury was deliberating and speculation on the effect of certain newspaper publicity. The verdict of a jury cannot be impeached by affidavits of third persons which merely set forth the substance of extrajudicial statements made by the jurors. People v. Giminiani, 45 Cal.App.2d 535, 540, 114 P.2d 392. A juror cannot impeach his own verdict except in the single case of a verdict arrived at by chance or lot. People v. Zelver, 135 Cal.App.2d 226, 235–236, 287 P.2d 183.

[21] Defendant complains of 4 rulings of the court. On cross-examination of Wooters, counsel for defendant sought to read to him a part of the decision of the Supreme Court in People v. Cahan (this defendant), 44 Cal.2d 434, 282 P.2d 905, and to ask him whether he had read it, and to show thereby that he was biased and prejudiced against defendant. The questions were not actually asked. Counsel stated his purpose to the court, the People objected, and the objection was sustained. The ruling was obviously correct. The witness could not be shown to be biased or prejudiced by what the Supreme Court said in the previous Cahan case. Defendant was not restricted in his effort to show that Wooters was biased.

[22, 23] On direct examination defendant testified he did not commit the offenses charged, did not know London or Scottie, and London did not owe him any money. On cross the following occurred:

"By Mr. Carr [Deputy District Attorney]:

"Q. Mr. Cahan, what is your occupation? A. I buy and sell used automobiles, and occasionally make wagers on the outcome of sporting events.

"Q. Do you take wagers as a business on the outcome of sporting events? A. I make wagers.

"Q. The question was, do you take wagers on the outcome of sporting events? A. No, sir.

"Q. Has that ever been your occupation?

"Mr. Parsons [attorney for defendant]: To which we object as immaterial, not proper cross examination, whether it has ever been.

"The Court: Sustained.

"Q. By Mr. Carr: Well, Mr. Cahan, as a matter of fact, around in the month of

December and the month of November, 1954, your principal occupation was that of operating a handbook, isn't that right—

"Mr. Parsons: To which I object—

"Mr. Carr: —on the outcome of sporting events?

"Mr. Parsons: To which I object as not proper cross examination.

"The Court: Overruled.

"The Witness: No, sir.

"Q. By Mr. Carr: You were a bookmaker then, weren't you?

"Mr. Parsons: To which I object as not proper cross-examination, not within the scope of the direct.

"The Court: Overruled.

"The Witness: No, sir.

"Q. By Mr. Carr: You know what I mean by a bookmaker? A. Yes, sir.

"Q. Now, isn't it a fact in connection with bookmaking activities that you had an individual by the name of Tillie, either true name or nickname, acting as your agent?

"Mr. Parsons: To which I object as not within the scope of the direct examination, improper cross examination, and immaterial.

"The Court: Overruled.

"The Witness: No, sir."

Defendant claims the rulings were erroneous. We think not. Since defendant testified he did not commit the offenses "'the permissible scope of cross-examination is very wide.'" People v. Tarantino, 45 Cal.2d 590, 599, 290 P.2d 505, 511. The cross-examination was directed to matters implicit in defendant's denials. The prosecution was based on the theory that defendant was the bookmaker with whom Scottie placed the London bets; that he was the one who suffered the $1,200 loss; and that that was why he went to London's apartment. The rulings were not erroneous.

[24] On cross-examination, after defendant had testified he had known Wooters for a couple of years and had talked to him 2 or 3 times, he was asked: "And you have heard recordings of your voice in the presence of Mr. Wooters, too, haven't you?" Counsel for defendant objected and the objection was overruled. The answer was "yes." Defendant assigns error. The ruling was proper.

[25] In rebuttal, in answer to questions of the district attorney, Wooters testified he had known defendant about 3 years and that he knew defendant's business or occupation during that time. He was then asked what it was, to which defendant objected. Some discussion was had and the district attorney made the statement set out in the margin.[6] The defendant assigned the statement as misconduct and asked the court to instruct the jury to disregard it. The court immediately instructed the jury to disregard everything said by both counsel. Defendant claims the statement was prejudicial. We cannot assume the jury disregarded the court's instructions.

We find no error in the record.

The judgment and the order denying a new trial are affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

6. "Your Honor, there is a connection between them when we consider the testimony of Mr. London to the effect that there was a gambling obligation of approximately $1,200.00 which he owed, and the inferences that followed that in connection with this particular case. We submit that we have a right to go into that question. If it is to be believed that—and the only testimony is that he is in the automobile business—there is no connection between this offense or the gambling obligation and the automobile business. It [sic] it is otherwise, I think we have a right to go into it."

142 Cal.App.2d 1

Myron R. HUBBELL et al., Plaintiffs and Respondents,

v.

CITY OF LOS ANGELES et al., Defendants and Appellants.

Civ. 20391.

District Court of Appeal, Second District, Division 1, California.

May 29, 1956.

Rehearing Denied June 18, 1956.

Hearing Denied July 24, 1956.

Mandamus proceeding was brought against the City of Los Angeles and others to invalidate a purported annexation by the City of Los Angeles of territory including an area purportedly annexed previously by the City of Inglewood. The Superior Court of Los Angeles County, Clarence M. Hanson, J., entered judgment adverse to the City of Los Angeles and others, and they appealed. The District Court of Appeal, Doran, J., held that evidence sustained finding of the Superior Court that the annexation proceedings by the City of Los Angeles were invalid.

Judgment affirmed.

1. Municipal Corporations ⇐123

The governing bodies of municipalities stand in a different and higher category than mere employees and directors of a private corporation.

2. Municipal Corporations ⇐123

Members of a municipal council are at all times trustees of the public welfare.

3. Municipal Corporations ⇐33(1)

A proceeding to annex territory to a city is either properly carried through in close conformity with statutory requirements, or it becomes a complete nullity. West's Ann.Gov.Code, §§ 35100–35158.

4. Municipal Corporations ⇐29(4)

Annexation statutes do not contemplate a situation in which two municipalities enter into a bitter contest to see which can deprive the other of a desired parcel. West's Ann.Gov.Code, §§ 35100–35158, 35300–35326.

5. Municipal Corporations ⇐33(1)

As between rival annexation proceedings and as between annexation and incorporation proceedings, the legislative body which first obtains its jurisdiction retains it exclusively until final determination of the proceeding. West's Ann.Gov. Code, §§ 35100–35158, 35300–35326.

6. Appeal and Error ⇐1012(1)

It is not the function of a reviewing court to weigh the evidence where the record discloses substantial evidentiary support for the findings of the trial court.

7. Mandamus ⇐168(4)

In mandamus proceeding against the city of Los Angeles and others to invalidate a purported annexation by the city of Los Angeles of territory including an area purportedly annexed previously by the city of Inglewood, evidence sustained finding of superior court that annexation proceedings by the City of Los Angeles were invalid. West's Ann.Gov.Code, §§ 35100–35158, 35300–35326.

Roger Arnebergh, City Atty., Bourke Jones, Allan G. Campbell, Asst. City Attys., Claude Hilker, Deputy City Atty., Los Angeles, for appellants.

Gibson, Dunn & Crutcher, Richard E. Davis, Samuel O. Pruitt, Jr., Raymond L. Curran, Los Angeles, for respondents.

DORAN, Justice.

The City of Los Angeles has appealed from a judgment granting to respondents a peremptory writ of mandate invalidating a purported annexation of certain territory designated as the "Howard Addition". The so-called Howard Addition includes an area known as "Johnson Rancho Territory No. 1", purportedly annexed by the City of Inglewood under provision of the Uninhabited Territory Act of 1939, Govt. Code, §§ 35300–35326. The basic question involved is as to which annexation proceeding is entitled to preference.

The record discloses that prior to April 10, 1953, all of the real property here involved was located outside the corporate

limits of Inglewood and of Los Angeles; that on that day certain property owners filed a request with the City Clerk of Inglewood asking for the annexation of what was designated as "Johnson Rancho Territory No. 1". On April 15, 1953 the Inglewood City Council, at a regular meeting, instructed the City Attorney to prepare the necessary papers for annexation; the matter was referred to the Inglewood City Planning Commission which on June 1, 1953, passed a resolution determining that the territory was contiguous to the City, was uninhabited, and should logically be a part of the City of Inglewood, and recommended annexation.

On June 2, 1953 the Inglewood City Council, by resolution, initiated annexation proceedings, and on July 7, 1953 held a public hearing relating thereto; an ordinance approving the annexation was duly adopted on July 14, 1953 at a regular council meeting, and a copy of said ordinance was mailed to the City Clerk of Los Angeles. The annexation ordinance was published and a copy filed with the Secretary of State; on August 19, 1953 the Inglewood City Clerk filed with the Los Angeles County Recorder, the necessary affidavit that all requirements in reference to the annexation had been completed, together with a certified copy of the boundary description and a map.

The purported annexation of the "Howard Addition" to the City of Los Angeles was instituted May 12, 1953 by twelve persons who published a notice of intention, dated May 11, 1953, to circulate an annexation petition pursuant to Government Code, Sections 35100–35158. Consent of the Los Angeles City Council to the circulation of such petition had not then been obtained, as required by statute; such consent was granted on May 13, 1953, and thereafter the same notice was republished with a changed date.

The trial court found that neither a copy of said notice nor of the affidavit of publication was filed with the City Clerk within 10 days, as required by statute. In the records of the City Council these documents are found between two other papers dated June 25, 1953, but no date of filing is endorsed thereon.

It was also found by the trial court that the Los Angeles City Council, "on or before June 1, 1953, had knowledge of the fact that 'Johnson Rancho Territory No. 1' was uninhabited territory and was subject to pending annexation, as such, to the City of Inglewood".

Thereafter, July 28, 1953 was set for the hearing of protests to the proposed annexation by the City of Los Angeles, and on July 27, 1953, written protests of "the owners of not less than 1025 separate parcels * * * within the 'Howard Addition'" were filed with the City Clerk. On July 28th, "less than 30 minutes before the time set for the protest hearing, purported withdrawals of certain protesting owners' signatures were filed * * *. Not more than 154 separate parcels * * * were represented by purported withdrawals * * *." Protestants appeared before the Council, and the City Clerk read a letter from the Inglewood City Clerk, transmitting a certified copy of the ordinance annexing Johnson Rancho Territory No. 1 to the City of Inglewood. Statements were made by counsel for respondent Hubbell and others, and the hearing was then continued to July 30, 1953.

Prior to resumption of the meeting on July 30, as found by the trial court, the Los Angeles City Clerk, in checking the protests, "relied upon information obtained from the Los Angeles County Assessor's Map Books and Equalized Assessment Roll * * * prepared as of March 2, 1953", as the sole basis for determining ownership and number of separate parcels in the area. All protests made by record owners whose names did not appear on the roll were eliminated, as were all protests representing parcels which did not appear as separate parcels.

The trial court found that at the July 30th meeting, the Council refused to supply requested information, refused to seek or consider evidence of ownership of separate parcels to be derived from title company records, refused to consider the fact that land within the Johnson Rancho Territory

No. 1, included in the proposed Howard Addition, had been subdivided in April, 1953 into 225 lots, and finally, "Counsel for the protestants attempted to complete the presentation of their protest but was cut short and prevented by the Council from doing so."

"Thereupon", the trial court found, "the Council purported to adopt a finding that the number of separate parcels in the 'Howard Addition' was 1459; that the owners of 489 of said parcels had made written protest * * * and that protests had not been made by owners of a majority of said separate parcels, and purported to pass an ordinance calling for a special election to be held on September 8, 1953, upon the question of the proposed annexation".

It was found that although "good and valid protests" were made by owners of a majority of the separate parcels, "The Council refused to recognize said majority protest, and, in doing so, acted capriciously, arbitrarily, in excess of its powers and jurisdiction, and in violation and derogation of the rights of the petitioners and plaintiffs and of all of the said protestants".

The court further determined that the Howard Addition annexation proceedings had "improperly and illegally included * * the 'Johnson Rancho Territory No. 1' area, which area was uninhabited and had been the subject of valid annexation proceedings by and has been annexed to the City of Inglewood". The annexation proceedings by the City of Los Angeles were held to be "wholly void, invalid and of no force or effect".

It is the appellants' contention that the annexation proceedings by the City of Los Angeles were properly conducted and were final and conclusive; that the protests were properly disallowed, and that even if there were defective procedural matters, they "did not vitiate the annexation proceedings". It is further argued that "The Howard Addition Annexation had priority in time and consequent precedence over the Inglewood proceeding, and the latter was therefore void in its inception".

Respondents, on the contrary, contend that the Los Angeles proceeding was irregular and invalid from the outset; that it was invalid "because appellants sought to include therein the Johnson Rancho Territory No. 1 as to which the Inglewood proceeding had precedence"; that the Howard Addition included "large, distinct and separable areas of uninhabited territory"; and that the Los Angeles Council "exceeded its jurisdiction and abused its discretion in that it arbitrarily deprived the protestants of a fair hearing and in that its findings were unsupported by evidence and contrary to law, and that the trial court had properly determined that the Los Angeles annexation was void".

Examining the contentions of the opposing parties in the light of the record, and considering the entire history of the annexation proceedings as carried on by the City of Los Angeles, the conclusion seems inescapable that the findings and judgment of the trial court are adequately supported by both law and evidence, and that no reversible error has been committed.

[1, 2] It requires no citation of authority in support of the proposition that the governing bodies of municipalities stand in a different and higher category than mere employees and directors of a private corporation. Whatever other functions they may be called upon to perform, members of a municipal council or other public body are at all times trustees of the public welfare. Obviously, such a trusteeship does not call for competition and strife between such bodies and the interested members of the public; nor between the bodies of neighboring municipalities. These salutary precepts do not appear to have been recognized or followed in the attempted annexation of the Howard Addition.

Appellants' contention that the trial court was without jurisdiction to entertain the instant controversy, and that the determination of the Los Angeles City Council was final and conclusive, is untenable. The various decisions cited by the two parties clearly negative such a proposition. The proceedings in the trial court were prop-

erly brought and the contestants were accorded every opportunity to present their respective claims.

[3] The annexation statutes here involved and previously referred to, were designed to cover the specific cases mentioned therein, and the various requirements therein prescribed were much more than mere formalities. They were definite safeguards designed for the protection of the public and those persons interested in proceedings of considerable importance. It will not do to consider such requirements as mere technicalities with no effect on the final result. Such a proceeding is either properly carried through in close conformity with the statutory requirements, or it becomes as the trial court here found, a complete nullity.

[4, 5] Obviously, the annexation statutes never contemplated a situation in which two municipalities would enter a bitter contest to see which could deprive the other of a desired parcel. As stated in the headnote to Borghi v. Board of Supervisors, 1955, 133 Cal.App.2d 463, 284 P.2d 537, "As between rival annexation proceedings and as between annexation and incorporation proceedings, legislative body which first obtains jurisdiction retains it exclusively until final determination of proceeding." The dates at which the rival proceedings were set in motion in the instant controversy have been hereinbefore set forth. As stated by appellant, because of different time requirements in the governing statutes, the City of Inglewood "could and did purport to complete its annexation of the Johnson Rancho before the Howard Addition matter was or could have been put to the vote of the electorate". There is evidence in support of the court's finding that the Los Angeles authorities had knowledge of the Inglewood proceedings as early as June 1, 1953, and on July 24, 1953 a copy of the Inglewood annexation ordinance was mailed to the Los Angeles City Clerk.

[6, 7] It is not the function of a reviewing court to weigh the evidence where the record discloses substantial evidentiary support for the findings of the trial court. And, as hereinbefore indicated, the trial court's determination that the Los Angeles annexation proceedings were invalid is adequately supported by the evidence. Aside from the fact that the Los Angeles annexation proceedings "sought to include * * * large areas of uninhabited territory", and "an area which was subject to valid proceedings for annexation to the City of Inglewood under the Annexation of Uninhabited Territory Act of 1939, which proceedings had and retained preference over the Los Angeles proceeding", the trial court found other fatal defects.

Of paramount importance in proceedings such as those here involved is the matter of public hearings, at which interested persons are entitled to be heard. If such hearings are permitted to degenerate into a mere token procedure, or if the administrative body proceeds arbitrarily and without regard to the protests filed, then the statutory requirements mean nothing, and those members of the public most vitally concerned lose all protection.

There is substantial evidence in support of the trial court's conclusion that at the protest hearing in the instant case, the Los Angeles City Council "acted arbitrarily, capriciously, unfairly"; that the Council's finding that "a protest had not been made by the owners of a majority of the separate parcels of property in the area involved, was not supported by sufficient or any evidence before the Council", and that the Council erroneously disregarded proper protests. It may be noted that any one of the specified errors would doubtless have been sufficient to invalidate the proceedings; the sum total of such errors on the part of the Los Angeles Council leaves no room for doubt.

It is unnecessary to further particularize in respect to the various contentions made by the appellants other than to say that they are each and all untenable. The trial court was in a much better position to judge of the weight and credibility of evidence than any reviewing court, and the conclusion reached is supported by record evidence. No reversible error has been pointed out.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.
Hearing denied; SHENK, J., dissenting.

141 Cal.App.2d 738

Mabel WINKLER and Clarence M. Winkler, Plaintiffs, Respondents and Appellants,

v.

SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, a partnership, Kaiser Foundation Hospitals, Dr. Peter Vega, Dr. J. G. Hallatt, Dr. Sidney R. Garfield, Paul Steil, Dr. Jerome Ettinger, Dr. Sheldon Koff, Dr. Frederick H. Scharles, Dr. Raymond M. Kay, Dr. John H. Winkley, Dr. Clifton Portnoff, Midway Hospital, a corporation, Retail Clerks Union Local 770, John Doe One, Two, Three, Four, Five, Six, Seven, Eight, Nine, Ten and Company One and Two, Defendants,

Southern California Permanente Medical Group and Dr. Sidney R. Garfield, Appellants and Respondents.

Civ. 21344, 21282.

District Court of Appeal, Second District, Division 1, California.

May 23, 1956.

Action for malpractice. The Superior Court of Los Angeles County, Clarence L. Kincaid, J., rendered a judgment on a verdict against employer physician but in favor of employee physicians and the employer physician and plaintiffs appealed. The District Court of Appeals, Nourse, J. pro tem., held that the verdict was self-stultifying and could not stand.

Reversed and remanded.

See, also, 136 Cal.2d 356, 288 P.2d 622.

1. Partnership ⇐174

Where physician and his physician employees formed partnership after ceasing to give treatment to particular patient, partnership could not be held liable for negligence of individual physicians in absence of showing that partnership had expressly assumed liability for previous acts of employees who became partners.

2. Limitation of Actions ⇐172

Master and Servant ⇐332(5)

In malpractice action against physician who operated clinic but did not personally treat plaintiff and his physician employees who treated plaintiff, verdict exonerating employees and holding employer liable could be sustained only on theory of negligence of another employee who made diagnosis, and where liability for such employee's negligence in diagnosis was barred by limitations, verdict against employer could not stand.

3. Limitation of Actions ⇐95(1)

Statute of limitations does not commence to run in malpractice action until plaintiff discovers his injury or through use of reasonable diligence could have discovered it.

4. Limitation of Actions ⇐95(1)

Any error or negligence in diagnosis of plaintiff as not having gallstones was absolutely established by removal of gall bladder disclosing existence of gallstones, more than one year before commencement of action, and hence running of limitations was not postponed because of plaintiff's alleged ignorance of negligence in diagnosis.

5. Appeal and Error ⇐882(12)

Where defendant requested instruction that jury could not consider particular claim of malpractice which had been barred by limitations, but request was refused, defendant's subsequent request for instructions which left question of limitations to jury did not invite error in submitting question of such negligence to jury and did not estop defendant from urging on appeal that such claim of negligence was barred by limitations.

6. Judgment ⇐695

A judgment exonerating agent does not exonerate the principal, if principal's independent negligence is proximate cause of injury.

7. Appeal and Error ⇐854(1)

In absence of direct evidence that physician employees were not properly trained or were unskilled or incompetent, or that physician employer was negligent in employing them, verdict exonerating employees but holding employer liable could not be sustained on theory that complaint alleged negligence in employing unskilled and incompetent servants.

8. Appeal and Error ⇐1173(1)

Where evidence would have supported verdict against employee physicians for malpractice, but jury was not instructed that they could not render verdict against employer unless they returned the verdict against one or more of employees, and jury returned self-stultifying verdict exonerating employees but holding employer liable, reviewing court would reverse the judgment in favor of employees as well as the judgment against employer, and remand for new trial.

Reid & Champlin, D. Wendell Reid, Encino, for plaintiffs, respondents-appellants.

Chase, Rotchford, Downen & Drukker, Richard T. Drukker, Los Angeles, for appellants-respondents.

NOURSE, Justice pro tem.

The appellants, Southern California Permanente Medical Group, a partnership, and Sidney R. Garfield, appeal from a judgment of the lower court, based upon the verdict of a jury, awarding plaintiffs the sum of $20,000 for injuries alleged to have been suffered by the respondent Mabel Winkler through the alleged negligence of the defendants, their agents, and employees. They also appeal from the order denying their motions for judgments notwithstanding the verdicts. Plaintiffs appeal from that portion of the judgment upon the verdict which was against them and in favor of the defendants Scharles, Winkley, Portnoff, and Koff.

The action is one commonly known as an action for malpractice. Plaintiff Mrs. Winkler was on June 8, 1951, a member of the Retail Clerks Union, Local 770. As a member of that union, she was entitled to medical and surgical care and treatment by the appellant Garfield, a physician, who maintained a clinic under the name of the Permanente Health Plan. The appellant Garfield employed in the clinic a number of doctors including the defendants Veger, Hallatt, Ettinger, Koff, Scharles, Kay, Winkley, and Portnoff, and an accountant, the defendant Steil. Defendant Southern California Permanente Medical Group is a partnership which was formed on January 1, 1953, and composed of certain of the defendant doctors theretofore employed by Garfield. Garfield was not a member of that partnership.

On June 8, 1951, Mrs. Winkler became ill while at work and visited the clinic, where she consulted Dr. Veger. She was examined and treated in the clinic by Dr. Veger, Dr. Hallatt, Dr. Ettinger, and Dr. Kruse until August 10, 1951, at which time she was referred to defendant Dr. Koff, who made a tentative diagnosis of gallstones and referred her to another employee of appellant Garfield, a Dr. Shapiro, for x-rays. Dr. Shapiro took a series of x-ray pictures of Mrs. Winkler's gall-bladder on August 14, and reported them negative. In taking these x-rays, Dr. Shapiro introduced a dye into plaintiff's body, but did not use a fatty-meal procedure. After receiving Dr. Shapiro's report, Dr. Koff advised the plaintiff that her x-rays were negative for gallstones. In the latter part of August, 1951, plaintiff returned to the clinic for further examination and was examined by Dr. Scharles, who prescribed certain medication.

On August 31, 1951, plaintiff was examined by one Dr. Seal, who was not a member of the clinic. He made a tentative diagnosis of gallstones, and took x-rays. He used the fatty-meal procedure, and interpreted the x-rays which he took as showing the presence of one gallstone and the possible presence of two others. The plaintiff immediately entered the Valley Hospital, but was thereafter transferred to the Midway Hospital, where she remained from September 12 until September 18, 1951, during which period other x-rays were taken and a diagnosis of the presence of gallstones was made; and on the 18th defendant Dr. Winkley removed the gallbladder, which was found to contain a single gallstone. After post-operative care plaintiff was discharged from the Midway Hospital on September 25, 1951, having received care during her stay in the hospital from defendants Portnoff, Kruse, Kay, Scharles, and Winkley. In October she returned for a general check-up by Dr. Winkley.

She returned to work November 1, 1951, and in March, 1952, some of the symptoms she had had before her operation returned, and she was thereafter examined and treated by Doctors Koff, Winkley, and Portnoff until the middle of September, 1952, after which time she did not return for medical care from any of the defendants.

On October 1, 1952, she consulted a Dr. Peterson, who made a diagnosis of stricture of the common duct, and pancreatitis. He then operated upon her and found a stricture in the common duct, together with acute hepatitis. The stricture was in the sphincter of Oddi where the common duct joins the duodenum. He dilated this sphincter, and thereafter bile flowed from the liver into the duodenum. Thereafter plaintiff suffered from hemorrhoids and a rectal fistula, and in November, 1953, she was treated for a kidney stone.

At the trial the plaintiffs produced qualified physicians who testified that Dr. Shapiro did not use accepted technique in x-raying the gall-bladder, and that he did not use the degree of skill, care, and diligence ordinarily possessed by radiologists in this community, either in taking or interpreting the x-rays.

Dr. Peterson testified, in answer to a hypothetical question, that the defendant physicians who cared for plaintiff Mrs. Winkler after her gall-bladder operation had not exercised the degree of skill and care which is possessed by doctors in the general practice of medicine in the community. All of the evidence showed that the operation for the removal of plaintiff's gall-bladder was skillfully performed. The testimony of plaintiffs' witnesses as to the negligence of Dr. Shapiro in the taking and reading of the x-rays, and of the other defendants in the post-operative care of the plaintiff, was disputed by evidence produced by the defendants.

On September 2, 1953, plaintiffs commenced this action. They joined as parties defendant the appellant Southern California Permanente Medical Group, a partnership (they did not allege of what persons the partnership was composed); the appellant Garfield; Kaiser Foundation Hospitals; Midway Hospital; Retail Clerks Union, Local 770; and Doctors Veger, Hallatt, Ettinger, Koff, Scharles, Kay, Winkley, and Portnoff; and Steil (sued as Styles). Their complaint was set forth in ten counts.

By the first count they charged that the defendants undertook to operate upon the plaintiff for the removal of gallstones, and so carelessly and negligently performed the operation, and so carelessly and negligently administered post-operative care, as to cause the plaintiff severe pain, vomiting, and diarrhea, and a second operation, which was performed on October 11, 1952. They further charged that the defendant Garfield negligently failed to select and employ physicians and surgeons possessed of or capable of exercising that degree of care, skill, or learning possessed and exercised by physicians and surgeons practicing their profession in the community.

By their second count they sought to charge the defendant union only, alleging the same injuries and damages as named in the first cause of action. By their third count they sought to charge the defendant Veger only, alleging that on or about the 8th of June, 1951, plaintiff Mrs. Winkler presented herself to Dr. Veger for physical examination, which was made by said defendant, and that he conducted said examination negligently and carelessly, and wrongfully diagnosed plaintiff's illness. By the fourth count they sought to charge the defendant Hallatt only, making the same charges of negligence against him as were made in the third cause of action against Veger, and alleging the same injuries and damage. The fifth count is an exact duplicate of the third, except that the defendant Ettinger is named as the negligent physician. The sixth count is also a duplicate of the third, except that the defendant Koff is named as the negligent physician. The seventh count is also a duplicate of the third, except that Scharles is named as the negligent physician. By the eighth count, plaintiffs sought to charge the defendant Kay only, alleging that he negligently performed the gall-bladder operation on the 18th of September, 1951. The ninth count charges the defendant Portnoff with neg-

ligence in carelessly, negligently, and wrongfully diagnosing plaintiff's illness, and negligence in the interpretation of plaintiff's x-rays. By the tenth count of the complaint, plaintiffs sought to charge only Dr. Winkley, alleging that he was negligent in the performance of the operation for the removal of plaintiff's gall-bladder.

By paragraph XII of the first count of the complaint (which paragraph is incorporated by reference in each of the other counts) there are allegations from which we may assume that the plaintiffs were attempting to plead that the defendant physicians who were charged with negligence in operating upon and in caring for plaintiff Mrs. Winkler were the servants and agents of the defendant Garfield, and the case was apparently tried upon the theory that this paragraph did so allege.

At the outset of the trial, judgment on the pleadings was rendered in favor of the defendant Midway Hospital. This judgment is final.

Motions for a judgment of nonsuit made by the defendants Retail Clerks Union, Steil, Hallatt, Ettinger, Veger, and Kay were granted, and the judgment entered in favor of these defendants is now final. The only defendants against whom plaintiffs' case was submitted to the jury are the appellants Southern California Permanente Medical Group, a partnership, and Dr. Garfield; and the defendants Kaiser Foundation Hospitals, Dr. Scharles, Dr. Winkley, Dr. Portnoff, and Dr. Koff.

At the conclusion of the trial and before argument, the court permitted the plaintiffs to amend their complaint to conform to proof, adding to their first cause of action a paragraph wherein they alleged that the defendants "so negligently and carelessly took and analyzed the gall-bladder x-ray series at the Southern California Permanente Health Plan Group Hospital that they failed to discover the existence of gall-bladder disease, and that said defendants, and each of them, did therefore fail to possess and exercise the proper degree of skill, care and diligence in the diagnosis * * * of plaintiff Mabel Winkler required to be possessed and exercised by qualified physicians and surgeons in this community * * *". They further alleged that plaintiffs did not discover and could not, by reasonable diligence and care have discovered, said negligence until the trial of the action, because prior to that time they had not been permitted to examine the x-rays taken.

To this amendment the defendants other than those as to whom the action had then been dismissed filed their answer placing the allegations of the amendment in issue, and alleging as a separate defense that the action was barred by subdivision 3 of section 340, Code of Civil Procedure.

As heretofore stated, the jury returned a verdict in favor of plaintiffs and against appellants and against the plaintiffs and in favor of all of the other defendants.

At the conclusion of the evidence, the appellants moved the court for directed verdicts, which were denied, and upon the return of the verdict, and before the entry of judgment thereon, they moved the court that judgment be entered in their favor notwithstanding the verdict. These motions were denied by the court before the entry of judgment.

Appeal of Southern California Permanente Medical Group, a partnership.

[1] The entity sued as Southern California Permanente Medical Group, a partnership, was not formed and did not come into being as an entity until about January 1, 1953. The plaintiff did not receive treatment of any nature or kind from any of the defendants after September, 1952. There was no evidence that the partnership assumed liability for any of the acts of such of the defendants as had been employees of the defendant Garfield prior to January 1, 1953, and who became members of the partnership. The complaint does not charge that any of the individual defendants who treated Mrs. Winkler were at the time of such treatment in the employ of or the agents of the partnership, or members thereof. There was, therefore, no basis whatsoever for a verdict against it, and the trial court should have granted its motion for judgment notwithstanding the verdict. The judgment in favor of the plaintiffs and

against this appellant must be reversed, and a judgment entered in its favor.

Hereinafter the defendant Garfield will be called the appellant.

Appellant maintains that inasmuch as the jury by its verdict impliedly found that none of the defendant physicians, who as employees of appellant treated Mrs. Winkler after the removal of her gall-bladder, were negligent, and that inasmuch as the negligence of Dr. Shapiro in taking and interpreting the x-rays of the plaintiff's gall-bladder occurred more than one year before the discovery by plaintiff of the error in his diagnosis, the judgment against him cannot stand. In other words, it is appellant's contention that if plaintiffs seek to support the jury's verdict on any acts of a defendant physician other than Dr. Shapiro, they cannot do so, because the verdict would then be self-stultifying inasmuch as the jury impliedly found that none of these physicians was negligent; and that the verdict cannot be supported on the basis of Dr. Shapiro's negligence, because any cause of action based upon his negligence was barred by the statute of limitations long before the commencement of the action.

[2] We have come to the conclusion that appellant's contentions must be sustained. It is apparent that the verdict cannot be sustained upon the basis of the negligence of Dr. Shapiro alone. Dr. Shapiro did not see or treat plaintiff Mrs. Winkler after rendering his diagnosis that her gall-bladder did not contain gallstones. This diagnosis was rendered more than two years prior to the commencement of this action.

Respondents contend, however, that they did not discover the error in Dr. Shapiro's interpretation of the x-rays or his negligence in taking them until during the trial of the action, and that therefore the action is not barred by the statute.

[3, 4] There is no merit in this contention, for while the statute of limitations does not commence to run in an action of this kind until the plaintiff discovers his injury, or through the use of reasonable diligence should have discovered it, Stafford v. Shultz, 42 Cal.2d 767, 270 P.2d 1; Costa v. Regents of University of California, 116 Cal.App.2d 445, 254 P.2d 85; Pellett v. Sonotone, 55 Cal.App.2d 158, 130 P.2d 181; Agnew v. Larson, 82 Cal.App.2d 176, 185 P.2d 851; Faith v. Erhart, 52 Cal.App.2d 228, 126 P.2d 151; Petrucci v. Heidenreich, 43 Cal.App.2d 561, 111 P.2d 421, still the facts here show that the plaintiffs had full knowledge of Dr. Shapiro's negligence nearly two years before the commencement of this action. The evidence establishes without conflict that several weeks after Dr. Shapiro had taken his x-rays, Mrs. Winkler was x-rayed by another physician not connected with appellant's clinic; that these x-rays showed that her gall-bladder did contain stones and on September 18 the correctness of the second diagnosis and the error in Dr. Shapiro's diagnosis was absolutely established by the removal of the gall-bladder and the examination of its contents. Therefore, assuming that some injury was caused to plaintiff by reason of the delay in the operation for the removal of her gall-bladder because of Dr. Shapiro's negligence in the taking of the x-rays of her gall-bladder and in interpreting them, any cause of action based upon that negligence is clearly barred by the statute of limitations.

[5] Respondents further contend that appellant induced this error by requesting instructions which submitted to the jury the question of whether or not plaintiffs did discover Dr. Shapiro's error prior to the time of trial. This contention cannot be sustained.

Appellant requested the trial court to instruct the jury that it could not, in determining the liability, consider any claim that appellant was negligent because of the failure of Dr. Shapiro to correctly diagnose the x-rays, and to instruct the jury that Dr. Shapiro's negligence was not an issue in the case. Upon the refusal of this instruction, appellant did submit instructions which left to the jury the question as to whether the action was barred by the statute of limitations. Appellant did not lead the trial court into error. He merely

acceded to the ruling of the trial court denying his request that the issue of Dr. Shapiro's negligence be taken from the jury. Therefore appellant is not estopped from here raising the error of the trial court, nor from here asserting that any cause of action that the plaintiffs might have because of the negligence of Dr. Shapiro is barred by the statute of limitations. Williamson v. Pacific Greyhound Lines, 93 Cal.App.2d 484, 487, 209 P.2d 146; Dowd v. Atlas Taxicab & Auto Service Co., 69 Cal.App. 9, 14, 230 P. 958.

Inasmuch as the verdict cannot be sustained on the basis of Dr. Shapiro's negligence, it is evident that it is self-stultifying. The appellant did not see or treat the plaintiff and could only be held liable under the doctrine of *respondeat superior*; and at plaintiffs' request the trial court so instructed the jury.

The jury, however, impliedly found that none of appellant's employees was negligent. It thus destroyed any basis for a verdict against appellant. This proposition is firmly established. Will v. Southern Pacific Co., 18 Cal.2d 468, 472, 116 P.2d 44; Bradley v. Rosenthal, 154 Cal. 420, 423, 97 P. 875.

[6, 7] Respondent argues, however, that inasmuch as the complaint charged appellant with negligence in employing unskilled and incompetent servants (the defendants in whose favor the jury returned verdicts), it must be assumed that the jury impliedly found that allegation to be true, and that therefore appellant can be held liable, irrespective of whether the individual employees were or were not negligent. The rule is that a judgment exonerating the agent does not exonerate the principal, if the principal is independently negligent and his negligence is a proximate cause of injury to another. But we need not examine the application of that rule to the facts here, for there is not an iota of evidence that the individual doctors were not properly trained, or were unskilled or incompetent, or that the appellant was negligent in employing them.

Respondents further argue that the acts of the employee-defendants were cumulative, and that while no single doctor could be found negligent in what he did, the acts of all of them taken together constituted negligence. We cannot see the logic of this reasoning, nor has respondent pointed to anything in the record to support it.

Plaintiffs' Appeal.

Plaintiffs assert that if that portion of the judgment which is in favor of the plaintiffs and against the defendant Garfield is reversed, that we should also reverse that portion of the judgment which is in favor of the defendants Scharles, Winkley, Portnoff, and Koff, and send the matter back for a new trial of the issues framed by the pleadings as to negligence on their part.

[8] We think that plaintiffs' position is well-taken, and that it would be unjust to reverse the judgment against the appellant Garfield and to let it stand in favor of the above-named doctors who were his employees.

Appellant Garfield does not contend that if a verdict had been returned against the individual doctors that that verdict would not have been supported by the evidence. On the contrary, he states at page 25 of his reply brief that the evidence on the issues as to the negligence of each of these physicians was conflicting.

As we have heretofore said, the trial court erred in not instructing the jury that they could not find appellant liable because of any negligence on the part of Dr. Shapiro. However, the court did instruct the jury that if the plaintiff discovered the fact of the existence of gallstones or could have, by reasonable diligence, discovered such fact before September 3, 1952, that then they should disregard any charge of negligence predicated upon the taking or interpretation of the x-rays by Dr. Shapiro. In view of the evidence that Mrs. Winkler was operated upon, her gall-bladder removed, and a stone found therein, on September 18, 1951, it is impossible to believe that the jury found that she did not discover Dr. Shapiro's negligence at that time, and that they consequently based their verdict on the negligence of Dr. Shapiro. This conclusion is supported by the amount of the verdict, as the evidence failed to show

that any substantial injury or damage was suffered by Mrs. Winkler because of the delay in performing an operation for the removal of her gall-bladder; and this was the only result of Dr. Shapiro's negligence. It is not reasonable to suppose that a jury would award $20,000 for such a slight detriment.

It is not difficult to see why the jury was misled into returning the stultifying verdict which they rendered. The court did not instruct them that they could not return a verdict against appellant Garfield unless they returned a verdict against one or more of the physicians who treated Mrs. Winkler after September 18, 1951, but only instructed them that they could not return a verdict against appellant unless they found as a fact that one of these physicians was negligent. We cannot say on what basis the jury arrived at their verdict against appellant, but it seems more probable that they found that the defendant physicians were negligent in their examinations and treatment of the plaintiff Mrs. Winkler after the operation than that they based their verdict upon the negligence of Dr. Shapiro; and it is understandable that having, in their deliberations, found these physicians negligent, they did not realize that in order to return a verdict against appellant it was necessary to return one against the negligent doctors. This being true, then in the interests of justice we must reverse not only the judgment against appellant Garfield but the judgment in favor of the defendants Scharles, Winkley, Portnoff, and Koff. Bradley v. Rosenthal, supra, 154 Cal. at pages 426–427, 97 P. 875; Tolley v. Engert, 71 Cal.App. 439, 441, 235 P. 651.

The judgment as against Southern California Permanente Medical Group, a partnership, and the order denying its motion that judgment be entered in its favor notwithstanding the verdict, are, and each of them is, reversed, with directions to the trial court to enter a judgment in its favor and against the plaintiffs. The judgment as against the defendant Dr. Sidney R. Garfield is reversed, and the judgment in favor of the defendants Dr. Frederick H. Scharles, Dr. John H. Winkley, Dr. Clifton Portnoff, and Dr. Sheldon Koff is reversed, and the cause remanded for a new trial, and the trial court is directed to exclude from the issues to be tried any negligence of the defendant or any of its employees in the taking or interpretation of x-rays of the plaintiff Mrs. Winkler prior to September 18, 1951. The order denying the motion of appellant Sidney R. Garfield for the entry of judgment notwithstanding the verdict is affirmed. Each party to bear his or its own costs on appeal.

WHITE, P. J., and DORAN, J., concur.



141 Cal.App.2d 711

PEOPLE of the State of California, Plaintiff and Respondent,

v.

George GREGOR, Defendant and Appellant.

Cr. 3151.

District Court of Appeal, First District, Division 1, California.

May 22, 1956.

Rehearing Denied June 6, 1956.

Hearing Denied June 20, 1956.

Defendant was charged with two counts of burglary and with a prior robbery. From a judgment of conviction and from an order denying defendant's motion for a new trial in the Superior Court, City and County of San Francisco, John B. Molinari, J., the defendant appealed. The District Court of Appeal, Peters, P. J., held that the evidence sustained conviction and that the alleged trial errors were not prejudicial.

Judgment and order affirmed.

1. Larceny ⇐64(7)

Where a person is shown to be in possession of recently stolen property slight corroborative evidence of other inculpatory circumstances tending to show guilt is sufficient to support a conviction.

2. Burglary ⇐42(3)

In burglary prosecution, there was sufficient corroborating evidence of defendant's guilt which when considered with possession of the stolen goods and of burglary tools pointed to defendant as a participant in the burglaries and was sufficient to sustain conviction.

3. Criminal Law ⇐370, 371(1, 12), 372(1)

Evidence of other crimes is admissible to show a common pattern, plan or scheme or where such evidence helps to show motive, intent, premeditation, guilty knowledge or malice.

4. Criminal Law ⇐371(6), 372(10), 673(5)

In burglary prosecution, admission of another burglary and possession by defendant of a check-writing machine stolen in that burglary offer to show criminal intent and common plan was proper especially where jury was instructed that evidence was offered for such limited purposes.

5. Criminal Law ⇐698(1)

Generally failure to object to the admission of evidence amounts to a waiver of the objection.

6. Witnesses ⇐287(4)

In burglary prosecution where defendant on cross-examination of arresting officer opened the subject of defendant's complicity in a bank crime in an attempt to raise an inference that defendant was free from complicity therein, redirect examination by the prosecution to rebut that inference was proper. West's Ann.Code Civ. Proc. § 2048.

7. Criminal Law ⇐1169(5)

In burglary prosecution, where walkie-talkies were introduced into evidence and may have been found in defendant's apartment, testimony of officer that such machines were sometimes used by burglars for communication between inside operator and a lookout did not establish prejudicial error where the evidence was stricken on the objection of the defendant that it was speculative.

8. Criminal Law ⇐369(7), 1169(5)

In burglary prosecution, with defense that defendant could not have committed the crime because at the time he was encased in a plaster cast for a back injury, cross-examination of defendant's medical witness whether the back injury could have been caused by a fall from a building or down a light well, to raise an inference that defendant fell while engaged in another burglary of which there was no evidence was improper but no prejudice resulted where the trial court sustained an objection to it.

9. Criminal Law ⇐706, 730(3)

In burglary prosecution question by prosecutor was improper where it attempted to go into the background of a prior conviction and imply that defendant was guilty of burglary as well as armed robbery but was not prejudicial, where trial court properly sustained an objection.

10. Criminal Law ⇐370, 371(6)

In burglary prosecution, evidence concerning stolen license plate found in defendant's possession and the automobile from which it came was admissible to show guilty knowledge or intent of the defendant.

11. Witnesses ⇐269(15)

In burglary prosecution, where witness testified on direct that defendant had gone to Las Vegas to help the witness by doing some of the driving and to gamble and not to attend another's trial at which defendant was arrested while in the company of the witness, the prosecutor was entitled to rebut such evidence by cross-examination showing that the defendant had in fact attended the trial.

12. Criminal Law ⇐1171(1)

In burglary prosecution, alleged misconduct of the prosecutor in asking questions that should not have been asked was not prejudicial where it did not appear that a different verdict would have been probable had the error not occurred.

13. Criminal Law ⇐814(1)

The jury should not be instructed on points not supported by the record.

14. Criminal Law ⇐792(2)

In burglary prosecution, instructions charging the law as to the liability of principals was proper under the evidence showing that defendant could not have entered

the burglarized premises himself because of his physical condition but that he could drive a car and could operate a walkie-talkie which apparatus was found in his possession along with burglary tools and some other stolen property. West's Ann. Pen.Code, § 31.

15. Criminal Law ⇐781(2)

In burglary prosecution charge on admissions was proper under the evidence.

Macinnis, Alaga & Glassman, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., William M. Bennett, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

The defendant was charged with two counts of burglary, and with a prior robbery, for which he had served time. He admitted the prior, but pleaded not guilty to the two main charges. He was convicted by a jury of both counts contained in the information. He appeals from the judgment of conviction and from the order denying his motion for a new trial.

One of the charges involved the burglarly of a radio store at 1282 Market Street. Some time between 6 p. m. on Saturday, November 6, 1954, and 9 a. m. on Monday, November 8th, that store was broken into by means of a hole cut in the ceiling of the store from a hotel room above. Two Hallicrafter radios, a Zenith portable radio whose serial number was known, and several other radios were missing. The safe had been broken into, the combination lock broken off, and the tumblers punched out. Some $1,551 was taken from the safe, consisting of checks, cash and coins, some of the coins being wrapped. A pink slip to a Cadillac owned by the owner of the store was also missing.

The second charge involved the burglary of a service station at 1200 Clayton Street, which was burglarized during the night of December 1, 1954. Entry here had been secured by cutting a hole by torch through a steel wall from one of the rest rooms of the establishment, into the lubrication room, which, in turn, led into the office. Here, too, the safe had been broken into, its dial knocked off and the tumblers punched out. Money and checks were taken from the safe.

Evidence of another burglary, not charged, also appears in the evidence. The Peninsula Distributing Company in San Mateo was burglarized during the night of September 11, 1954, entry being secured through a skylight. Here, too, the safe had been pried open. A check writing machine, 58 blank checks, and two petty cash boxes were taken.

The pertinent testimony at the trial can be summarized as follows: An inspector of the police robbery detail testified that he arrested defendant on December 20, 1954, under the following circumstances: On that date, he called upon defendant in his apartment located at 795 Corbett Avenue, San Francisco. Defendant was then alone in the apartment. The officer identified himself and told defendant that he wanted to question him about a missing automobile license plate. Defendant denied knowledge of the plate, but invited the officer to enter. The officer searched the premises. In a closet off the living room the missing license plate was found, as well as burning torches, acetylene tanks, and a white canvas sack containing 7 of the checks taken from the service station. Nearby was a brown metal suitcase containing coins. In another money bag were found several rolls of coins similar to those taken from the radio store, and, on the kitchen table, was found the Zenith radio taken in that burglary. A Hallicrafter radio of the type stolen from the radio store was found in the living room. The check writing machine stolen from the Peninsula Distributing Company was also found in the closet. On the floor of the closet were found two walkie-talkies, batteries, bolt cutters, a wire ladder, a sweat shirt, gloves, gauges, a sledge hammer, a punch bar, and wire and rope.

The defendant admitted to the officer that the apartment was his, but at first denied any knowledge of who owned the items above mentioned. Upon further questioning, he at first remained mute, but then

stated: "Well, they are in my possession, I guess they must be mine." He also admitted renting the apartment under an assumed name.

There was evidence from another police officer that the equipment and tools found in the apartment were capable of effecting entry to the radio store and service station, were capable of punching out the safes there located, and were commonly used by burglars in breaking, or entering, or leaving the premises.

One of defendant's defenses was based on evidence that at the time of the burglaries he had a broken back, was encased in a large body cast, and could not have done the physical work involved in the burglaries. A doctor testified that on September 27, 1954, 40 days before the radio store burglary, and 64 days before the service station burglary, he had examined defendant, who gave a false name, and discovered that defendant had a fractured vertebra in his spine. Defendant was taken to a hospital where he remained until October 6, 1954. As part of the prescribed treatment defendant was encased in a large body cast which he was still wearing on December 20, 1954, when he was arrested, and which was not removed until January 12, 1955.

The specialist who treated defendant testified that the injury suffered by defendant was very painful and made heavy work difficult and painful. Defendant, however, after the cast was put on, was ambulatory, and, at the time of the burglaries, could drive a car, and could, of course, operate a walkie-talkie telephone.

The defendant testified that upon leaving the hospital on October 6, 1954, he went to live with a Mr. and Mrs. Decota in South San Francisco; that he had only been at his apartment, where he was arrested, twice between August and December, 1954, and that he moved back to his apartment on December 20, 1954, at 1 or 2 a. m. Several witnesses corroborated defendant to the extent that they testified that during November and early December, 1954, they had seen defendant at the home of the Decotas, where he was obviously then living. At least one of these witnesses testified that by early December defendant was able to drive a car. Neither Mr. nor Mrs. Decota was called to testify.

Defendant explained his use of false names by testifying that he was trying, in this fashion, to break off associations with persons he had met in San Quentin. He also testified that for part of the time he was living in South San Francisco he had sublet the apartment to a girl named "Lois," and that in October, 1954, he had given access to the apartment to a former prison friend by the name of Cornuelle, sometimes referred to as Cornell. Defendant denied knowing that the stolen goods or the burglar's tools were in his apartment, denied ever seeing them before, claimed that the Zenith radio was in the closet and not in the kitchen, but admitted that the Hallicrafter radio was in the living room, denied admitting that the property belonged to him, and, in general, denied any connection with the burglaries. He admitted to having paid the rent on the apartment ($125 a month) since 1951, and admitted that he was purchasing a Cadillac. He had not worked for a year prior to his arrest, claiming to have earned enough to live by gambling.

Cornuelle, at the time of trial an inmate of San Quentin, testified that he had lived in the defendant's apartment from October to late December, 1954, that the burglary equipment and stolen articles were his, and that defendant knew nothing about these articles; that the Hallicrafter radio found in the apartment had been placed there by some one identified only as "Ray." Admittedly, from October through December, Cornuelle was a registered guest in a San Francisco hotel.

The appellant first attacks the sufficiency of the evidence by claiming that the only evidence against him is that he was found in possession of recently stolen property, and by urging that such evidence is not sufficient to sustain a conviction. A few quotations will suffice to point out the rule in this regard:

[1] In People v. Mora, 139 Cal.App. 2d 266, 293 P.2d 522, 525, this court stated: "'* * * when a person is

shown to be in possession of recently stolen property slight corroborative evidence of other inculpatory circumstances tending to show guilt is sufficient to support a conviction.' "

In People v. Taylor, 4 Cal.App.2d 214, 217, 40 P.2d 870, 871, the applicable rules are summarized as follows: "The failure of the accused to account for such possession upon a theory inconsistent with his guilt of the offense charged, or to show that the possession was honestly obtained, is itself a circumstance tending to show guilt. This corroborating evidence need be but slight, provided it is convincing. Flight, false statements showing consciousness of guilt or as to how the property came into defendant's possession, assuming a false name, inability to find the person from whom defendant claimed to have received the property, have each in turn been held to be sufficient to connect the accused with the crime when proven in connection with possession of the stolen property. [Citing two cases.] And when defendant makes an explanation as to the manner in which he came into possession of such stolen property, the question as to whether he is telling the truth in that regard rests solely with the jury." (See also People v. Smith, 128 Cal.App.2d 706, 275 P.2d 919; People v. Nelson, 126 Cal.App.2d 453, 272 P.2d 536; People v. Clark, 122 Cal.App.2d 342, 265 P.2d 43; People v. Russell, 34 Cal.App.2d 665, 94 P.2d 400; People v. Bonner, 5 Cal. App.2d 623, 43 P.2d 343; People v. McClain, 115 Cal.App. 505, 1 P.2d 1085 and 115 Cal.App. 512, 1 P.2d 1023.)

[2] How do these rules apply to the present case? Obviously, appellant was found in possession of recently stolen property. Now what corroborative evidence was there to support the finding of the jury that appellant had stolen this property? First, along with the stolen property was found an assortment of burglar's tools of the type that could have been used in the two charged burglaries. According to the arresting officer, defendant admitted that these things, and the stolen property, were his. Then it was shown that appellant rented the apartment under a false name and likewise gave the doctor a false name. Appellant's explanation to the effect that in this fashion he was trying to dissolve associations with former convicts seems questionable when it is remembered that appellant testified that he let Cornuelle, an ex-convict, use the apartment without charge, and when the evidence shows that during the period involved appellant was closely associated with a Ralph Hill, another San Quentin acquaintance. Another corroborating detail is that several inconsistencies appear in appellant's evidence. In one place in the record appellant testified that he returned to the apartment at 1 a. m., the day of his arrest, while in another place he testified that it was 9 p. m. of the night before his arrest. Appellant testified that he had sublet the apartment to "Lois" who, he said, had paid at least one month's rent to the realty company. This was denied by officers of the realty company who testified that appellant alone paid the rent. Appellant and Cornuelle differed by over two months as to when "Lois" is supposed to have occupied the apartment. It should also be mentioned that the record shows that appellant traveled to Las Vegas when one Stelling was sentenced for violation of the Dyer Act involving the Cadillac whose pink slip had been stolen from the radio store, the car itself being stolen several days later. These corroborating details, and others that could be mentioned, constitute substantial corroborating evidence, which, when considered with the possession of the stolen goods and of the burglary tools, point to appellant as one of the participants in the burglaries.

[3] Appellant next objects to the admission into evidence of the facts in reference to the Peninsula Distributing Company burglary, and of the check writing machine that had been stolen in that burglary and found in appellant's apartment. Of course, evidence of other crimes is admissible to show a common pattern, plan or scheme, or where such evidence helps to show motive, intent, premeditation, guilty knowledge or malice. People v. Cassandras, 83 Cal.App. 2d 272, 188 P.2d 546; People v. Albertson, 23 Cal.2d 550, 145 P.2d 7; People v. Dabb, 32 Cal.2d 491, 197 P.2d 1; People v. Newson, 37 Cal.2d 34, 230 P.2d 618.

[4] In the instant case the challenged evidence was offered to show criminal intent and common plan. The jury was instructed, at the request of the prosecutor, that the evidence was offered for those limited purposes. It was clearly admissible to show intent and common plan. Obviously, where the loot from three recent burglaries is found in a defendant's possession, that tends to show guilty knowledge. In all three burglaries the *modus operandi* was similar.

[5] It should also be mentioned that when the evidence of the Peninsula Distributing Company burglary was first offered by the prosecution, appellant offered no objection. No objection was made until the stolen check writing machine was offered into evidence. Generally speaking, failure to object amounts to a waiver. People v. King, 13 Cal.2d 521, 90 P.2d 291; People v. Whalen, 70 Cal.App.2d 142, 160 P.2d 560; People v. Odom, 72 Cal.App.2d 72, 164 P.2d 68; People v. Hurst, 36 Cal. App.2d 63, 96 P.2d 1003; People v. Descant, 51 Cal.App.2d 343, 124 P.2d 864.

Appellant next charges the prosecutor with seven acts of prejudicial misconduct.

1. Again appellant urges that evidence of the Peninsula Distributing Company burglary was inadmissible and that to offer it was prejudicial misconduct. As already held, the evidence was admissible.

[6] 2. Next objection is made that the prosecutor was guilty of prejudicial misconduct during his redirect examination of the arresting officer when he was queried about the "walkie-talkie bank robbers." This occurred under the following circumstances: The arresting officer on direct told of finding the walkie-talkies in appellant's apartment. On cross-examination appellant's counsel then asked the officer if, at the time of the burglaries here involved, the police were also looking for some walkie-talkie bandits that had robbed a Bank of America branch on Geary Street. The officer replied "Yes." Then the officer was asked if appellant had not been exonerated of that charge, to which he replied "no," that no charge had been filed, but the investigation was still open. Then on redirect occurred the incident of which complaint is made. The prosecutor asked the arresting officer if the bank investigation was still open, and if the bank robbers were masked. The officer replied "Yes." Then he was asked if those robbers used a walkie-talkie, to which he replied that they did use one very similar to the one in evidence. Obviously, this redirect examination was proper. Appellant's counsel opened the subject, apparently in an attempt to raise the inference that appellant was free from complicity in the bank crime that had been widely publicised. The prosecution had the right to try to rebut that inference. § 2048, Code Civ.Proc.

[7] 3. After the walkie-talkies had been introduced into evidence another officer testified that these machines were sometimes used by burglars for communication between the inside operator and the lookout. On the objection of appellant that this was speculative, this evidence was stricken. In its instructions the trial court told the jury to disregard all evidence that had been stricken. Certainly this is not a situation where the mere asking of the question was prejudicial. Simply because an objection is sustained to a question does not mean that the mere asking of it constitutes prejudicial error.

[8] 4. Objection is next made to the cross-examination of one of appellant's medical witnesses who was asked if appellant's back injury could have been caused by a fall from a building or down a light well. The obvious purpose of the question was to raise the inference that appellant fell while engaged in another burglary of which there was no evidence. Thus, the question was clearly improper, and the trial court so ruled by properly sustaining an objection to it. Thus, there was no prejudice.

[9] 5. An improper question was also asked appellant on cross-examination when he was asked concerning the circumstances in reference to his prior conviction. This occurred under the following circumstances: The prosecutor asked appellant if he knew Cornuelle, and when appellant replied that he did, asked if Cornuelle was an ex-convict, appellant replied: "In fact

in 1945, me and Arthur Cornuelle went to the penitentiary on the same offense there; we both pled guilty to armed robbery." The prosecutor then asked: "You broke into Grison's Restaurant together, and burglarized the restaurant and also held up the ——." Appellant's counsel here objected, and, after some argument, the trial court sustained the objection. The question was improper because it attempted, improperly, to go into the background of the prior, and also implied that appellant was guilty of burglary as well as armed robbery. But the trial court properly sustained the objection. We cannot hold that the mere asking of the question was prejudicial misconduct.

[10] 6. The sixth assignment of misconduct relates to evidence concerning the stolen license plate found in appellant's possession, and the automobile from which it came. It will be remembered that the arresting officer testified that when he called at appellant's apartment he asked about the stolen license plate which had been stolen from a Cadillac, and later discovered the plate in appellant's apartment. It was introduced into evidence along with the other stolen goods found there. On cross-examination of appellant the prosecutor elicited from him that the license plate was "hot," that it came from a Cadillac stolen in Oakland, and that the companion plate had been found on an automobile belonging to Ralph Hill, and that the stolen Cadillac had been parked near to appellant's apartment. Appellant denied all knowledge of the stolen Cadillac or of its license plates. Appellant's counsel then objected to this line of questioning, assigned it as misconduct, and moved for a mistrial. The court denied the motion and the subject was dropped until the arresting officer was recalled in rebuttal. He testified that the police, when they left appellant's apartment with appellant under arrest, discovered the stolen Cadillac parked in front of 715 Corbett Street, appellant's apartment being 795 Corbett Street. Then there were a whole series of questions relating to the license plate and the stolen Cadillac. Objections to many of the questions were sustained on the ground that appellant's knowledge was hearsay. The questions not based on hearsay were not objected to. Clearly, proper evidence of this other offense was admissible to show guilty knowledge or intent on the part of appellant in whose apartment the stolen plate was found.

[11] 7. The last assignment relates to evidence relating to the arrest of appellant in Las Vegas while in the company of Ralph Hill. It will be remembered that in the burglary of the radio store an ownership slip to a Cadillac was stolen. The Cadillac belonged to the owner of the radio store, and it was stolen several days after the radio store burglary. This is a different Cadillac from the one found near appellant's apartment. It appears that a person by the name of Stelling was charged in Nevada with a violation of the Dyer Act in connection with this Cadillac. Appellant admitted knowing Stelling, "vaguely." He was then asked if, in company with Ralph Hill, he had not gone to Las Vegas to attend Stelling's trial. Appellant replied that he had gone to Las Vegas with Hill, not for the trial, but for Stelling's sentencing, because Hill, not appellant, was interested in Stelling. Hill testified that appellant accompanied him to Las Vegas to help with the driving, and to gamble, while the witness went to see Stelling. No objection is made to any of this examination. The alleged misconduct occurred during the cross-examination of Hill when he was asked: "Isn't it a fact that you and Gregor got arrested in Las Vegas as you left the courthouse?" Appellant vigorously objected, cited the asking of the question as misconduct, and moved for a mistrial. The court denied the objection and the motion, ruling that the question was proper. Hill then was forced to admit that he and appellant had been so arrested. The ruling was proper. Hill had testified on direct that appellant had gone to Las Vegas to help the witness by doing some of the driving, and to gamble, and not to attend Stelling's trial. The prosecutor was entitled to rebut that by showing that appellant had in fact attended the trial.

[12] We have reviewed all seven charges of misconduct. Undoubtedly there

were several questions asked by the prosecutor that should not have been asked, and that he should have known were objectionable. But after reading the entire record we cannot say that such conduct was prejudicial. Certainly we cannot say that "'a different verdict would not have been improbable had the error not occurred.'" People v. Teixeira, 136 Cal.App.2d 136, 151, 288 P.2d 535, 544.

[13] Appellant next objects to several instructions which he concedes correctly state the law but which he contends find no support in the record. He contends that this was error, under the well settled rule that a jury should not be instructed on points not supported by the record. People v. Moore, 43 Cal.2d 517, 275 P.2d 485; People v. Silver, 16 Cal.2d 714, 108 P.2d 4.

[14] Appellant first objects to instructions correctly setting forth the law as to the liability of principals. A principal is, of course, one who commits the charged offense or who knowingly and with criminal intent aids and abets in its commission, or, whether present or not, advises and encourages its commission. § 31, Pen.Code. Certainly the evidence here warranted such an instruction. The evidence shows that appellant could not have entered the premises himself because of his broken back and the cast. But the evidence also shows that he could drive a car and could operate a walkie-talkie. Such an apparatus was found in his possession, along with burglary tools and some of the stolen property, which appellant told the officer were his. This evidence tended to show that appellant was an aider and abettor of the crimes charged, and justified the court in giving the instruction on principals.

[15] Appellant also objects to a correct instruction as to the law applicable to admissions, claiming that there were no admissions. Appellant has apparently forgotten his admission to the arresting officer concerning the things found in his apartment: "Well, they are in my possession, I guess they must be mine." He also admitted that he was the tenant of the apartment which he had rented under an assumed name. The trial court, under such circumstances, would have been derelict in its duty if it had not instructed on the law applicable to admissions.

The judgment and order appealed from are affirmed.

BRAY and FRED B. WOOD, JJ., concur.



142 Cal.App.2d 85

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

William B. BOORMAN, Defendant and Appellant.

Cr. 2669.

District Court of Appeal, Third District, California.

June 4, 1956.

Hearing Denied June 27, 1956.

Defendant was convicted of burglary in the second degree. The Superior Court, Mendocino County, Hale McCowen, J., pronounced judgment on the jury's verdict, and defendant appealed. The District Court of Appeal, Schottky, J., held that evidence was sufficient to support conviction.

Judgment affirmed.

1. Burglary ⇐41(1)

Evidence was sufficient to support conviction of second degree burglary.

2. Burglary ⇐45

In burglary prosecution, weight of conflicting evidence was question for jury to determine.

3. Jury ⇐131(6)

In burglary prosecution, trial court erred in refusing to permit defendant's counsel to ask any of prospective jurors whether he was a deputy sheriff, where sheriff's office investigated alleged crime and complaint was sworn to by a deputy sheriff. West's Ann.Pen.Code, § 1078.

4. Jury ⇐131(1)

The purpose of Penal Code section, requiring trial court to examine prospective jurors and permit reasonable examination thereof by counsel for people and defendant, was to expedite such examination, but not by depriving people or defendant of right to reasonable examination of prospective jurors. West's Ann.Pen.Code, § 1078.

5. Jury ⇐131(3, 6)

A party may ask prospective jurors what their occupations are in order to furnish basis for further questions and answers relative to grounds for challenge of jurors for cause or aid party in determining whether to exercise peremptory challenges. West's Ann.Pen.Code, § 1078.

6. Criminal Law ⇐1035(5)

In burglary prosecution, trial court's refusal to permit defendant's counsel to ask any prospective juror whether he was a deputy sheriff was not ground for reversal of conviction, where no peremptory challenges were exercised by either people or defendant and no affidavit that any prospective jurors were deputy sheriffs was filed in support of defendant's motion for new trial.

Wayne P. Burke, Ukiah, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier and Harold A. Bailin, Deputies Atty. Gen., for respondent.

SCHOTTKY, Justice.

Defendant was charged with having burglarized the business office building occupied by the Mel Coombs Lumber Company at Piercy in Mendocino County. He was found guilty of burglary in the second degree, and following the denial of his motion for a new trial, judgment was pronounced on the verdict. He has appealed from the judgment and from the order denying his motion for a new trial.

Defendant based his appeal on the following contentions:

1. That the evidence was insufficient to sustain a conviction.

2. That defendant was deprived of due process in that he was precluded from making a reasonable examination of prospective jurors.

Before discussing these contentions we shall summarize briefly the evidence as shown by the record.

Upon his arrival at 8 a. m. on Wednesday, August 24, 1955, William Allman, office manager for the company, found the window near his desk partly opened, although it was his practice to close the windows each night. A strip of adhesive tape was on the window which had apparently been used to pull the window open sufficiently to permit entry of a hand which could then open the window. Adhesive tape was readily available in a near-by first aid building which was kept open at all times. Another window showed marks of an unsuccessful attempt at entrance. Approximately $220 from a metal tobacco can which was kept in a desk drawer was discovered to be missing shortly before 1 p. m. that afternoon. Allman had counted the funds on the previous Saturday and had last seen the money on the previous afternoon when the defendant had been given a $10 advance. Fingerprints were found upon the window which indicated that the person had grasped the window as if to pull it open. The thumb print found on the outside of the window proved to be that of the defendant. Although the prints on the inside could not be clearly identified en toto, a right index fingerprint was found to have nine points of similarity with that of the defendant. Ten points are usually held to be conclusive proof of identifications according to respondent. The window had been washed on Saturday, August 20, 1955, and no other prints were found thereon.

On Monday, August 22d, the defendant, who was then employed by the company, injured one of the fingers on his right hand, not the thumb or index finger, and came into the office where a temporary bandage was applied. Then Allman took him to the hospital and, upon his return, defendant received his paycheck. He was taken home and did not return to the mill until the afternoon of the next day when he came into the office and asked Allman for a $10 advance. The $10 was taken from among the currency in the metal tobacco can from

which the remaining money was later stolen.

Allman testified that while defendant was in the office on Monday and on Tuesday, he was at his desk, which was one and a half feet from the window. At no time did he see the defendant place his hand upon the window or come near enough to do so although such action would have been evident to Allman had it occurred. The distance from the normal standing position upon the concrete porch outside of the window to the window was 70 inches. When defendant came into the office for the $10 advance he was never closer to the window than approximately 6 to 8 feet.

In explanation of his fingerprints defendant testified that while waiting for Mr. Coombs to sign his paycheck the injured hand was hurting and he held it up to alleviate the pain but was not sure that in so doing he had touched the window. Other evidence will be referred to hereinafter.

In support of his first contention defendant argues that the evidence shows that defendant was around this window while lawfully upon the premises of the company as an employee. He asserts that there is nothing to indicate that the defendant was in possession of anything that was taken from the building, and that the only evidence that could possibly connect him with the commission of the crime was the fact that he left the premises about the time of the burglary, that he gave inconsistent statements of his whereabouts, and the fingerprint found on the window. He states that there were some 66 employees who had access to this money. He argues further that the evidence is entirely circumstantial and that the law requires that it must be not only consistent with the hypothesis of guilt, but inconsistent with any other rational hypothesis.

Respondent in reply contends that there was ample evidence to support the jury's verdict and points to the following evidence appearing in the record:

(1) The defendant was completely familiar with the premises where the burglary took place and knew where the container was.

(2) Defendant had apparent opportunity to illegally enter the office and steal the money. He was proven to be and he admitted that he was in the regional area of Piercy on the evening that the crime took place. According to Franklin Miller, a California Highway Patrolman, defendant was involved in an accident in the vicinity of Meyers Flat at 10:30 that evening. The witness took him to Garberville and from Garberville to Miranda, arriving in Miranda about midnight.

(3) Evidence that defendant attempted to provide an alibi which later proved to be false is probative of a guilty mind. Upon being arrested defendant made and signed a statement which, in effect, placed the defendant in Eureka, far from the scene of the crime. He therein stated that after going to the mill for the $10 advance on Tuesday, he went to Garberville and from Garberville to Eureka, arriving in Eureka early in the evening. The evidence of Patrolman Miller clearly proved the falsity of this statement, for the defendant was in the vicinity of Meyers Flat at 10:30 p. m. and in Miranda at midnight. On the witness stand defendant attempted to explain this inconsistency by indicating that he had been mixed up as to dates.

(4) Defendant's fingerprints appeared upon the window which had been opened to gain entry into the offices. From the position of the fingerprints upon the window the jury could readily infer that the person leaving them was the perpetrator of the crime. Respondent argues that fingerprints are the strongest evidence of identity of a person, and under the circumstances of the present case they were sufficient to identify the defendant as the criminal. Respondent argues also that defendant made a weak attempt to explain the presence of his fingerprints, but he was not sure that he had touched the window. Furthermore, Allman testified that he was at a nearby desk at all times when the defendant was in the office or near the window, and he did not see the defendant place his hand upon the window, although had such action taken place he would have been aware of it. Also, defendant's explanation does not show why or how his fingerprints

were found in such a manner as to indicate a grasping of the window rather than a mere "touching" thereof.

[1, 2] We are unable to agree with defendant's contention that the evidence was insufficient to support the judgment. Defendant's argument is merely an argument as to the weight of conflicting evidence, and the weight of the evidence was a question for the jury to determine. It is clear that there was ample evidence to support the verdict of the jury.

[3, 4] Defendant's second contention that the court erred in limiting his right to examine prospective jurors to ascertain whether or not they were deputy sheriffs has substantial merit. The record shows that the trial court, in asking questions of the members of the jury panel collectively, asked the following questions:

> "Have any of you occupied a position from which you might have some bias or prejudice either for or against the Defendant in this case? I'm referring particularly to the position such as deputy sheriff which might give you some bias or prejudice. Do any of you entertain any bias or prejudice by reason of anything of that sort?"

The record shows that deputies of the sheriff's office investigated the alleged crime and that the complaint was filed by a deputy sheriff. During the examination of one of the prospective jurors by defendant's counsel, the following occurred:

> "Q. Are you in any way connected with the Sheriff's office—
>
> "The Court: Mr. Burke, that is a question that goes solely to the advisability of exercising a peremptory challenge and will be disallowed. It's not implied bias.
>
> "Mr. Burke: What is that, Your Honor?
>
> "The Court: I said that question will be disallowed. It goes only to the question of advisability of exercising a peremptory and is not—The Court will not allow it.
>
> "Mr. Burke: I'm not sure that I caught the full intent, Your Honor.
>
> "The Court: Well, the full intent is you may examine as to cause or implied bias, actual bias, or implied bias; but to ask a question to determine whether or not it is advisable to exercise a peremptory is beyond the legal scope.
>
> "Mr. Burke: Yes, I understand that. I didn't know the question I asked The Court particularly had reference to what I was—
>
> "The Court: Well, the question is whether he was a Sheriff. Well, he might be a Sheriff and he's still a good juror. There's no implied bias by the mere fact he occupies the position of sheriff or deputy sheriff.
>
> "Mr. Burke: I'm not so sure, Your Honor, in view of the fact the complaining witness was deputy sheriff, Your Honor.
>
> "The Court: Well, the mere fact this man was a deputy sheriff, the man who swore to the complaint, doesn't raise any implied bias. You may question as to actual bias.
>
> "Mr. Burke: Well, I wish to abide by the Court's ruling. As I understand, I may not inquire as to whether or not any of these jurors are deputy sheriffs in the County of Mendocino; is that the ruling of the Court?
>
> "The Court: Yes, sir.
>
> "Mr. Burke: Very well, Your Honor, may it be understood I have attempted to ask the question?
>
> "The Court: The record will so show."

Section 1078 of the Penal Code provides:

> "It shall be the duty of the trial court to examine the prospective jurors to select a fair and impartial jury. He shall permit reasonable examination of prospective jurors by counsel for the people and for the defendant."

We believe that the court erred in refusing to permit defendant's counsel to ask any of the prospective jurors if he was a deputy sheriff. The court did not ask that question and even if the court had asked such a question of the panel collectively,

we believe that counsel for defendant should have been permitted to ask the question. While the purpose of said Section 1078 was to expedite the examination of prospective jurors, it is stated in People v. Estorga, 206 Cal. 81, at page 84, 273 P. 575, at page 576:

"* * * The purpose of the statute, however, was not to bring about expedition by depriving either the people, or defendants charged with the commission of offenses, of the right of a reasonable examination of prospective jurors, * * *"

[5] We think the correct rule is stated in the following quotation from Walker v. Greenberger, 63 Cal.App.2d 457, at pages 463–464, 147 P.2d 105, at page 108:

"Plaintiff contends further that the trial court erred in not permitting counsel for plaintiff, in questioning the prospective jurors concerning their qualifications, to ask a certain juror or any juror what his occupation was. That contention is based upon proceedings in the trial court as shown by the following excerpt from the transcript: 'Q. (by Mr. Jones, attorney for plaintiff) Your occupation, Mr. Cunningham (a prospective juror)? The Court: That is wholly immaterial, Mr. Jones. Mr. Jones: It is very important, Your Honor. The Court: I will not permit it in my courtroom, if you have any general occupation you may ask, but the matter of occupation is wholly immaterial in a challenge for cause.' The transcript shows further as follows: 'Whereupon the same question was asked of other jurors on the examination for cause and the Court ruled that such an examination for cause would not be permitted in that Court.' The ruling was erroneous. Plaintiff was entitled to reasonable interrogation of prospective jurors as a basis for determining whether he should challenge the juror for cause or whether he should exercise his right to challenge the juror peremptorily. It is reasonable to assume that an answer to that question might have furnished a basis for further questions and answers relative to grounds for challenge for cause, which might have established a basis for such a challenge.

"Irrespective of a challenge for cause, the question was a reasonable one to aid plaintiff in determining whether to exercise a peremptory challenge. * * *"

While the mere fact that a prospective juror was a deputy sheriff would not of itself be a ground of challenge for cause, yet in a case where the sheriff's office has investigated the alleged crime and the complaint was sworn to by a deputy sheriff, a defendant on trial should certainly be permitted to ask and have answered the question of whether or not the prospective juror is a deputy sheriff.

[6] However, the record shows that no peremptory challenges were exercised by either the People or the defendant, and we do not believe that we would be justified upon the record here to hold that the ruling of the court was reversible error. Defendant was represented by able and experienced counsel, and it would not have been difficult for such counsel to have ascertained whether or not any prospective juror was a deputy sheriff in time to have exercised a peremptory challenge. The fact that defendant's counsel exercised no peremptory challenges at all indicates that he did not believe any member of the jury panel was a deputy sheriff and the further fact that no affidavit that any of them were deputy sheriffs was filed in support of defendant's motion for a new trial, strengthens us in the belief that defendant was not prejudiced by the court's ruling.

The judgment and order are affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

141 Cal.App.2d 875

Harry SPENCER, Plaintiff and Appellant,

v.

BEATTY SAFWAY SCAFFOLD COMPANY, a corporation, Charles Mackintosh and Mackintosh & Mackintosh, Respondents, Beatty Safway Scaffold Company, a corporation, Arthur Pinner, Jr., Does I to L, inclusive, Defendants.

Civ. 21094.

District Court of Appeal, Second District, Division 2, California.

May 28, 1956.

Rehearing Denied June 27, 1956.

Hearing Denied July 24, 1956.

Action against the designers of folding bleachers for gymnasium and subcontractor who installed them for injuries sustained by physical education instructor when he fell from top of extended bleacher section with plywood cover of adjoining retracted section on his chest. The Superior Court, Los Angeles County, Arthur Crum, J., entered judgments of nonsuit in favor of all defendants except subcontractor and entered judgment in favor of defendant subcontractor notwithstanding verdict in favor of plaintiff, and plaintiff appealed. The District Court of Appeal, Moore, P. J., held that the evidence failed to establish that any negligence of defendants was the proximate cause of instructor's fall and injuries and that res ipsa loquitur doctrine was not applicable.

Judgments and orders affirmed.

1. Negligence ⇐56(1.1)

Mere proof of negligence is insufficient to establish liability, unless such negligence is causally connected with injury.

2. Negligence ⇐122(1)

A person who suffers amnesia as a result of injuries is presumed to have been acting with due care for his own safety.

3. Negligence ⇐122(1)

Presumption that one who suffered amnesia as a result of injuries was acting with due care for his own safety was sufficient to establish his freedom from contributory negligence, where such presumption was not overcome by positive evidence.

4. Negligence ⇐56(1.3)

Negligence, in order to be actionable, must be the proximate cause of injury.

5. Negligence ⇐121(1, 5)

In tort action, plaintiff had the burden of establishing every fact essential to his cause, particularly that the negligence complained of was the proximate cause of injury.

6. Negligence ⇐134(11)

In tort action, the proof must be sufficient to raise a reasonable inference that the negligence complained of was the proximate cause of injury and evidence that such negligence could possibly have been the cause is not sufficient.

7. Evidence ⇐597

Where the evidence leaves fact finder in doubt and uncertainty as to existence of an essential fact, he cannot base a verdict or finding on guess or conjecture.

8. Negligence ⇐134(11)

In action against engineers who designed folding bleachers for gymnasium and subcontractor who installed such bleachers for injuries sustained by physical education instructor when he fell from top of extended bleacher section with plywood cover of adjoining retracted section on his chest, evidence failed to establish that any negligence of defendants was the proximate cause of fall and resulting injury.

9. Negligence ⇐121(3)

In action against engineers who designed folding bleachers for gymnasium and subcontractor who installed them for injuries sustained by physical education instructor when he fell from top of extended bleacher section with plywood cover of adjoining retracted section on his chest, "res ipsa loquitur" doctrine was not applicable, in view of fact that bleachers had been under control of board of education and its agents, including injured instructor and others, for eight months since completion of installation and absence of showing that injury was not caused by voluntary act of injured instructor.

See publication Words and Phrases, for other judicial constructions and definitions of "Res Ipsa Loquitur".

10. Negligence ⇐121(2)

"Res ipsa loquitur" doctrine is not applicable unless injury was caused by an agency or instrumentality within control of defendant and must not have resulted from a voluntary act of injured person.

11. Judgment ⇐199(3.15)

Where the evidence was insufficient to establish that any negligence of defendant was the proximate cause of injury for which plaintiff sought to recover damages and res ipsa loquitur doctrine was inapplicable, defendant was entitled to judgment notwithstanding verdict in favor of plaintiff.

12. Negligence ⇐136(1)

Defendants were entitled to judgment of nonsuit in negligence action, in absence of evidence that any negligence of defendants caused injuries for which plaintiff sought to recover damages.

Samuel P. Young, Los Angeles, for appellant.

Reed & Kirtland and Henry E. Kappler, Los Angeles, for respondent Beatty Safway Scaffold Co., Inc.

Murchison & Cumming, by R. Bruce Murchison, Los Angeles, for respondents Charles Mackintosh and Mackintosh & Mackintosh, a partnership.

MOORE, Presiding Justice.

Only two questions are posed by this appeal: (1) Was the evidence against the corporate defendant sufficient to justify an inference that it was guilty of actionable negligence or did it warrant a judgment for such defendant *veredicto non obstante?* (2) Was the evidence against the other defendants so devoid of substance as to warrant the granting of their motions for a nonsuit?

Appellant sued for damages allegedly resulting from bodily injuries suffered by him while standing on a bleacher which had been designed by respondents Mackintosh and Mackintosh, engineers, employed by respondent Beatty Safway Scaffold Company, a corporation, herein referred to as "Beatty." The general contractor for constructing a gymnasium building at the Belvedere Junior High School was Arthur Pinner Jr. whose contract included the installation of the automatically operated bleachers. The installation of the bleachers began January 28, 1952. The work had been completed on April 30 when the engineers for the Board of Education were present and witnessed the equipment in place, and in operation. No corrections were suggested with reference to the operation or to the bleacher covers.

At the close of plaintiff's case, motions for nonsuits by all defendants were granted except that of Beatty. A verdict against it for $57,000 was set aside and a judgment notwithstanding the verdict was entered in favor of Beatty and against Spencer. Appeals were taken by plaintiff from that judgment, and also from the judgments of nonsuit granted the other defendants.

Appellant was 57 years of age. For many years prior to his accident, he had been the head physical education instructor at the Belvedere Junior High School in the City of Los Angeles. On December 16, 1952, he was in charge of the gymnasium, the bleachers and other installations. As such instructor and director, it was his duty to operate the folding bleacher devices and the retractable basketball backstops in the gymnasium. The backstops were raised and lowered by cranks inserted in winch boxes attached to the walls above the bleachers. While he was about to crank, or was in the act of cranking a backstop into place, a bleacher lid (cover) fell and struck him on the chest.

The installation of the bleachers had been completed April 30, 1952, but they were not used regularly until September. They were installed by the corporate defendant Beatty, a subcontractor under defendant Pinner. The bleachers were in six consecutive sections on the west wall of the gymnasium, about one inch apart and one inch from the wall, numbered 1 to 6 from north to south. Each section is operated separately and was so constructed as to be extended outward from the wall when the planks automatically came into place, thereby affording seating facilities for spectators. It is supported

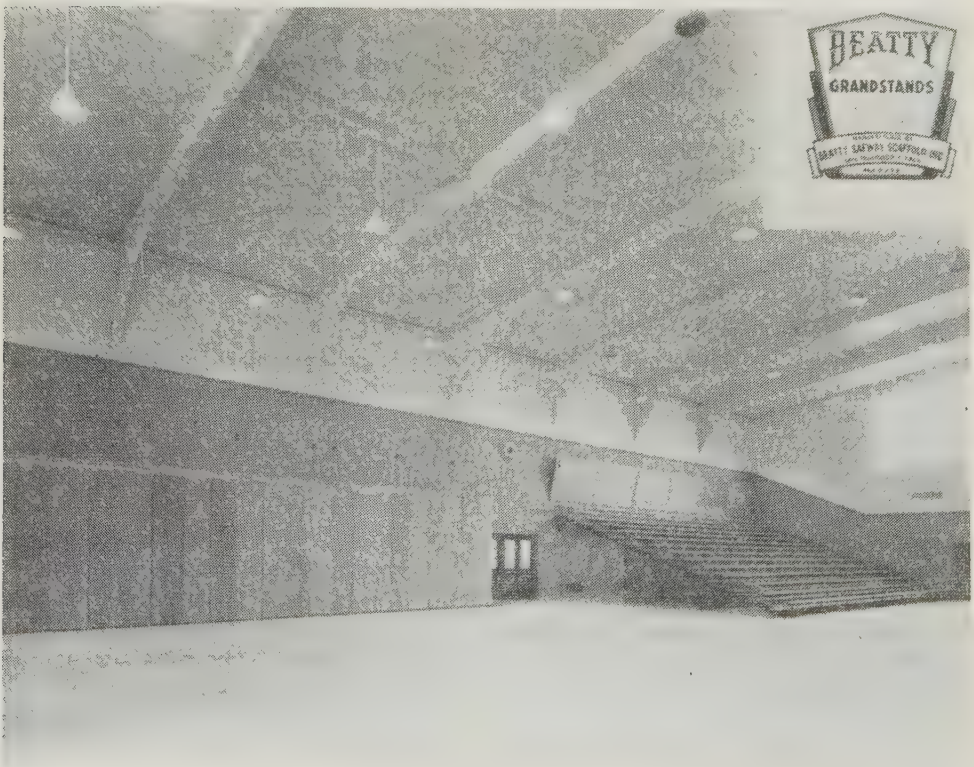
by standards on wheels. It is to be folded, or retracted, when not in use. It is extended or opened by manually pushing the wheel-supported frame forward from the wall. Then the front cover lies flat on the gymnasium floor, while the bleacher seats rest upon the extended frame; at the same time the "lid" or top-cover is raised to a vertical position, parallel with the wall. When it is retracted, the front cover is placed so as to conceal the bleacher frame and seats from view, while the lid normally descends from its vertical position near the wall behind the retracted bleacher to become the top of a box, shutting the bleacher wholly from view. The cover or lid is made of half-inch plywood. The top or lid of the box created by closing or retracting the bleacher is of sufficient strength to prevent balls or other equipment from getting into the folded bleachers, but it is not strong enough to support heavy objects or the weight of a man. When the lid is up, it stands in delicate balance, with its upper edge about four inches from the wall.

The Automatic Operation

This automaton is operated by the force of gravity, slightly aided by the attendant. A section has three sets of pulleys operating antagonistically. One end of the cable is securely attached to the lid; it proceeds through a pulley attached to the wall above the lid; thence it proceeds down the wall to a point below the lid through an opposing pulley; thence to a screw in the bleacher frame. When the bleacher is retracted, the cable slackens, whereupon the near-vertical lid falls into its place, covering the enclosed bleacher. That takes the slack from the cable which becomes taut again.

When the engineers for the Board of Education on April 30, 1952, observed the bleachers in operation, they found no fault in their construction or operation. For views of a section extended and a section retracted, see the reproductions of photographs in evidence.

Defendants' Exhibit A



Defendants' Exhibit K



A New Factor Enters

The bleachers having been accepted, a new device was found essential to the gymnasium. Basketball backstops were installed. They also were put on the west side of the gymnasium. They were attached to the wall and the ceiling to be raised and lowered as required. The mechanism for operating the backstop is controlled by winch devices fastened to the wall above the bleachers and in such positions that they are above the top of the lid when it is in vertical position. The installation of the backstops and winches appears to have been an afterthought of the school board for there is no evidence that Beatty had an inkling of the plan subsequently to install the additional equipment.

How it Happened

Appellant had, prior to December 16, 1952, observed the successful operation of the bleachers. They were throughout the autumn operated successfully. On the last mentioned date he went to the top of section 6 in order to crank a winch box located above the vertical lid over section 5. While doing so, the lid of that section suddenly fell, struck appellant, knocked him off the bleachers to the floor and caused him to

suffer brain concussion, retrograde amnesia, permanent paralysis downward from the eighth dorsal vertebra.

Was Bleacher Negligently Constructed?

[1] The expert proof shows definitely that the basic design of the bleacher was proper and appellant's counsel admitted that no part of it was improperly constructed. It appears, however, that the execution of the details was so far substandard that the operation of the pulley on bleacher 5 froze and became ineffective at the time of appellant's fall. The pulley that was fastened to the wall behind the seats, half way to the floor, was too small for the cable. After the accident it was found to be immobilized. Also, the cable at that point was pinched. While there was no evidence that the cable broke, the immobility caused by the failure of the cable readily to pass through the pulley was sufficient to cause the lid to remain up when it should have come down. Other criticisms of the experts were such things as tended to create friction, thereby causing a diminution in the ease with which the cable proceeded to respond to the forces operating upon it. The immobility of the cable left the lid in its vertical position. But conceding the freezing of the cable to have been due to the negligence of Beatty, mere proof of negligence on the part of a defendant does not complete the circuit of proof of his liability. To make him legally liable, the negligence of the defendant must be fastened to the injury. If it is not, a judgment against him is not justified. Puckhaber v. Southern Pacific Company, 132 Cal. 363, 364, 64 P. 480; see also Greene v. Atchison, T. & S. F. Ry. Co., 120 Cal.App.2d 135, 140, 260 P.2d 834, 40 A.L.R.2d 873; Neuber v. Royal Realty Co., 86 Cal.App.2d 596, 630, 195 P.2d 501; Reese v. Smith, 9 Cal.2d 324, 328, 70 P.2d 933. Where the negligence proved is not connected with the injury, "the case stands exactly as if no negligence had been proven." Ibid, Puckhaber v. Southern Pacific Company, 132 Cal. at page 365, 64 P. at page 480.

The Lid or Cover

[2, 3] Made of plywood, the cover was 16 feet long, four feet wide, and weighed 120 pounds. It suddenly fell, struck appellant and precipitated him to the floor. But there is no evidence of what happened just prior to the lid's falling. Since he suffered amnesia, he is presumed to have been acting with due care for his safety. Smellie v. Southern Pacific Company, 212 Cal. 540, 562, 299 P. 529; Ellison v. Lang Transportation Company, 12 Cal.2d 355, 359, 84 P.2d 510. That presumption followed him throughout the trial and it was never overcome by positive evidence. Hence, by that presumption of due care, appellant is relieved of the charge of contributory negligence. That presumption is aided by the evidence in this case. Not one of the four small boys who either saw him ascend bleacher No. 6 or saw him falling, threw any light on the cause of his fall. If his usual practice of standing with one foot on the extended bleacher, as on section 6 in the instant action, and the other on top of the retracted section, as on 5 herein, was negligence, the presumption here is that he did not do so. If he did anything negligently, it was not observed by those boys. Rios saw that his feet were not wide apart, although one foot was ahead of the other. Salazar saw that appellant's body was wholly on bleacher 6. Moreno saw him standing on the right side of open bleacher 6. They all saw what appellant did before he fell, to wit, reach forward with the crank for the winch box. But what thereafter occurred was unknown until two of them saw him falling with the cover on his chest. Some of them saw him insert the crank into the winch box as though to wind the backstop; some saw him falling with the 120-pound lid against his chest. But not a word was uttered proving that he was negligent. However, it now appears to be certain that although he was not negligent, yet what he himself did to the cover brought an end to his greater usefulness in his profession.

When the plyboard cover stands almost vertical, it is held so by the cable while the

bleacher is extended which in turn is held taut by the screws in the wall. Unless those screws came out, the cover could not fall. It is possible that appellant lost his balance as he leaned from the top seat on section 6 to crank the winch above section 5, and in falling grabbed the cover and went down with it. If he did that, or anything else to cause him to fall, although not negligence, such possibility or some act of his caused him to fall and in his falling to pull the cover down and that fall and his pulling the cover with him or some other act of his was the sole proximate cause of the tragedy, unless the doctrine of *res ipsa loquitur* is applicable.

[4–7] Certainly, the accident can be traced to no negligence of the defendants or any of them. Before negligence can be actionable, it must be the proximate cause of the injury. 19 Cal.Jur. 557. Before negligence is actionable, a causal connection must be shown to have proceeded in unbroken course from the so-called negligent act to the injury. Lawrence v. Southern Pacific Company, 189 Cal. 434, 442, 208 P. 966, 969; 19 Cal.Jur. 557, note 18. The burden rests on the plaintiff to prove that the alleged negligence was the proximate cause. Ibid. The plaintiff in a tort action must establish the presence of every fact essential to his cause, especially that the negligence complained of was the proximate cause of the injury and not a mere speculation. McKellar v. Pendergast, 68 Cal.App. 2d 485, 489, 156 P.2d 950. That defendant's negligence could *possibly* have been the cause, is not sufficient. The proof must be sufficient to raise a reasonable inference that the negligence complained of was the proximate cause of the injury. If that is not the result of the evidence, if the fact finder is left in doubt and uncertainty, he cannot base a verdict or finding on guess or conjecture. Reese v. Smith, 9 Cal.2d 324, 328, 70 P.2d 933; Puckhaber v. Southern Pacific Company, 132 Cal. 363, 366, 64 P. 480.

[8] As proof that negligence of respondents did not cause appellant to fall, it is recalled that he had for eight months been familiar with the method of operating the bleacher, and had been the chief actor in its operation. He had never discovered anything out of order. On the contrary, he had abused the plyboard by standing on the lid which was not designed to support a man's weight. Such practices may have caused a warping of the plyboard and thus have added to the friction of the cable and caused it to be immobilized.

[9, 10] *Res ipsa loquitur* does not apply. It does not appear that the injury was not caused by a voluntary act of appellant. Ybarra v. Spangard, 25 Cal.2d 486, 491, 154 P.2d 687, 162 A.L.R. 1258. From the events recited above, and from the allegation [1] that appellant went upon the bleachers to pull the cover down, it would not be irrational to conclude that his voluntary act was the cause. At the most, it cannot be said that the probabilities weigh against Beatty's negligence as the proximate cause of appellant's falling beneath the bleacher's cover. In such event, *res ipsa loquitur* does not apply. La Porte v. Houston, 33 Cal.2d 167, 169, 199 P.2d 665; Zentz v. Coca-Cola Bottling Company, 39 Cal.2d 436, 442, 247 P.2d 344. Moreover, in view of the law that the doctrine of *res ipsa loquitur* is not applicable (1) unless the negligent act was caused by an agency or instrumentality within the control of the defendant and (2) must not have resulted from a voluntary action of the plaintiff, Ybarra v. Spangard, supra, 25 Cal.2d at page 489, 154 P.2d 687, it is here recalled that Beatty's last control over the bleachers and winches was April 30, 1952; that thereafter they were for eight months under the exclusive control of the Board of Education and its agencies. Also, during that period, appellant was, himself, the very agent who operated and cared for the gymnasium equipment. He had operated the bleachers and backstops numerous times and they worked properly. The bleacher was equipped with a turnbuckle for taking up any slack in the cable. Whether plaintiff ever operated it does not appear. He was not asked and did not

1. The original complaint alleged he went upon the bleachers to pull down the lid.

say what, if any, other adjustments he made at any time on the bleachers or backstops. The other physical education teachers and the coach of the East Los Angeles Junior College basketball team were authorized to use the crank and crank box. What they did in the way of operation or adjustment does not appear. Plaintiff explained the operation of the backstop to the "gym" coach and the inference is that he also was privileged to operate it. Mr. Bohme, an instructor, operated the bleachers and backstops four or five times. Once a lid stuck and he pulled it down with his hand. He testified that he had done nothing in the way of maintenance, or of changing any wires or oiling the pulleys or anything of that sort. He is the only witness who was asked about any change of any kind in the bleachers after delivery by defendant Beatty. This record falls far short of evidence "permitting a reasonable inference that it [the bleacher] was not accessible to extraneous harmful forces and that it was carefully handled by plaintiff or any third person who may have moved or touched it" (to borrow the phrasing of Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 458, 150 P.2d 436, 439).

[11] The order granting Beatty's motion for judgment notwithstanding the verdict was properly granted.

Orders of Nonsuit Were Proper

[12] In view of the foregoing discussion, it appears that the order for nonsuit on the motions of Charles Mackintosh and Mackintosh and Mackintosh were wholly justified. No negligent act on the part of either was proved. These engineers designed a safe and efficient automatically controlled bleacher. Its failure to operate efficiently could not have been due to the negligence of either and if it failed to perform at a critical moment, such failure was not the cause of the injury.

Judgment and orders affirmed.

FOX and ASHBURN, JJ., concur.

CITY OF OAKLAND, a municipal corporation, Plaintiff and Respondent,

v.

OAKLAND UNIFIED SCHOOL DISTRICT OF ALAMEDA COUNTY, State of California, a public corporation, and Board of Education of the Oakland Unified School District of the City of Oakland, County of Alameda, State of California, Defendants and Appellants.

No. 16748.

District Court of Appeal, First District, Division 1, California.

May 23, 1956.

Rehearing Denied June 22, 1956.

Hearing Denied July 18, 1956.

Action by a municipal corporation to have its rights declared under an indemnity clause in a lease and to require lessees to save it harmless from a negligence action brought by a user of walkway to the leased premises. From a judgment by the Superior Court, County of Alameda, A. T. Shine, J., in favor of plaintiff, defendants appealed. The District Court of Appeal, Bray, J., held that the "premises" did not include a walkway providing access to the auditorium, and lessees were not obligated to save lessor harmless as to claim of patron for injuries sustained because of defect in walkway in front of and adjoining building.

Judgment reversed.

1. Indemnity ⇐6

Where indemnity provision of lease purports to indemnify lessor against results of its own negligence and lease has been prepared by lessor, indemnity provision must be construed against lessor.

2. Indemnity ⇐8

The law does not favor one who endeavors to indemnify himself against his own negligence, and a provision in an instrument doing so will be strictly construed against party relying upon it.

3. Indemnity ⇐8

Under indemnity clause of lease which obligated lessee to hold lessor free from lia-

bility or claim for damages from any cause arising out of use of premises by lessee, and described the premises as the arena of auditorium building, the "premises" did not include walkway providing access to auditorium, and lessee was not obligated to save lessor harmless as to claim of patron for injuries sustained because of defect in walkway in front of and adjoining building.

See publication Words and Phrases, for other judicial constructions and definitions of "Premises".

Woodrow W. Kitchell, Oakland, Herbert Chamberlin, San Francisco, of counsel, for appellants.

Appelbaum, Mitchell & Bennett, Oakland, for respondent.

BRAY, Justice.

Defendants leased from plaintiff the Arena of its Municipal Auditorium building in which to hold the "Annual Spring Music Festival." One Mrs. Genevieve Herd sued plaintiff for damages for injuries which she claimed to have sustained while attending said festival. She alleged that her injuries were due to a fall caused by a defect in the walkway providing access to the easterly entrance of said Municipal Auditorium. Claiming that under the lease above mentioned defendants had agreed to indemnify plaintiff against all loss, expense or claim for damages arising out of the use of the property described in the lease, plaintiff demanded that defendants defend plaintiff in the Herd action. Defendants refused so to do. Plaintiff brought this action to declare its rights under said lease and particularly to have it declared that defendants hold plaintiff harmless from any claims of said Genevieve Herd in said action brought by her against plaintiff. Defendants appeal from a judgment in favor of plaintiff.

The trial court found that the place where Mrs. Herd claimed to have been injured was a "path * * * providing access" to the easterly entrance of said Municipal Auditorium owned by plaintiff,[1] and that the place where the injury occurred was a part of the premises leased to defendants in the said lease, and that the accident sustained by Mrs. Herd arose "out of the use and occupation of the premises leased * * *"

Question Presented.

Does the indemnity clause of the lease apply to the place of injury?

Premises Indemnified.

What were "the premises" as to which the indemnity applies? The lease, prepared by plaintiff, provides: "1. That the lessor hereby leases to the lessee, and the lessee hereby hires from the lessor, the Arena of the Oakland Municipal Auditorium Building, *hereinafter referred to as the 'premises'* (and no other space or accommodation except as may be hereinafter expressly provided for) for the sole purpose of holding the Annual Spring Music Festival in said building * * *" (Emphasis added.) (No other space or accommodation is referred to.) The balance of said paragraph 1 and the other 12 paragraphs, excepting only paragraph 12, have no bearing on the problem here involved. Paragraph 12 provides: "That the lessee will hold the lessor free from any liability or claim for damages or suit for or by reason of any injuries to any person or property, of any kind whatsoever, from any cause whatsoever arising out of the use and occupation of *the premises* by the lessee; and the lessee hereby covenants and agrees to indemnify and save harmless the lessor from all liability or damage on account of or by reason of any such injuries or damages." (Emphasis added.)

At the trial Mrs. Herd testified that as she left the Music Festival, she walked out of the auditorium, descended steps to a walkway in front of and adjoining the building. After walking 22 to 25 feet on the walkway she stepped into a hole, whereby she was injured. This hole was in the center of the pathway. It customarily held a post, but the post had been removed. There is no evidence to show who had removed it. A photograph of the

1. The court also referred to it as a "walkway providing access * * *."

pathway was introduced in evidence. It shows a cement walk running parallel to the easterly end of the auditorium building. At the near end of the picture the walk inclines upward and then levels off. The steps to the doorways of the building lead off this walk at right angles. On the outer side of the walk is an iron railing. There was no evidence that the walk was used for purposes other than ingress and egress to or from the building.

Forrest Mitchell, who executed the lease on behalf of defendants, testified that at the time of executing it he understood that people attending the festival would be entitled to use the walkway and exits of the auditorium to get in and out.

[1, 2] The question here is not alone what could be used by defendants as appurtenant to the leased portion of the building but particularly as to what places the indemnity provision would apply. In determining this question and in interpreting the lease, it must be borne in mind that the terms of the lease must be construed strictly against plaintiff, first because the lease was prepared by plaintiff (see Basin Oil Co. v. Baasch-Ross Tool Co., 125 Cal.App.2d 578, 271 P.2d 122; Pacific Lumber Co. v Industrial Accident Comm., 22 Cal.2d 410, 422, 139 P.2d 892; E. A. Strout Western Realty Agency v. Gregoire, 101 Cal.App.2d 512, 517, 225 P.2d 585); and secondly, because the indemnity provision purports to indemnify plaintiff against the results of its own negligence.[2] "* * * the law does not look with favor upon attempts to avoid liability or secure exemption for one's own negligence, and such provisions are strictly construed against the person relying upon them. * * * [W]here the language of an instrument purporting to exculpate one of the parties for its future negligence was prepared entirely by the party relying on its terms, words clearly and explicitly expressing that this was the intent of the parties are required. [Citations.]", Basin Oil Co. v. Baasch-Ross Tool Co., supra, 125 Cal.App.2d at pages 594, 595, 271 P.2d at page 131.

In Hollander v. Wilson Estate Co., 214 Cal. 582, 7 P.2d 177, the tenant leased the fourth floor of a 7 story building. The lease contained a provision indemnifying the landlord against all claims for damages to persons or property "'in or about or connected with this tenancy or the occupancy of said demised premises.'" 214 Cal. at page 584, 7 P.2d at page 178. The court held that while no mention was made in the lease of the tenant's right to use the elevator, such right was an appurtenance of the lease. However, as to the indemnity clause, although the elevator was in a sense "connected with" the tenancy, "It is contrary to sound construction to say that said instrument had in contemplation the release from liability for damages for personal injuries arising from the negligent operation or maintenance of this public elevator." 214 Cal. at page 585, 7 P.2d at page 179.

In Pacific Indemnity Co. v. California Electric Works, Ltd., 29 Cal.App.2d 260, 84 P.2d 313, the court was construing the indemnity provision of a building contract. It held that to construe the provision as applying to the indemnity of one of the parties against its own wrong, "* * * the language of the contract must be of such a nature as to compel that interpretation, and to accomplish such a result the language used must be clear and explicit." 29 Cal.App.2d at page 274, 84 P.2d at page 320. It then quoted from Murray v. Texas Co., 172 S.C. 399, 174 S.E. 231, to the effect that "broad and comprehensive" language alone is not enough. The language indemnifying against the parties' own wrong must nevertheless be clear and explicit and as the defendant there wrote the indemnity provision into the contract for its own benefit, it should have "plainly stated, if such was the understanding of the parties, that the plaintiff agreed to re-

2. While there was no evidence of who removed the post leaving the hole into which Mrs. Herd fell, her complaint against plaintiff alleged that the "dangerous, hazardous, and defective condition" was due to a "hole * * * which * * * had been duly created" by plaintiff.

lieve it in the matter from all liability for its own negligence." 29 Cal.App.2d at page 274, 84 P.2d at page 320.

[3] Applying such rules to the lease here, it would appear that while as appurtenant to the portion of the building leased there necessarily followed the right to use all portions of the building and even the walkway necessary for ingress to and egress from the Arena,[3] the indemnity provision only applied to the "premises" as strictly defined in the lease. Paragraph 12 limits the indemnity to claims resulting from "the use and occupation of the premises * * *" The parties have specifically defined "the premises" as "the Arena * * * (and no other space or accommodation except as may be hereinafter expressly provided for) * * *" While, of course, people going to the Arena would be entitled to use the walkways and driveways around the building and parking areas, if any, it would be unreasonable, in view of the very restrictive language of the lease, to hold that the indemnity applied to injuries incurred by conditions in those areas, particularly conditions over which defendants would have no control but plaintiff would. The mere fact that plaintiff made no charge to defendants for the use of the Arena would not broaden the terms of the indemnity. While the trial court did not characterize the walkway other than to say that it provides ingress to and egress from the building, the Herd complaint charged that the walkway "was, and now is, dedicated to and set apart for the use of the general public and of individual persons in general, while in, upon and about said 'Municipal Auditorium.'" Under the lease defendants had the exclusive use of the Arena for the specified evening. Its use, however, of means of ingress and egress was not exclusive. Those means would have to be shared with the general public. That fact is another reason for construing strictly the indemnity provision and not applying it to all areas owned by plaintiff which the patrons of the Music Festival would use in coming to the affair. If it was to be the understanding of the parties that the pathway outside the building was to be included in the indemnity clause, it would have been a very simple matter for plaintiff in drawing the lease to so provide.

Plaintiff has cited cases like Werner v. Knoll, 89 Cal.App.2d 474, 201 P.2d 45, and Barkett v. Brucato, 122 Cal.App.2d 264, 264 P.2d 978, as upholding clauses similar to paragraph 12. There is no question but that the indemnity provision is a valid one. The only question is as to what part of plaintiff's property it applied to. This question was not involved in the cited cases. The language of the lease is clear and unambiguous. It defines "premises" and limits the indemnity to the premises defined. The fact that the parties "understood," if they did so, that defendants were to use more than the defined premises, did not extend the indemnity to more than the expressly defined limits.

The judgment is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.



141 Cal.App.2d 828

George E. AGAJANIAN, also known as George Agajanian, and Marjorie D. Agajanian, Plaintiffs and Appellants,

v.

Peter CUCCIO, Minnie Cuccio, Anthony J. Pernechele and Jennie Pernechele, Defendants and Respondents.

Civ. 21435.

District Court of Appeal, Second District, Division 2, California.

May 24, 1956.

As Amended on Denial of Rehearing June 15, 1956.

Hearing Denied July 18, 1956.

Suit for specific performance or damages for alleged breach of defendants' contract to sell and convey to one of plaintiffs land leased to him by defendants on his ex-

3. See Owsley v. Whelan Drug Co., 83 Cal. App.2d 454, 457, 189 P.2d 50; Mayer v. Hazzard, 10 Cal.App.2d 1, 3, 51 P.2d 189.

ercise of option under lease to purchase land. Defendants filed a cross-complaint for ejectment and to quiet title to land. From a judgment of the Superior Court of Los Angeles County, McIntyre Faries, J., for defendants and cross-complainants, plaintiffs appealed. The District Court of Appeal, Fox, J., held that option did not include a community oil lease covering leased land and other property, so that conveyance of land alone would not carry owners' royalty interest in such lease and specific performance, which plaintiffs did not desire unless oil rights were included, was properly refused.

Judgment affirmed.

1. Mines and Minerals ⇐53

On lessors' performance of contract to sell and convey leased land to lessee on his exercise of option in lease to purchase land, lessee becomes owner in fee of land and thus entitled to mineral rights therein, where mineral lease, to which land lease is subject, covers only property sold; right thus created in lessee being a "profit a prendre".

See publication Words and Phrases, for other judicial constructions and definitions of "Profit a Prendre".

2. Mines and Minerals ⇐70(1)

A royalty return rendered by mineral lessee to his lessor for a profit a prendre in land is an incorporeal hereditament analogous to rent.

3. Mines and Minerals ⇐64

A royalty interest under mineral lease passes on sale of realty covered thereby to grantee of fee, in absence of reservation thereof by seller.

4. Mines and Minerals ⇐74, 79(1)

The royalty interest transferred by each of owners of lands covered by community oil lease to their colessors is an incorporeal hereditament in gross and does not follow conveyance of a lessor's land, but can only be conveyed by specific transfer of such interest.

5. Mines and Minerals ⇐74, 79(1)

Each of owners of lands covered by community oil lease conveys to his colessors a percentage interest in all oil produced on his land by lessee during life of lease, and such interest is an estate in real property, which does not follow conveyance of land, but can be conveyed only by specific conveyance of such interest.

6. Mines and Minerals ⇐53
Specific Performance ⇐7

An option, given lessee by lease, to purchase leased land, did not include community oil lease, to which land lease was subject, so that conveyance of land to lessee on his exercise of option would not carry owners' royalty interests in oil lease, and specific performance of lessors' contract to sell and convey land to lessee was properly refused by Superior Court, where lessees did not desire specific performance unless oil rights were included.

7. Evidence ⇐450(4)

An option given lessee to purchase leased land by lease stating that it was subject to oil lease was ambiguous as to whether oil lease covered such land only or also included additional land as a community lease, so as to authorize admission of parol evidence to clarify such question and aid in ascertaining parties' intention.

8. Mines and Minerals ⇐53
Specific Performance ⇐25

Landowners, agreeing in lease of land to give lessee option to purchase it, did not become bound to transfer owners' interest in community oil lease, to which land lease was subject, when they signed lessees' escrow instructions providing for assignment of oil lease to lessee on his exercise of option, where owners concurrently executed additional escrow instructions providing for their retention of oil lease and lessee refused to approve such instructions, so that no contractual rights matured from escrow instructions and lessee was not entitled to specific performance of owners' alleged contract to sell and convey land, with oil lease, to him.

Jerrell Babb, Los Angeles, for appellants.

William Bronstein, Los Angeles, for respondents.

FOX, Justice.

Plaintiffs sued for specific performance, or, in the alternative, for damages. Defendants filed a cross-complaint for ejectment and to quiet title. The court denied specific performance and refused to award damages to plaintiffs. It rendered judgment in favor of the cross-complainants and quieted their title. Plaintiffs appeal.

On October 4, 1951, Peter Cuccio and Anthony Pernechele leased certain real property to plaintiff George E. Agajanian, the pertinent provisions of the lease reading as follows:

"The Lessor's agrees to lease five acres of land located at Earl & Spencer-Redondo, Southwest Corner Lot 41 for the term of One Year and option of Nine more years, this Lease can be terminated from Year to Year upon mutual agreement by both parties, Lessor's and Lessee at $120.00 Dollars Per year payable in advance, also this Lease is subject to the Lease which certain Oil co. holds, and that the Landlord is not responsible for any liability.

"The Lessor's agree to give the Lessee two Years option to purchase property located at Earl & Spencer for the sum of $10,000 Dollars *Cash Deal only.* (Ten Thousand Dollars)

"This land is leased for the purpose of agricultural and Cattle raising only."

The habendum clause states that the term of the lease is for one year: from the 4th of October, 1951, to the 4th of October, 1952.

Mr. Cuccio and his wife, Minnie, owned a one-half interest in this property as joint tenants; Mr. Pernechele and his wife, Jennie, owned the other one-half interest, also as joint tenants. Neither wife, however, signed the lease to Mr. Agajanian.

In September, 1953, Mr. Agajanian decided to exercise the option to purchase the property. He served a written notice on Mr. Cuccio and Mr. Pernechele to that effect. It called upon them to furnish a grant deed conveying said property, free and clear of all liens and encumbrances, "except any cloud that may be created thereon by a certain oil and gas lease now outstanding against said premises, vested in you, Peter Cuccio and Anthony J. Pernechele, * * *."

As a means of effectuating the purchase, plaintiff opened an escrow at a local bank. The buyers' instructions provided: "It is agreed between buyer and seller that the existing oil lease on subject property is to be assigned to the buyer herein." Mr. Cuccio and Mr. Pernechele and their respective wives signed the sellers' portion of the escrow instruction which recited that they approved and accepted the terms and conditions contained in the buyers' instructions. At the same time, however, defendants executed Additional Instructions, the typewritten portion of which reads in part as follows: "All instructions in this escrow are acceptable, with the following amendment. The Seller's hereby amend these escrow instructions as follows: Seller agrees to sell all property with the reservations of oil and mineral rights and the oil lease presently in existence to be retained by the sellers * * *" Plaintiffs refused to approve these additional instructions. It developed at the trial [1] and the court found [2] that the oil lease in question was a community lease covering this and other property.

The court found, in effect, that the oil lease was not included in the so-called option. This question represents the real heart of the lawsuit.

[1–5] Appellants' position is that they have an option that is in all respects sufficient and enforceable and that they "have established their rights in the community oil lease since they are entitled to be owners in fee of the land." They argue that "It follows as a matter of law that with the performance of said contract plaintiffs will become owners in fee of the said real property and thus entitled to the mineral rights thereof." This argument is sound where the lease covers only the property that is sold. "The right thus created in the lessee is a *profit a prendre.* [Citations.] The royalty return which the lessee renders to his lessor for a *profit a prendre* in land is analogous to rent, an incorporeal hereditament. [Citations.]" Tanner v. Title Ins. & Trust Co., 20 Cal.2d 814, 819–820, 129 P.2d 383, 386. In the absence of a reservation by the seller, such a royalty interest passes to the grantee of the fee on a sale of

1. During the trial judge's interrogation of defendant Peter Cuccio concerning the lease the witness stated: "* * * It is a community lease, is what it is, your Honor.
"The Court: Is the well on your property? The Witness: No, not on my property. It is next door."

2. Finding IX reads as follows: "Finding of this Court * * * is that the only evidence introduced by the plaintiffs as to the market value of said real property described in plaintiffs' Amended Complaint, together with the defendants' rights under a community oil lease which covers the property and other property, is of the sum of $10,000.00."
In the judge's memorandum of decision he stated: "Both parties knew there was an existing community oil lease which included these premises."

the real property covered by the lease. Tanner v. Title Ins. & Trust Co., supra, 20 Cal.2d at page 820, 129 P.2d 383. Other factors, however, must be considered where, as here, the land in question is, along with other land, in what is commonly known as a community oil lease. By executing the community lease, the defendants herein and each of the other lessors assigned or conveyed to his colessors a percentage interest in all oil produced on his land by the lessee during the lease. The consideration for that transfer was the similar mutual assignments of the other lessors. "The royalty interest thus transferred by each landowner to his colessors is an incorporeal hereditament in gross * * *." Tanner v. Title Ins. & Trust Co., supra, 20 Cal.2d at page 820, 129 P.2d at page 386. Such interest "does not follow the conveyance of the lessor's land, but can only be conveyed by a specific transfer of that interest." Tanner v. Title Ins. & Trust Co., supra. In discussing the interests created by a community lease, the court, in Brown v. Copp, 105 Cal.App.2d 1, 5, 232 P.2d 868, 871, points out that each of the landowners conveys "to his colessors a percentage interest in all oil produced on his land by the lessee during the life of the lease," and that this is "an estate in real property." The court then states: "This estate does not follow the conveyance of the lessor's land but can only be conveyed by a specific conveyance of that interest. [Citations.]" 105 Cal.App.2d at page 6, 232 P.2d at page 871. To the same effect is Friedrich v. Roland, 95 Cal.App.2d 543, 549, 213 P.2d 423.

[6] Applying these principles to the case at bar, it is plain that, assuming plaintiffs had an enforceable option, a conveyance of the land alone would not carry with it the royalty interests of the owners in the community oil lease. The so-called option that Mr. Cuccio and Mr. Pernechele signed does not expressly purport to include the royalty interests of the owners in any community oil lease covering the property. It is therefore clear that plaintiffs are not entitled to the interest of the defendants in the community lease. Plaintiffs do not desire specific performance unless the oil rights are included. It follows that the court properly refused to decree specific performance. Plaintiffs make no contention that they are entitled to damages in lieu of specific performance.

[7] Plaintiffs vainly argue that the court erred in deciding the option was ambiguous and in admitting parol evidence to clarify it and as an aid in ascertaining the intention of the parties. The ruling was correct for the option is obviously ambiguous and unclear in several particulars. We need point out only one: the document containing the option made reference to an oil lease on the property; it did not reveal whether the lease covered oil on defendants' property only or whether it also included additional land as a community lease. Parol evidence was necessary to a clarification and determination of this point, which is, as we have seen, an important factor in the case.

[8] Plaintiffs argue that defendants became bound to transfer their interest in the oil lease when they signed plaintiffs' escrow instructions, which provided that "the existing oil lease on subject property is to be assigned to buyer." This argument would be persuasive if it were the whole story, but it is not. Concurrently with signing the plaintiffs' escrow instructions defendants executed additional escrow instructions agreeing to sell the land but providing, *inter alia,* that "the oil lease presently in existence to be retained by the sellers." That the initial and additional instructions were signed as a part of the same transaction is made clear by the testimony of Mr. Coveney, who handled the escrow. He was asked this question: "And did they [the defendants] sign the original and amended instructions simultaneously, at the same time?" The answer was in the affirmative. It is apparent that the reservation of the oil lease made by the defendants in the additional or so-called amended instructions was intended by them to be and in fact was a condition of their approval of the buyers' instructions, which condition the latter did not accept. Hence no contractual rights matured out of the escrow instructions, since the condition upon which the escrow instructions would be binding was

not fulfilled. Paratore v. Scharetg, 53 Cal. App.2d 710, 713, 128 P.2d 560. This is the view the trial court took of the escrow phase of the transaction. It is fully supported by the evidence.

It is unnecessary to consider other points discussed in the briefs.

The judgment is affirmed.

MOORE, P. J., and ASHBURN, J., concur.



141 Cal.App.2d 849

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Joseph E. WILLIAMS, Defendant and Appellant.

Cr. 3153.

District Court of Appeal, First District, Division 2, California.

May 28, 1956.

Defendant was convicted of taking and driving an automobile without consent with intent to deprive owner of possession. The Superior Court, Alameda County, Donald K. Quayle, J., entered judgment and defendant appealed. The District Court of Appeal, Dooling, J., held that evidence was sufficient to support verdict of guilty.

Judgment affirmed.

1. Automobiles ⇐355(10)

In prosecution for taking and driving automobile without consent of owner with intent to deprive owner of possession, evidence was sufficient to support verdict of guilty. West's Ann.Vehicle Code, § 503.

2. Criminal Law ⇐1173(2)

In prosecution for taking and driving automobile without consent of owner with intent to deprive owner of possession, failure of trial court to instruct jury on its own motion that violation of Penal Code section making it a misdemeanor for any person to take an automobile without permission of owner for purpose of temporarily using it, was an included offense under Vehicle Code section making it a felony for any person to take a vehicle without consent of owner with intent to either permanently or temporarily deprive owner of his title to or possession of such vehicle, was not prejudicial error. West's Ann.Pen.Code, § 499b; West's Ann.Vehicle Code, § 503.

3. Criminal Law ⇐824(3)

Rule that the jury should be given instructions on general principles of law applicable to case and even if not requested by parties such instructions should be given by court of its own motion does not require a court to instruct jury that a violation of one Penal Code section is an offense included in other section.

4. Criminal Law ⇐1037(1), 1044

Where no objection was made to alleged prejudicial remarks on trial of action and no motions were made to strike such remarks from record or to instruct jury to disregard them, defendant was in no position to complain about them on appeal.

5. Criminal Law ⇐1171(5)

In prosecution for taking and driving automobile without consent of owner with intent to deprive owner of possession, wherein defendant was also charged with having been convicted of three prior felonies which were admitted, comments of prosecutor in opening and closing argument to jury on defendant's failure to testify was not prejudicial on ground that defendant had no choice but to remain silent in view of his three prior convictions for same or similar offenses. West's Ann.Const. art. 1, § 13; West's Ann.Pen.Code, § 1323; West's Ann.Vehicle Code, § 503.

Henry M. Elson, Berkeley, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Appellant, Joseph E. Williams, was charged with a violation of Vehicle Code section 503 in that he took and drove a vehicle without the consent of the owner and with the intent to deprive the owner of his possession of said vehicle. He was also charged with having been convicted of three prior felonies, auto thefts, all of which he admitted. He pleaded not guilty and after a jury trial was convicted of the crime charged. He appeals from the judgment of conviction.

[1] Appellant's first contention that the evidence is insufficient to support the verdict is without merit. The owner of the car, one Luther Upshaw, allowed his daughter, Mrs. McCauley, to use his automobile on Saturday, September 4, 1954. He did not give appellant permission to drive the car and did not know him. He described his car as a 1951 Buick, License Number 3B2671. Mrs. McCauley testified that on the afternoon of September 4, she parked the car in front of her house on Twenty-ninth Street near San Pablo Avenue in Oakland. She left the car locked with the windows rolled up. There was only one set of keys to the car and she had possession of them. The next morning the car was missing. Mrs. McCauley had given no one permission to drive it.

One L. D. Williams testified that on Saturday, September 4, at about 10:30 or 11:00 p. m. he called upon appellant Joseph E. Williams at the Ebony Plaza Hotel. This hotel was located about a block from where Mrs. McCauley parked the car in question. He and appellant drank a half a bottle of gin in appellant's room. The witness then informed appellant that he had no money with him but suggested that if appellant could "get a way in a car" they could go to the witness' home in Richmond where he had some money. This would enable them to buy some more drinks. Appellant then left the room and returned an hour or an hour and a half later. He again left the room and was gone about twenty-five minutes. When he returned he said, "Come on, let's go." The witness left the hotel with appellant. The two of them entered a '51 or '52 Buick parked on the street. When the witness entered the car he noted sparks flying under the dash. The witness said to appellant: "Joe, you are not stealing this car?" Appellant with the witness as a passenger then drove the car to Richmond. They stayed in Richmond approximately twenty-five or thirty minutes and then came back to Oakland. Appellant parked the car two or three blocks from the Ebony Plaza Hotel. The witness asked appellant why he was leaving the car there and appellant answered: "I am supposed to leave it here."

Police Officer Milton P. Habelt testified that on September 5, 1954, he was sent to check a 1951 Buick, License Number 3B2671 for fingerprints. It was parked on Twenty-sixth Street, just west of San Pablo Avenue. He found two prints, one on the left wind-wing and one on the rear-view mirror. He stated that the car was not "hot-wired" (a method of by-passing the ignition so that a car may be started without the key) when he saw it although there were two or three small pieces of wire lying on the floor.

Robert M. Cooper, an assistant criminologist for the Oakland Police Department, identified the fingerprint taken by Officer Habelt from the left wind-wing as that of appellant Williams.

The owner of the car testified that after the car was returned to his daughter he noted his son-in-law fixing some wires under the dashboard. He stated that his son-in-law was trying to connect them.

There was ample evidence presented at the trial from which the jury could have found that appellant was guilty. The jury could have found that appellant gained entrance to the car through the wind-wing where his fingerprint was found and then "hot-wired" the car in order to get it started without the key. The testimony of the witness L. D. Williams is not so unreliable and inherently improbable, as appellant contends, that it must be disregarded. Further in view of the other evidence against appellant the fingerprint evidence would seem to constitute strong evidence against him. People v. Adamson, 27 Cal.2d

478, 165 P.2d 3. A different situation was presented in People v. Flores, 58 Cal.App. 2d 764, 137 P.2d 767, relied on by appellant, wherein the fingerprint evidence was held not sufficient. In the Flores case there was no other evidence connecting the defendant with the crime of grand theft of an auto and he admitted being in the stolen car, thus furnishing an explanation for the presence of his print in the car. In the instant case there is other evidence connecting appellant with the crime and he did not admit being in the car.

[2] Appellant's next contention is that the trial court committed prejudicial error in failing to instruct the jury that a violation of Penal Code section 499b was an included offense under a charge of violation of Vehicle Code section 503. Vehicle Code section 503 provides in part: "Any person who drives or takes a vehicle not his own, without the consent of the owner thereof, and with intent to either permanently or temporarily deprive the owner thereof of his title to or possession of such vehicle, whether with or without intent to steal the same, * * * is guilty of a felony * * *." Penal Code section 499b provides in part: "Any person who shall, without the permission of the owner thereof, take any automobile, * * * for the purpose of temporarily using or operating the same, shall be deemed guilty of a misdemeanor * * *." No instruction was given or requested on this latter code section.

Although appellant did not request an instruction on Penal Code section 499b as an included offense he argues that it was error for the trial court not to give such instruction on its own motion. He cites People v. Carmen, 36 Cal.2d 768, 228 P.2d 281, and People v. Brown, 131 Cal.App.2d 643, 281 P.2d 319. In both of these cases the defendant requested an instruction on the included offense so that they are not authority that such instruction must be given by the court on its own motion. He argues however that the case falls within the reasoning of the statement in People v. Klor, 32 Cal.2d 658, 662, 197 P.2d 705, 707, that the "jury should be given instructions on the general principles of law applicable to the case and even if not requested by the parties such instruction should be given by the court of its own motion."

[3] That the Supreme Court does not extend this rule to instructions on included offenses, at least of the character involved here, seems clear from the following language found in People v. Chessman, 38 Cal. 2d 166, 187–188, 238 P.2d 1001, 1014:

> "As to crime (2), grand theft of an automobile, there is ample evidence * * * to show that he intended to steal it. But, defendant says, the evidence would also permit the inference that he took the car with intent merely to deprive the owner of possession temporarily; i. e., the lesser offense of violation of section 503 of the Vehicle Code; and the jury should have been so instructed. * * * If defendant wished to raise this contention, he should have requested an instruction as to the lesser offense and argued the matter to the jury."

Here appellant neither requested the instruction nor argued the matter to the jury. In this respect his case is on all fours with that of Chessman. See also People v. Johnson, 99 Cal.App.2d 717, 727, 222 P.2d 335; People v. Zabel, 95 Cal.App.2d 486, 489, 213 P.2d 60; People v. Arguilida, 85 Cal.App.2d 623, 625, 193 P.2d 478; People v. Dunlop, 79 Cal.App.2d 207, 211, 179 P.2d 658.

[4, 5] Appellant's last contention is that the district attorney was guilty of prejudicial misconduct in commenting in his opening and closing arguments to the jury on appellant's failure to testify. No objection was made to these comments on the trial of the action. No motions were made to strike these remarks from the record or to instruct the jury to disregard them. It would seem that appellant is thus in no position to complain about them on appeal. People v. Perry, 14 Cal.2d 387, 396, 94 P.2d 559, 124 A.L.R. 1123; People v. Sykes, 44 Cal.2d 166, 172–173, 280 P.2d 769. An examination of the comments satisfies us, as well, that in view of California Constitution, Article I, § 13 and Penal Code, § 1323 they were not improper. People v. Adam-

son, 27 Cal.2d 478, 486–490, 165 P.2d 3. The trial court correctly instructed the jury on appellant's right to remain silent. Appellant's argument that the prosecutor should not be allowed to comment as he did here because as a practical matter appellant had no choice but to remain silent in view of his three prior convictions for the same or similar offenses was presented in the Adamson case and there rejected. The court there stated that any change in the law in this respect must be made by the Legislature.

Judgment affirmed.

NOURSE, P. J., and KAUFMAN, J., concur.



141 Cal.App.2d 807

Dewey GRISWOLD and Fritz Hommen, Petitioners and Appellants,

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL and Russell S. Munro, Director of Department of Alcoholic Beverage Control, Respondents.

Civ. 16848.

District Court of Appeal, First District, Division 1, California.

May 24, 1956.

Mandamus proceeding. The Superior Court, Santa Clara County, W. W. Jacka, J., denied the petition, and the petitioners appealed. The District Court of Appeal, Peters, P. J., held that finding that licensees had served liquor to a minor was supported by evidence.

Affirmed.

1. Intoxicating Liquors ⇐108(5)

Finding that licensees had served liquor to a minor was supported by evidence. West's Ann.Bus. & Prof.Code, § 23000 et seq.

2. Intoxicating Liquors ⇐108(10)

Findings of Alcoholic Beverage Control Board must be sustained if it has committed no error of law and if evidence, although conflicting, is sufficient to support its findings of fact. West's Ann.Code Civ. Proc. § 1094.5.

3. Administrative Law and Procedure ⇐474
Intoxicating Liquors ⇐108(9)

Licensees electing to appear in propria persona, in administrative proceedings which culminated in suspension of their license, were not, by so appearing, entitled to any special privileges, and if objectionable evidence was offered they were required to object, just as if they were represented by counsel.

4. Administrative Law and Procedure ⇐474

Hearing officer is not required to assume duties of counsel for party appearing in propria persona.

5. Trial ⇐105(1)

Absence of objection to proffered testimony, whether litigant appears in propria persona or by counsel, is waiver of objection.

6. Trial ⇐105(2)

Hearsay, admitted without objection, may be considered in support of finding.

7. Evidence ⇐536

Police officer, as expert in field, was competent to give his opinion as to whether glass had contained distilled spirits.

8. Evidence ⇐87

In liquor case, presumption that liquor is served when requested is not overcome by presumption of innocence, and such presumption may support finding and will prevail until controverted. West's Ann. Pen.Code, § 382.

9. Intoxicating Liquors ⇐108(9)

On record presented in mandamus proceeding brought for review of decision of alcoholic beverage control appeal board affirming 15-day suspension of on-sale license for furnishing whiskey to minor, it could not be said that punishment imposed constituted an abuse of discretion. West's Ann.Pen.Code, § 382.

10. Administrative Law and Procedure
⇐324, 761

Degree of penalty is matter vested in administrative agency, and it can be upset only where an abuse of discretion clearly appears.

Morris Oppenheim, San Francisco, for appellants.

Edmund G. Brown, Atty. Gen., Charles A. Barrett, Deputy Atty. Gen., for respondents.

PETERS, Presiding Justice.

Dewey Griswold and Fritz Hommen operate a restaurant and bar in Los Altos, Santa Clara County, and are the possessors of an on-sale general liquor license. They were duly charged with selling liquor to a minor on a specified date, and with permitting the minor to consume the liquor on the licensed premises. After a hearing, the hearing officer acquitted the licensees of the consumption charge, but found that the licensees had furnished whiskey to the minor in violation of the Alcoholic Beverage Control Act, Business and Professions Code, § 23000 et seq., and recommended a 15-day suspension of the license. The Department of Alcoholic Beverage Control adopted the recommendation of the hearing officer, which decision was affirmed by the Alcoholic Beverage Control Appeals Board. On petition for a writ of mandate, the Superior Court denied the petition. The licensees appeal from that judgment.

The finding that the licensees furnished whiskey to a minor on October 2, 1954, is supported by the evidence.

The minor involved, a student at Stanford University, was 20 years and four months of age at the time of the offense. He testified that on the night in question he attended a party at the licensed premises given by his fraternity; that after the meeting he walked up to the bar which was quite crowded; that he called out to the bartender that he wanted a "bourbon on rocks"; that the bartender placed the drink on the bar and a customer picked it up and handed it to him; that he then tossed 50 cents on the bar as the drink was in transit to him; that he then sat down at a nearby table but, before he had started to consume the drink, liquor control officers picked it up and put it in a bottle; that at no time did anyone connected with the licensed premises ask him his age or for identification.

Liquor control officer Spitzley testified that he and three other liquor control officers arrived at the licensed premises about 10:20 p. m. of October 2, 1954; that he and another officer entered the restaurant and in a rear room saw "a group of young people sitting at a table with liquor in front of them—apparently liquor"; that he questioned the Stanford student, and after being first told by the boy that he was 21, finally ascertained from his driver's license that he was 20 years and 4 months old; and that the student stated that he had bought the drink at the front bar. The seized drink was put into a medicine bottle.

Officer Coulman corroborated Spitzley and testified that when he entered the back room he saw the student "with an old fashioned glass which we assumed to contain distilled spirits, in his hand"; that Spitzley then "seized the old fashioned glass which contained distilled spirits."

Neither officer saw the student consume any of the liquor. Neither the bottle nor its contents containing the student's drink was introduced into evidence. The officers also testified that Cobb, the bartender, did not deny serving the drink to the student, but stated that he could not remember doing so. He admitted that he was the only bartender on duty at the time.

Griswold, one of the licensees, appeared at the hearing *in propria persona.* He did not deny that liquor had been served to the minor, but testified that the policy of the restaurant was to be careful about serving minors, and that "it was crowded that night," and the student looked "around 25 or 26, and that was one reason * * * a mistake was made, but we try to stay within the law."

The record also shows, and the hearing officer expressly found, that there was no previous record of any violations by the licensees.

[1, 2] The finding that the licensees served liquor to a minor is supported. The findings of the Alcoholic Beverage Control Board, a constitutional agency, must "be sustained if it has committed no error of law and if the evidence, although conflicting, is sufficient to support its findings of fact." Covert v. State Board of Equalization, 29 Cal.2d 125, 131, 173 P.2d 545, 548; see also Genser v. State Personnel Board, 112 Cal.App.2d 77, 245 P.2d 1090; Chosick v. Reilly, 125 Cal.App.2d 334, 270 P.2d 547; § 1094.5, Code Civ.Proc.

[3–6] The major contention of appellants is that there is no substantial evidence to sustain the finding that the beverage served to the student contained distilled spirits, and if there is any such evidence it is hearsay or improper conclusion evidence which should have been excluded by the hearing officer because appellants appeared without counsel, and were entitled to protection. Appellants make much of the fact that, although notified of their right to appear by counsel, they elected to appear *in propria persona,* and contend that it was the duty of the hearing officer to exclude hearsay or otherwise objectionable evidence even though no objection was made. There was no such duty cast on the hearing officer. Appellants elected to appear *in propria persona.* By so appearing they were not entitled to any special privileges. If objectionable evidence was offered they were required to object just as if they were represented by counsel. People v. Collins, 117 Cal.App.2d 175, 255 P.2d 59. The hearing officer is not required to assume the duties of counsel for a party appearing *in propria persona.* The absence of an objection to proffered testimony, whether the litigant appears *in propria persona,* or by counsel, is a waiver of the objection. Hearsay, admitted without objection, may, of course, be considered in support of a finding. Merchant Shippers Ass'n v. Kellogg Express & Draying Co., 28 Cal.2d 594, 170 P.2d 923.

[7, 8] The evidence in the present case is that the student ordered "bourbon on rocks"; that in response to this request a drink was delivered to him in an old fashioned glass; that Officer Spitzley saw the student and others seated at a table "with liquor in front of them—apparently liquor"; that Officer Coulman "assumed" that the glass in front of the student contained distilled spirits, and then stated positively that Officer Spitzley seized the glass "which contained distilled spirits." The licensees did not deny that distilled liquor was served the student, but simply urged that an honest "mistake" had been made. Some of this evidence may have been hearsay, and some of it may have been opinion evidence, but no objection was made to it. Officer Coulman's testimony goes beyond hearsay and amounts to a definite assertion that the glass contained distilled spirits. Moreover, as an expert in that field, he was certainly competent to give his opinion on that subject. It also should be pointed out that the student ordered "bourbon on rocks" which the trier of the fact knew to be a distilled liquor. In response to that request he was served a drink. Under Penal Code section 382 appellants would have been guilty of a penal offense if something other than "bourbon on rocks" had been served to the customer. Thus, there was a disputable presumption that the student got what he ordered. In a liquor case, the presumption that liquor is served when requested is not overcome by the presumption of innocence. People v. Minter, 73 Cal.App.2d Supp. 994, 167 P.2d 11; People v. Agnew, 16 Cal.2d 655, 107 P.2d 601. This presumption may support a finding, and it prevails until controverted.

While it would have presented a much stronger case had the officers had the contents of the glass analyzed and introduced expert evidence on the subject, this was not indispensable. Respondents established a prima facie case by the evidence already reviewed. Appellants did not see fit to attack this prima facie case, but simply offered evidence to excuse the violation, and practically conceded that they had violated the law, claiming inadvertence. Thus, the finding of violation of the statute is supported.

[9, 10] Appellants urge that the penalty—15 days suspension of the license—was excessive and constituted an abuse of discretion. It may be that the penalty is

somewhat harsh. The minor was over 20 years of age. The only evidence in the record as to his appearance is that he looked to be 25 or 26. The sole drink served to him was served under circumstances that indicate no conscious intent to violate the law. There is an express finding that there is no record of any prior violations by the licensees. But the degree of penalty is a matter vested in the administrative agency. It can be upset only where an abuse of discretion clearly appears. Bonham v. McConnell, 45 Cal.2d 304, 288 P.2d 502. No such abuse was here present.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.



141 Cal.App.2d 870

Fred H. KNOBLOCK, Plaintiff,

v.

WAALE-CAMPLAN COMPANY, a corporation; Continental Casualty Company, a corporation; Los Angeles City School District, a Municipal Corporation; A. Gelfan & Company, a corporation; Dunn-Edwards Corporation, a corporation, John Does One To Five, Defendants.

WAALE-CAMPLAN COMPANY, a corporation, Cross-Complainant and Respondent,

v.

J. C. CROOKSHANKS and Merridy C. Crookshanks, Cross-Defendants and Appellants.

Civ. 21516.

District Court of Appeal, Second District, Division 1, California.

May 28, 1956.

Action, wherein assignee of subcontractor sought to recover from prime contractor, sub-contractor, sub-contractor's officers and others funds which prime contractor had erroneously paid to subcontractor rather than to assignee, and wherein prime contractor cross-complained against subcontractor and its officers seeking judgment in favor of plaintiff and against them. The Superior Court of Los Angeles County, Clarence E. Johns, J., entered judgment in favor of cross-complainant and against cross-defendants, and they appealed. The District Court of Appeal, White, P. J., held that sub-contractor became involuntary trustee for funds, and when individual defendants as its officers issued checks paying such funds to one such individual defendant, they, as agents of trustee, were equally and individually liable for such funds.

Judgment affirmed.

1. Appeal and Error ⇐863

Where cross-defendants' notice of appeal specified that appeal was taken from whole of the judgment, but appeal affected only portion of judgment against them, District Court of Appeal would consider only such portion of judgment as was against them and in favor of respondent.

2. Judgment ⇐250, 252(1)

Where answer was filed, court was authorized to grant any relief consistent with the case made by complaint and embraced within issues, irrespective of theory upon which facts were pleaded, title of pleading, or what relief was sought by prayer. West's Ann.Code Civ.Proc. § 580; West's Ann.Civ.Code, § 2224.

3. Money Received ⇐18(3)

In action wherein cross-complainant prayed that court enter judgment in favor of plaintiff and against certain defendants for an amount of money which cross-complainant had paid to such individual defendant and evidence conclusively showed that corporate defendant received such money because of cross-complainant's mistake and that money should have been paid to plaintiff as such corporate defendant's assignee, evidence justified conclusion such funds were withdrawn from corporate defendant by checks payable to individual defendant, corporate defendant's president, and court could properly enter judgment prayed for, even if cross-complaint was uncertain.

West's Ann.Code Civ.Proc. § 580; West's Ann.Civ.Code, § 2224.

4. Trusts ⇐104

Where one erroneously paid funds to corporate defendant rather than to its assignee, corporate defendant became involuntary trustee for such funds, and when individual defendants as its officers wrote checks paying such funds to one of such individual defendants, they, as agents of corporate trustee, were equally and individually liable for such funds. West's Ann. Civ.Code, § 2224.

5. Appeal and Error ⇐1135

It is the duty of an appellate tribunal to affirm any judgment not shown to be erroneous.

6. Appeal and Error ⇐499(1)

Reviewing court could not reverse judgment on any contention that it was rendered on theory not presented to trial court where reviewing court did not have arguments of counsel or authorities cited by them to trial court before it.

Earle E. Cook, Los Angeles, for appellant.

Vincent Scott, H. Burdette Fredricks, Los Angeles, for respondent.

WHITE, Presiding Justice.

Cross-defendants J. C. and Merridy Crookshanks have appealed from a judgment of the Superior Court of Los Angeles County, which provides that plaintiff Fred H. Knoblock recover from defendants Waale-Camplan Company and A. Gelfan & Co., jointly and severally, the sum of $3,451.20 and that cross-complainant Waale-Camplan Company recover from the cross-defendants A. Gelfan & Co., J. C. Crookshanks and Merridy C. Crookshanks, jointly and severally, the sum of $2,556. Neither of the defendants Waale-Camplan Company and A. Gelfan & Co. has appealed and the portion of the judgment against them in favor of the plaintiff is shown by the record to have been satisfied.

[1] While the notice specifies that the appeal is taken from the whole of the judgment, an appeal by these cross-defendants affects only the portion of the judgment against them. This court will therefore consider only the portion of the judgment against appellants and in favor of the respondent. Lake v. Superior Court, 187 Cal. 116, 120, 200 P. 1041.

A summary of the facts which gave rise to this litigation follows.

Defendant A. Gelfan & Co., a corporation, became obligated to paint the Venice High School as subcontractor under the defendant Waale-Camplan Company, a corporation. Thereafter plaintiff Knoblock lent A. Gelfan & Co. the sum of $6,000 and A. Gelfan & Co. assigned to Knoblock $6,000 of the money to become due A. Gelfan & Co. from said Waale-Camplan Company under said subcontract, which assignment was presented to and accepted by said Waale-Camplan Company on or about August 24, 1951. On September 12, 1951, the sum of $2,556 became due plaintiff Knoblock by virtue of said assignment, but through mistake Waale-Camplan Company issued and delivered a check for that amount to A. Gelfan & Co. and not to plaintiff Knoblock, its assignee. A. Gelfan & Co. kept and deposited the check and the amount thereof was never returned to defendant and cross-complainant Waale-Camplan Company.

Appellants J. C. and Merridy Crookshanks are husband and wife. The testimony of J. C. Crookshanks discloses that he was the vice-president, his wife was secretary-treasurer, and A. Gelfan was president of A. Gelfan & Co. from its beginning until November 7, 1951; and during said time they were the only directors of said corporation. Mr. Gelfan became quite ill about October 15, 1951. He then left the business and had nothing to do with it thereafter. When Mr. Gelfan left, Crookshanks "took over" and he and his wife "conducted the business of the corporation". Crookshanks further testified as follows:

> "Q. You did take some interest in what money was coming in and going out? A. I took interest in what the bank balance was, mostly.

"Q. Then it shows the date here, September 18, 1951, $2,556? A. Yes.

"Q. When did you first know that the corporation received $2556 from Waale-Camplan Company? A. When Mr. Knoblock contacted me sometime, I believe it was in October or the first of November, 1951.

"Q. Then you and Mr. Knoblock had a conversation relative to that amount of money? A. We did.

* * * * * *

"Q. Mr. Knoblock in his conversation you referred to had told you that payment had been made to your corporation by mistake? A. I understood it at that time.

"Q. And you understood the money had been paid you by mistake? A. That is right.

"Q. You made no attempt or took no measures to repay that? A. At that time, no.

"Q. Well, did you ever? A. No; not that I did not have the intention to eventually."

After appellant J. C. Crookshanks knew of the money so paid to the corporation by mistake, he and his wife signed and delivered to him as payee checks on the account of the corporation, as follows:

Dec. 26, 1951, Check No. 590, for $2,000.
Jan. 14, 1952, Check No. 604, for $3,000.
Jan. 15, 1952, Check No. 605, for $1,000.
Jan. 23, 1952, Check No. 614, for $1,000.

Not long afterward, appellants ceased operations of A. Gelfan & Co.

On October 6, 1952, appellant J. C. Crookshanks, as president of A. Gelfan & Co., petitioned the Federal Court to declare the corporation bankrupt. His petition shows debts $4,690, assets $2,013.38 consisting of no cash, $375 stock in trade, and the balance debts due on open accounts. Crookshanks, knowing that Waale-Camplan Company had paid A. Gelfan & Co. $2,556 by mistake, that said $2,556 had been deposited in the account of the corporation and thereafter transferred to himself by check, and that said $2,556 had never been returned to Waale-Camplan Company, did not list Waale-Camplan Company as a creditor of A. Gelfan & Co. No officers or stockholders of A. Gelfan & Co., other than A. Gelfan and the appellants, are shown by the petition.

The first ground for reversal urged by appellants in their opening brief is that relief not prayed for was granted. The cross-complaint is stated to be "for declaratory relief and to determine controversy and order". By its prayer, respondent Waale-Camplan Company, a corporation, asks "that this court make and enter its judgment in favor of said Fred H. Knoblock and against cross-defendants herein in said sum of $2,556; and that the court further enter its judgment that this cross-complainant is not indebted to said cross-defendants or to said Fred H. Knoblock. For its costs herein incurred. For such further relief as to the court may seem just."

Appellants demurred to said cross-complaint on the ground, among others, "that the cross-complaint is uncertain in that the prayer asks this court to make and enter a judgment against cross-defendants in favor of one Fred H. Knoblock, who is not a party to this cross-complaint". The demurrer was overruled and appellants thereafter filed their answer by which they admitted "that Waale-Camplan Company by error paid to A. Gelfan & Company the sum of $2,556 on or about September 12, 1951, which sum at said time should have been paid to Fred H. Knoblock".

Assuming, but not deciding, that appellants' demurrer to the cross-complaint on the ground of uncertainty in that a portion of the prayer sought unwarranted relief was well taken, nevertheless, under the circumstances of the instant action, the order overruling said demurrer was not prejudicial.

[2] In the instant action, an answer having been filed, the court was authorized to grant "any relief consistent with the case made by the complaint and embraced within the issue". Sec. 580, Code of Civil Procedure. This is true irrespective of the theory upon which the facts were pleaded, the title of the pleading, or what relief was

sought by the prayer. Estrin v. Superior Court, 14 Cal.2d 670, 676–678, 96 P.2d 340; Mannon v. Pesula, 59 Cal.App.2d 597, 609, 139 P.2d 336; Nelson v. Abraham, 29 Cal. 2d 745, 749, 177 P.2d 931; Jones v. Alexander, 101 Cal.App.2d 44, 45, 224 P.2d 870.

Appellants further contend that "the evidence at the trial on the cross-complaint does not justify the relief granted".

[3] The evidence in support of the cross-complaint is without conflict that A. Gelfan & Co. received, because of cross-complainant's mistake, the sum of $2,556 to which it had no right; and that the amount was never repaid.

"One who gains a thing by * * * mistake * * * is * * * an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." Sec. 2224, Civil Code.

[4] Knowing that $2,556 of the money in the account of A. Gelfan & Co. was so held by it as trustee for Waale-Camplan Company, appellants nevertheless, by their checks, reduced the cash of A. Gelfan & Co. to zero. From the evidence before the court, the conclusion is justified that Waale-Camplan Company's $2,556 was withdrawn from the corporate funds by checks payable to appellant J. C. Crookshanks. Both appellants having signed the corporation's checks, both are equally responsible. Gray v. Sutherland, 124 Cal.App.2d 280, 290, 268 P.2d 754. Both being agents of the corporate trustee, when they thus relieved the corporation of its possession of the trust money, they, individually, were charged with the same duties and obligations as had been imposed upon the corporate trustee. Crenshaw v. Ray C. Seeley Co., 129 Cal. App. 627, 632, 19 P.2d 50; Bridgford v. McAdoo, 48 Cal.App. 305, 306, 191 P. 1113.

[5, 6] Appellants contend that the judgment cannot be sustained on the theory that they were involuntary trustees because that theory was not presented to the trial court. We do not have before us the arguments of counsel or authorities cited by them to the trial court, but in any event it is the duty of an appellate tribunal to affirm any judgment not shown to have been erroneous.

Having determined that respondent Waale-Camplan Company is entitled to judgment against appellants for the return of its money so held by them in trust, it is not necessary to discuss appellants' arguments and authorities cited by them regarding the legality of their preferential payment of the corporation's debt to appellant J. C. Crookshanks, or the procedures required to set aside illegal preferences.

The judgment is affirmed.

DORAN and FOURT, JJ., concur.



141 Cal.App.2d 812

Herbert D. THOMAS, Plaintiff and Respondent,

v.

BUTTRESS & McCLELLAN, Inc., a corporation, Panelcrete of California, a corporation, and J. E. McClellan, individually, Defendants and Appellants.

Civ. 21213.

District Court of Appeal, Second District, Division 2, California.

May 24, 1956.

Rehearing Denied June 18, 1956.

Hearing Denied July 18, 1956.

Action to recover commissions. The Superior Court, Los Angeles County, Otto J. Emme, J., rendered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Ashburn, J., held that where oral employment contract provided that sales manager was to receive salary and percentage commission on employer's "gross sales," a term used in sense of "gross receipts," and employer's business then consisted entirely of precast construction job contracts on a "package" basis, and thereafter employer entered into different type of contract to furnish work and services in construction of guided missile plant, employer's "gross receipts," for purposes of computation of commission, were not entire cost to Government of guided missile

plant, and such commission was limited to a percentage of amount of employer's fee for supervision of construction of plant.

Reversed.

Fox, J., dissented.

1. Sales ⇐1(1)

A "sale" is a contract by which, for a pecuniary consideration called a "price", one transfers to another an interest in property.

See publication Words and Phrases, for other judicial constructions and definitions of "Price" and "Sale".

2. Contracts ⇐147(1)

Intent of parties to contract is to be ascertained as of time contract was made, not at some later date, and subsequent unforeseen events cannot be allowed to control in arriving at that intent. West's Ann. Civ.Code, § 1636.

3. Master and Servant ⇐70(2)

Where oral employment contract provided that sales manager was to receive salary and percentage commission on employer's "gross sales", a term used in sense of "gross receipts", and employer's business then consisted entirely of precast construction job contracts on a "package" basis, and thereafter employer entered into different type of contract to furnish work and services in construction of guided missile plant, employer's "gross receipts", for purposes of computation of commission, were not entire cost to government of guided missile plant, and such commission was limited to a percentage of amount of employer's fee for supervision of construction of plant.

See publication Words and Phrases, for other judicial constructions and definitions of "Gross Receipts".

4. Trial ⇐203(2), 261

Trial judge has right to refuse erroneous request without having any duty to modify it, and he has like right to ignore absence of definitive or qualifying instructions; but it is also incumbent upon trial court to give instructions on all vital issues in case, and if necessary to modify incomplete instructions or give ones drafted by court.

5. Appeal and Error ⇐1072
New Trial ⇐76(1)

Where verdict was excessive as a matter of law, refusal to grant new trial constituted reversible error.

Guy E. Ward and Clarke A. Knicely, Beverly Hills, for appellants.

Zahradka, Glines & Bentley, Los Angeles, for respondent.

ASHBURN, Justice.

Plaintiff brought an action for the recovery of commissions under an oral contract of employment. The jury returned a verdict in plaintiff's favor against defendants Buttress & McClellan, Inc., Panelcrete of California, and J. E. McClellan in the sum of $44,723.90. Defendants appeal from the judgment.

The employment agreement, which was made in June 1950, specified that plaintiff should become sales manager for defendant Buttress & McClellan and as compensation receive a salary of $700 per month, plus a commission of one-fourth of one percent of "gross sales" of the employer.

Of the numerous claims made by appellants as ground for reversal it is necessary to consider only one primary and one secondary contention: (1) That the basis for computation of commissions due plaintiff as such sales manager cannot include the cost of a certain construction job done for Consolidated Vultee Aircraft Corporation (commonly known as Convair), a guided missile plant at Pomona, California; (2) alternatively, that the compensation received by Buttress & McClellan for doing that work is the maximum amount that can be included in the base if plaintiff is entitled to any commission on account of the Convair contract.

At the time the employment contract was made, Buttress & McClellan was engaged in selling "package" or "turnkey" construction jobs, mostly precast industrial plants. Plaintiff was familiar with defendants' business and its method of conducting the same. Asked to explain his duties as sales manager plaintiff testified: "A broad defi-

nition is the general supervision of the sales effort in obtaining business. To detail that, this was a peculiar situation. Buttress & McClellan occupied a very unique situation in the construction industry at that time. They were the pioneer developers of precast construction. That is what is commonly known as tillup. Buttress & McClellan did not participate in competitive bidders in the sense that an ordinary contractor would. They did not function on any jobs unless they made the drawings and did the construction as a package deal. In other words, the common terminology is a turn-key job, and in order to participate in the industrial picture in Los Angeles it was necessary for a certain amount of promotion in order to convince a client that he would have the best economic picture by entering into a contract with Buttress & McClellan rather than hiring an independent architect and then submitting it to the general construction fraternity for competitive bids. That involved the constant knowledge of the new industrial projects within the area that we chose to work in and the submission of certain data to these people to encourage them to talk to us about the business and for us to make certain preliminary drawings of what we expected to furnish them and a detailed estimate which was generally explained to the client, what we expected to put into a building for a given amount of money. After that procedure had been completed, why, we were usually in the position to talk contract to them, develop a contract and submit it to the owner, with this stipulation, that we would furnish the working drawings for the building and complete the building ready for occupancy for the owner. Certain exceptions that the owner may or may not have furnished certain of his own facilities, but generally speaking it was a turn-key job where he would occupy the facilities when we would have completed them."

Such a "package" or "turnkey" job required defendant to furnish all engineering and architectural services, supply all labor and material and deliver a completed structure for an agreed price. The agreement with plaintiff was that he should have a salary of $700 a month, plus one-fourth of one per cent of defendant's "gross sales." These package jobs comprised the whole business of defendant at that time, and the word "sales" necessarily applied to them. Technically they did not constitute sales, see United Iron Works v. Standard Brass Casting Co., 69 Cal.App. 384, 388, 231 P. 567; 46 Am.Jur. § 12, p. 206; 77 C.J.S., Sales, § 2, pp. 584–585; 27 Cal.Jur. § 3, p. 199, but all parties tried the case upon the theory that they were sales. As thus used that word was actually the equivalent of "gross receipts."

[1] In April, 1951, some nine or ten months after plaintiff's compensation contract was made, the Convair guided missile job became a possibility; a letter of intent was issued on July 20, 1951; that was authority for doing the first $250,000 of work. The contract which eventuated on January 15, 1952 (made effective as of July 20, 1951) was quite different from the package deal that defendant was wont to make. It was a contract for the rendition of services and in no sense a sale. Defendant's compensation was to be a percentage of the actual cost of the work—under a "cost-plus-fixed-fee" contract—which cost was borne by the United States. A joint bank account was established by Convair and defendant, the funds therein deposited were furnished by the government, and costs of labor and materials were paid out of that account upon the joint signatures of Convair and Buttress & McClellan. Title to materials or other purchases never vested in defendant and it received for itself none of the moneys of the joint account except its fee for supervision of the job. That fee was $435,219.90, based upon a cost of $17,113,703. (When the fee for architectural and engineering services is added the total cost becomes $18,234,244.63.) Clearly there was no sale here. "A sale is a contract by which, for a pecuniary consideration called a 'price,' one transfers to another an interest in property. * * * '"Sale" is a word of precise legal import. * * * It means at all times a contract between parties to give and to pass rights of property for money, which the buyer pays or promises to pay the seller for the thing bought

and sold.'" Van Allen v. Francis, 123 Cal. 474, 479, 56 P. 339, 341. "To constitute a sale of property as distinguished from other agreements or transfers relative to property it is essential that in addition to other elements the absolute or general property in the thing sold be transferred from the vendor to the vendee." Eggert v. Pacific States Savings & Loan Co., 57 Cal. App.2d 239, 242, 136 P.2d 822, 825. The Convair deal was strictly a service contract, 22 Cal.Jur. § 9, pp. 82–83; Crowe v. Boyle, 184 Cal. 117, 134, 193 P. 111, and the problem is to determine whether the word "sale" as used in June, 1950, is to be held to apply to a deal made in 1951 or 1952 which does not possess the characteristics of a sale and which was not contemplated by the parties when dealing in June, 1950.

[2] The intent of the parties to a contract is to be ascertained as of the time the contract was made, not some later date. Civ.Code § 1636; Doll v. Maravilas, 82 Cal. App.2d 943, 949, 187 P.2d 885; 12 Cal.Jur. 2d § 120, p. 328; 17 C.J.S., Contracts, § 295, pp. 689, 694. Subsequent unforeseen events cannot be allowed to control in arriving at that intent. In Pendell v. Westland Life Ins. Co., 95 Cal.App.2d 766, 214 P.2d 392, the meaning of the word hernia as used in an insurance policy had to be determined. At page 777 of 95 Cal.App.2d, at page 399 of 214 P.2d, the court said: "Contracts 'must be so interpreted as to give effect to the mutual intention of the parties *as it existed at the time of contracting.*' Civ. Code, sec. 1636. (Italics added.) The purpose of interpreting a writing is to ascertain the intention of the parties at the time the writing was made. The action taken by appellant in 1946 with respect to the amount it would pay for specified 'hernia' operations has no bearing and does not shed any light on what was intended by the word 'hernia' as used by it in its 1943 contract." Hoffer Oil Corporation v. Hughes, Tex.Civ.App., 16 S.W.2d 901, 904: "In construing a contract, the cardinal rule is to ascertain the intention of the parties. Their intention is to be ascertained from the words used in the contract, construed in the light of the facts and circumstances surrounding the parties at the time it was made, and not in the light of subsequent unforeseen facts and circumstances, and in light of the purposes sought to be accomplished by the making of the contract." Nelson v. Big Rapids Gas Co., 299 Mich. 284, 300 N.W. 89, 95: "To determine the intention of plaintiff and defendant it is necessary to examine their situation prior to and on May 20, 1933, when this contract was made. Changing circumstances and events subsequent to the execution of the contract are not controlling factors in determining such intention." See also, 17 C. J.S. Contracts, § 321, p. 750.

There is a conflict in the evidence concerning what happened at the time the Convair deal became a reality in July, 1951. Defendant McClellan asserts that he told plaintiff he would receive no commission on that job as payment of one would be illegal [1] and that plaintiff acquiesced. Plaintiff flatly denies any such conversation or understanding. He asserts that there was no change in the basis of his compensation either at that time or when he went to take charge of defendant's San Jose office in September, 1951. The jury having found with him, we must accept his testimony in this regard for present purposes. The record is devoid of any evidence pointing to a practical construction by the parties of the word "sale" as applied to a service contract such as the one with Convair. Plaintiff never made any claim to a commission upon that specific job and defendant never paid him on that basis, nor was there any talk or any agreement, express or implied, about it. We therefore have the bald question whether the word "sales" as used in June, 1950, applies to a deal made in July, 1951 or January, 1952, which has none of the earmarks of a sale.

[3] For present purposes it is as if there were no conflict in the evidence upon the subject, plaintiff's testimony having been accepted as true for purpose of this appeal. The question is one of law. So considered, it appears that there is no basis for applying the word "sale" to the entire cost (to the

1. The record does not sustain this assertion of illegality of such a commission.

Government) of the Convair job. As the original use of that word signified gross receipts of defendant, and there was no subsequent conversation on the subject, the fair interpretation of the language of the contract as applied to the new factual situation is that it continued to refer to gross receipts of defendant,—in this instance the $435,000 fee. The amount of the verdict shows that it was rendered upon the basis of an $18,000,000 sale and is therefore excessive; to what extent we are not in position to determine.

There seems to be no controlling equity which would justify a more expansive application of the term "sales." Plaintiff did not produce the customer or in any sense originate the Convair deal; he took no part in the negotiations; before he went to San Jose (from July to September) he took no part in the work, and that was also true after he went to the northern city. The only thing he ever did was to devote about three weeks to compiling some of the information that went into a brochure that was presented to Convair during the early discussions. The matter of commissions is not to be confused with that of salary. Plaintiff was paid $700 a month when in Los Angeles and a like amount when in San Jose. This is not a case of keeping an employee in service and denying an obligation to pay his salary. It is a question of measuring the additional compensation payable to him.

Appellants complain that the court wrongfully refused to instruct the jury upon the subject of what constitutes a sale, their theory being that the Convair job was not a sale and the $18,000,000 cost to the government not a proper basis for computing plaintiff's commissions. Proceeding upon the tacit assumption that gross sales are the equivalent of gross receipts, counsel for defendants requested instructions to the effect that the $435,000 fee is the measure of plaintiff's commission on the Convair job if he is entitled to any compensation thereon. Unfortunately, all such instructions requested by defendants were inept and properly denied for that reason.

But the record shows that this case went to the jury without their being advised of the real question to be solved by them. They were not told what constitutes a sale within the purview of plaintiff's contract, or what was the basis of his compensation, or how it was to be computed. They were merely advised in two instructions that in the event they found plaintiff entitled to recover he should receive "one-quarter of one per cent of all the sales made by the defendants." The jurors were left to determine for themselves whether plaintiff was entitled to any compensation for the Convair job and were not told how to approach that question. This would be a serious defect in any trial.

[4] It is generally recognized that the trial judge has a right to refuse an erroneous request without having any duty to modify it, and that he has a like right to ignore the absence of definitive or qualifying instructions. But that does not mean that the trial judge's obligation is limited to that of referee. Such authorities do not dispense with his obligation to see that justice is done and to that end to furnish the jurors with guidance upon the controlling legal principles applicable to the case. Jaeger v. Chapman, 95 Cal.App.2d 520, 525, 213 P.2d 404, 407: "Of course, although misleading, inaccurate or incomplete instructions need not be modified, it is incumbent on the trial court to give instructions on all vital issues in the case so that the jury will have a full and complete understanding of the law applicable to the facts, and if necessary to modify incomplete instructions or to give ones drafted by the court. Herbert v. Lankershim, 9 Cal.2d 409, 482, 71 P.2d 220." The following language is quoted from the cited case of Herbert v. Lankershim: "In the interest of a full and complete understanding of the law applicable to the case it was necessary that the jury be instructed on the major subjects raised by the pleadings even if a modification in this or other respects was required to make a more acceptable presentation of the law. We think this is the rule approved by statute and judicial decision where fundamentals are involved, there being no attempt on the part of the author to mislead the court or jury by re-

sorting to equivocally or ingeniously phrased requests, especially in cases where the jury otherwise would be left uninstructed on vital issues of the case." 9 Cal.2d at page 482, 71 P.2d at page 256. Pleasants v. Fant, 22 Wall. 116, 121, 22 L.Ed. 780, 783: "It is the duty of a court, in its relation to the jury, to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial. This is done by making plain to them the issues they are to try, by admitting only such evidence as is proper in these issues, and rejecting all else; by instructing them in the rules of law by which that evidence is to be examined and applied, and finally, when necessary, by setting aside a verdict which is unsupported by evidence or contrary to law."

53 Am.Jur. § 510, page 412: "The law of every case, in whatever form presented, belongs to the court; and in a jury trial it is not only the prerogative of the judge, but his solemn duty, to declare it, especially where requested so to do. * * * In some jurisdictions the practice statutes and rules of practice impose an imperative duty upon the trial court to charge the jury. It is not to be inferred, however, that the trial court is bound upon its own initiative fully to charge the jury upon all facts and issues in this case; under this rule it is the duty of the trial court to instruct the jury on the basic fundamental rules applicable to the principal facts in issue, and if its charge does not fully cover the facts and issues as counsel conceive them, it is the latter's duty to request instructions upon specific questions arising." See also, 88 C.J.S., Trial, § 299, p. 811; 64 C.J. § 531, p. 592.

The trial court on its own motion should have instructed the jury that the measure of recovery in the event they should adopt plaintiff's version of the facts would be one-fourth of one per cent of defendant's $435,000 fee, so far as the Convair job was concerned. The cause must be reversed. Of course there was a substantial conflict in the evidence upon this vital issue, for defendant McClellan testified in effect that he and plaintiff agreed that the latter should have no commission on the Convair job. Upon a new trial it would be the duty of the trial judge to give appropriate instructions upon the separate theories advanced by the respective parties.

[5] Defendants moved for a new trial upon the grounds of excessive verdict, insufficiency of the evidence, that the judgment is against law, etc. The verdict being excessive as a matter of law the refusal to grant a new trial constitutes reversible error. 20 Cal.Jur. § 73, page 115.

The judgment is reversed.

MOORE, P. J., concurs.

FOX, Justice.

I dissent.

In my opinion, the judgment against defendant Buttress & McClellan (hereinafter referred to as B&M) should be affirmed.

The record discloses that when plaintiff became B&M's sales manager, the company's main offices were in Los Angeles but its job sites were in various parts of the state. It maintained a branch office in San Jose, California, to handle its northern operations. Plaintiff's employment contract provided that in addition to a fixed salary, he was to receive .0025% of "gross sales." He was paid this commission on the basis of the contract price regardless of whether he personally contributed to the consummation of a contract and regardless of whether a profit or loss was made on the project.

In the summer of 1951, B&M initiated work on the Convair project under a preliminary agreement dated July 20, 1951, known as the Letter of Intent. J. E. McClellan, who was president of B&M and was the person who engaged plaintiff, testified that he informed plaintiff that in the event B&M should get the Convair contract, no commission on that project would be given him or any other salesman. He stated he told plaintiff he believed it would be illegal to award any commission on a government defense project, and that plaintiff expressed his assent. Plaintiff categorically denied that he was ever told no

commission would be paid him on the Convair contract.[1]

As has been indicated, B&M was also engaged in construction activities near San Jose. In September, 1951, McClellan asked plaintiff to take charge of the B&M operation there to replace a man who had suffered a heart attack. Plaintiff assented reluctantly, and left to supervise B&M operations in that area. McClellan testified that a new compensation arrangement was made at that time under which plaintiff was to receive a salary and 25 percent of the profits of the northern business. Plaintiff testified that no alteration was made of the terms of his original agreement.

In November, 1951, McClellan organized a corporation named Panelcrete to take over B&M's San Jose operations. Panelcrete's main office was located at the Los Angeles address of B&M and it also occupied the former office of B&M in San Jose. The record discloses that in the early part of 1952, McClellan owned all the stock of Panelcrete and he had then also acquired all the stock of B&M. McClellan became president of Panelcrete, the same office he held with B&M. The offices of Panelcrete were virtually identical with those of B&M, except that plaintiff was made vice president of Panelcrete in the fall of 1952 so that he would have authority to execute contracts. Some of the jobs which B&M had undertaken around San Jose were transferred or assigned to Panelcrete by B&M at McClellan's direction. Plaintiff's duties with respect to Panelcrete's operations "fell within the same pattern" as his functions in San Jose for B&M prior to Panelcrete's existence.

The evidence further showed that while plaintiff was supervising Panelcrete's operations he was never relieved of his title of sales manager for B&M. He continued to so designate himself with McClellan's knowledge. He received his salary at all times not from Panelcrete, but from B&M, and his living quarters, the cost of meals, and the use of a car were provided him by B&M while he was in San Jose. He received commissions on sales made by B&M before and after he was sent to San Jose. In communicating with McClellan, plaintiff referred to his San Jose assignment as "the Panelcrete branch of Buttress and McClellan."

Until early in 1952, B&M was working on the Convair project under the Letter of Intent. The definitive contract was drawn up in final form and signed by B&M and Convair on January 15, 1952. However, the parties agreed that the date of the contract should appear as of July 20, 1951, to correspond with the date of the Letter of Intent. This latter date was therefore inserted in place of the date on which the contract was actually signed. The total cost of the Convair project was about $18,234,000. Under the fixed fee formula based on percentage of actual cost provided in the contract, B&M earned $435,219.90 as its fee for designing and constructing the plant.

In June, 1953, plaintiff severed his connection with Panelcrete and B&M. The Convair project was completed sometime prior to July 14, 1953. No commission was paid to plaintiff on that job. Plaintiff thereupon instituted the present action to recover commissions owing him under his contract of employment. In accordance with the jury's verdict, plaintiff was awarded a judgment in the sum of $44,723.90 against B&M, Panelcrete and J. E. McClellan.

The principal ground upon which the majority opinion bases its reversal is that as a matter of law it must be held that the total price of the Convair project could not be encompassed in the term "gross sales" as used by the parties. The majority holds that as a matter of law it was error to award plaintiff any commissions on the

1. Of course, if such commissions were in fact illegal, this would be a complete defense to plaintiff's claim. It is significant that defendant did not interpose the defense of illegality to defeat plaintiff's claim, nor do they contend on appeal that the payment of such a commission is illegal. Furthermore, it may be noted that if plaintiff were in fact entitled to such a commission, there would be no consideration for the purported modification agreement. Peachy v. Witter, 131 Cal. 316, 319, 63 P. 468.

total cost of the Convair project because it was merely a contract for work and services and not a sale within the meaning of plaintiff's employment contract. As a corollary, it holds that because B&M received only a fee of $435,219.90, plaintiff's commission, as a matter of law, must be limited to a percentage of that amount. It derives this result by assuming—contrary to the implied finding of the jury—that the term gross sales "was actually the equivalent of 'gross receipts.'" But by this interpretation what the majority is actually doing is to equate the words "gross sales" with "gross profits." For as McClellan himself testified, the B&M fee on the Convair deal was its gross profit on the job. I regard it as entirely unwarranted to arbitrarily ascribe to the term "gross sales" the circumscribed meaning arrived at by the majority. And the law is certainly otherwise.

The term "gross sales" cannot be said to convey the same definite and inflexible significance under all circumstances and whenever used. Its meaning depends on the connection in which it is employed and the result intended to be accomplished. Commeford v. Baker, 127 Cal.App.2d 111, 117, 273 P.2d 321; W. F. Boardman Co. v. Petch, 186 Cal. 476, 482, 199 P. 1047. As stated in Commeford v. Baker, supra, 127 Cal.App.2d at page 120, 273 P.2d at page 327: *"The understandings of the parties as to the meaning of the term 'gross sales' cannot be determined as a matter of law.* * * * Evidence should be received and all facts should be considered which would aid the court in reaching a decision as to the meaning the parties attributed to the term 'gross sales'. The duty of interpretation is that of the trial court." (Italics added.)

The B&M corporation was not engaged in the business of an ordinary vendor of property, real or personal. Its function was to procure business on a "package deal" basis wherein, at an agreed price, it would furnish its client with industrial buildings or facilities commensurate with its needs. In so doing it gave counsel to prospective clients and formulated proposed plans, it provided the preliminary engineering and architectural services, it arranged for the procurement of labor and materials and it supervised the construction of the entire project to its conclusion. Its business, in effect, was the sale of its integrated "know how" to industrial clients desirous of erecting new or expanded physical facilities. Its salesmen searched out and endeavored to obtain contracts for the design and construction of industrial projects.

In the instant case, it was for the jury to ascribe to the term that meaning which would make it conform to the intent of the parties. Commeford v. Baker, supra. The jury unquestionably concluded that the Convair contract was a sale in consonance with the type of business B&M was engaged in, and that the total cost of the project was the "gross sales" yardstick by which plaintiff's commission was to be measured. This was an entirely reasonable determination of a factual question. The Convair project was the general type of undertaking B&M characteristically engaged in, although larger than any it had previously done. It was apparently considered a "sale" by McClellan, within the contemplation of the agreement, for he testified he told plaintiff he could not pay him a commission on the Convair deal because it would be illegal to do so, not because it was not a "sale."

The mere fact that the contract price was to be arrived at on a cost-plus fee basis did not as a matter of law transmute it into a category outside the pale of the commission agreement. The usual methods for paying for construction work are by lump sum, by item charges, or by cost plus a fee based on a percentage of costs. In a lump sum contract, the contractor makes up a bid from his knowledge of the cost of materials, cost of labor and the particular engineering and architectural specifications of the job, adding thereto a sum which will represent his profit. Such bid is ordinarily final, any changes being the subject of settlement between the owner and contractor. Whether the contractor's profit is larger or smaller than he anticipated, or whether he makes any profit at all, depends on how favorably anticipated conditions turn out to be. Under the cost-plus fee contract, the risk of loss inherent in the lump sum contract is minimized, the owner being charged all

proper costs but receiving the benefit of favorable conditions which might reduce anticipated costs, while the contractor's profit is derived from the percentage of cost which makes up his agreed fee. In the one case, the contractor's anticipated profit is an item included in the bid made for the work; in the other it is included in the amount finally fixed as his fee when the cost of the completed project is ascertained. But under either system, where an employee's compensation agreement is based on "gross sales," the trier of fact is entitled to compute such commission on the basis of the total cost of the project to the client where it finds this corresponds to the intent of the parties. The jury was not required to limit plaintiff's commission to .0025% of $435,219.90, which was B&M's fee, and constituted its gross profits on the job. There was no testimony that the amount of plaintiff's commission was a percentage of gross profits; his percentage was based on "gross sales," which has no relationship to profits. On all other projects plaintiff was paid his commission on the total cost of the job; he even received commissions on such basis on jobs which lost money.

It was therefore entirely proper to use the total cost of the Convair project as the figure upon which plaintiff's commission was to be calculated. This is further borne out by the practical construction McClellan himself put on the contract when he allegedly told plaintiff it would be illegal to pay him a commission. Clearly it could not be considered illegal for B&M to pay an employee any amount it wanted out of its own profits (the fixed fee) on the job. The document offered by McClellan in support of his belief was Exhibit F, the Armed Forces Procurement Regulations. This was properly excluded as irrelevant, since it does not purport to indicate that commissions to an employee of a contractor are illegal, but simply that a commission paid was not an item for which the contractor would be reimbursed by the government on a cost-plus type contract. So it is reasonable to infer that McClellan was thinking of the entire contract cost when he purportedly told plaintiff that he could pay him no commission. To uphold the majority view, that no more than the amount of B&M's fee could be taken into consideration by the jury, would compel us not only to decide as a matter of law what was intrinsically a question of fact but would also distort the meaning of the term "gross sales" as used in this factual context to something less than the totality which its use imports.

The majority opinion attaches significance to the fact that plaintiff "never made any claims to a commission" on the Convair job. It fails to note, however, that this job was not completed until approximately a month after plaintiff's employment was terminated. His right to commission, of course, did not finally accrue until the project was completed.

Defendants' contention that the court committed prejudicial error in failing to instruct the jury as to what constituted gross sales within the meaning of the agreement is specious. As the majority concedes, "all such instructions requested by defendants were inept and properly denied for that reason." The trial judge is under no duty to revise inadequate, improper or erroneous instructions to make them state the law correctly. Tossman v. Newman, 37 Cal.2d 522, 525, 233 P.2d 1; Austin v. Riverside Portland Cement Co., 44 Cal.2d 225, 235, 282 P.2d 69. The jury was instructed that if plaintiff was entitled to recover he should receive "one quarter of one percent of all the sales made by the defendants." They were told that "if there is any uncertainty in the contract the acts of the parties under the contract afford one of the most reliable means of arriving at their intention" and that "the construction thus given to a contract by the parties before any controversy has arisen should, when reasonable, be adopted." The jury was sufficiently oriented with respect to the fact that there was ambiguity regarding the amount of compensation to which plaintiff was entitled. Nothing would have been added to their deliberations by instructing them that "gross sales" could either be construed as the total cost of the project or the amount of the fee B&M received. For this is the question they must in all events inevitably have considered in arriving at their verdict. The

phrase "gross sales" could not have been defined for the jury as a question of law since this was a pure question of fact—there being no unalterable or immutable definition of the term as a proposition of law.

Defendants' argument that plaintiff was not entitled to a commission on the Convair deal because that contract was signed in January, 1952, at which time plaintiff was working for Panelcrete in San Jose, is unfounded. The short answer to this is that B&M dated its agreement July 20, 1951, at which time there is no question plaintiff was a B&M employee. "'The time at which an instrument becomes operative, or has the legal effect for which it is made is its date.'" Knight v. City of Los Angeles, 26 Cal.2d 764, 771, 160 P.2d 779, 783. It is fundamental that where parties to an agreement provide that a written contract be entered into as of an earlier date than that on which it is executed, the agreement is effective retroactively as of the earlier date. Wright v. Prudential Ins. Co., etc., 27 Cal. App.2d 195, 219, 80 P.2d 752; Brewer v. National Surety Corp., 10 Cir., 169 F.2d 926, 928.

Furthermore, under the evidence the jury could have impliedly found that despite plaintiff's transfer to San Jose to supervise Panelcrete's operations, he remained, nevertheless, an employee of B&M under the original agreement and that he was entitled to commissions until termination of his employment in June, 1953. Plaintiff testified that the original oral agreement as to the amount of his compensation was never changed and he denied that any other remuneration agreement was in effect. This was undoubtedly believed by the jury despite contrary testimony. Although plaintiff was ostensibly a Panelcrete official, the evidence was such that the jury was warranted in disregarding the corporate entity of Panelcrete and impliedly finding that it was merely an instrumentality or business conduit of B&M and that plaintiff continued to be employed under his original contract despite his transfer to a new arena of activity under a different corporate entity.[2]

However, I agree with the contention that liability should not be fastened upon Panelcrete or McClellan, individually. It is true, of course, that because the individual and his corporate alter ego have identical duties and obligations, Wenban Estate, Inc. v. Hewlett, 193 Cal. 675, 697, 227 P. 723; Llewellyn Iron Works v. Abbott Kinney Co., 172 Cal. 210, 214, 155 P. 986, it is often appropriate to bind both under a liability incurred by either. Gordon v. Aztec Brewing Co., 33 Cal.2d 514, 522–523, 203 P.2d 522; Marabito v. San Francisco Dairy Co., 8 Cal.App.2d 54, 47 P.2d 530; Thomson v. L. C. Roney & Co., 112 Cal.App.2d 420, 246 P.2d 1017. However, it is unnecessary to go so far in the instant case. There is no suggestion that B&M is insolvent or that it could not respond to the judgment or that fraud or injustice would occur unless Panelcrete and McClellan were also bound. "The fact that the corporate entity has been disregarded for some purposes does not warrant its being disregarded for all purposes." Grant v. Weatherholt, 123 Cal.App.2d 34, 39, 266 P.2d 185, 195. For that reason, I would amend the judgment by striking therefrom the names of Panelcrete and J. E. McClellan.

A brief word regarding defendants' as-

2. The jury had before it evidence (1) that McClellan was president of both corporations; (2) that McClellan owned all the B&M stock early in 1952; (3) that he was the dominant stockholder of Panelcrete at the time of its formation and early in 1950 acquired all its stock; (4) that both corporations used the same offices; (5) that both corporations had substantially the same officers; (6) that contracts of one were transferred to the other with no apparent consideration; (7) that McClellan dominated and controlled the policies of both corporations; (8) that Panelcrete was simply used as an instrumentality for carrying on the Northern California operations of B&M; (9) that after McClellan sent plaintiff to San Jose, B&M continued to pay his salary and other expenses while he was in charge of Panelcrete operations; (10) that McClellan allowed plaintiff to use the title of sales manager for B&M while he was managing Panelcrete; (11) that at no time was plaintiff paid by Panelcrete for his services.

sertion that the court erred in refusing to consider, on the motion for a new trial, the affidavit of Juror Alex Hahn and defendants' counsel. Reference is made in the briefs to the purported contents of these affidavits. However, they have not been included in the record on appeal and are not before the court for examination. Under such circumstances they may not be considered in proof of any fact therein stated and without them an appellate court cannot review the propriety of the order denying the motion for a new trial. Drummond v. Drummond, 39 Cal.App.2d 418, 421, 422, 103 P.2d 217; Toomes v. Nunes, 24 Cal. App.2d 395, 399, 75 P.2d 94.

Hearing denied; TRAYNOR, J., dissenting.



142 Cal.App.2d 26

John A. CARDOZA, Plaintiff and Respondent,

v.

Geoffrey H. MILLINGTON, Stanford Sport Shop, Inc., a corporation, Defendants and Appellants.

No. 16753.

District Court of Appeal, First District, Division 1, California.

May 31, 1956.

Action to reform preincorporation agreement between partners and for dissolution of corporation. The Superior Court, Santa Clara County, Leonard R. Avilla, J., granted relief on both counts of complaint and defendants appealed. The District Court of Appeal, Agee, J. pro tem., held that evidence was sufficient to show that parties had agreed that stock of corporation would be issued to the partners in equal amounts, and that issuance of more stock to one partner than other was result of mutual mistake, and also that part of complaint for dissolution, which was brought less than five months after partner became shareholder of record of outstanding shares, could not be maintained.

Judgment affirmed in part and reversed in part.

1. Reformation of Instruments ⇐1

Equity power in reformation action is very broad.

2. Reformation of Instruments ⇐6

Courts of equity have no power to make new contracts for parties to a contract.

3. Reformation of Instruments ⇐45(2)

In action to reform preincorporation agreement between partners on ground that one of partners received more shares of stock in newly formed corporation than other partner through mutual mistake of both partners, evidence was sufficient to show that parties agreed stock would be issued in equal amounts and that unequal amounts were issued through mutual mistake of the partners. West's Ann.Civ.Code, § 3399.

4. Corporations ⇐614(1)

Under statute providing that a shareholder or shareholders of corporation who have been record holders for period of not less than six months and who hold not less than 33⅓ per cent of number of outstanding shares may file complaint for involuntary dissolution of corporation, stockholder, who held more than 33⅓ per cent shares in corporation, and who filed action for dissolution less than five months after he became a shareholder of record of outstanding shares could not successfully maintain such action. West's Ann.Corp.Code, §§ 4650, 4651.

5. Corporations ⇐614(1)

Statute providing that a complaint for involuntary dissolution may be filed by shareholder who has been record holder for period of not less than six months and who has not less than 33⅓ per cent of number of outstanding shares in corporation must be strictly construed, as right of dissolution created by the statute was created in derogation of the common law. West's Ann.Corp.Code, § 4650.

Crist, Peters & Donegan, Elton F. Martin, Palo Alto, for appellant.

W. Gordon Eustice, Los Altos, for respondent.

AGEE, Justice pro tem.

This is an action brought by John A. Cardoza to reform a "pre-incorporation agreement" between himself and his former partner, Geoffrey H. Millington, and to dissolve Stanford Sport Shop, Inc., a California corporation, which took over the partnership business. Hereafter, the plaintiff and respondent will be referred to as Cardoza and the defendants and appellants as Millington and the corporation.

Cardoza and Millington had been friends since 1927, when they lived next door to each other. In 1945, they formed a partnership to engage in the business of selling fishing, hunting and other sporting goods and equipment under the name of Stanford Sport Shop. Their starting capital was small. In the beginning they both slept in the back of the store and ate most of their meals together. They worked long hours. In general, Cardoza managed the fishing end and Millington the hunting end. Ownership, profits and control were equal. The books were loosely kept. In July, 1948, an accountant was hired to set up bookkeeping records. He used January 1, 1948, as a starting date. The partners agreed that their respective capital accounts would be fixed at an equal amount as of this date. Thereafter, these accounts were never equal because there was always some variance between their respective withdrawals. There was no separate fund maintained for such withdrawals. All funds of the business were commingled and kept in one general account. At the end of an accounting period, one-half of the profits made during such period less the respective withdrawals was credited to each partner's capital account. As of February 29, 1952, Cardoza's capital account was $34,432.90 as against $34,364.39 for Millington. This was the last time it was greater than Millington's. As of December 31, 1952, Millington's capital account was $36,672.42 and Cardoza's was $36,222.17. In May or June, 1953, the partners discussed the advisability of incorporating. Millington consulted with the accountant and with the attorney for the partnership. He reported back to Cardoza that both advised it. Cardoza did not consult with anyone other than his partner. The attorney drafted a "pre-incorporation agreement," which the parties signed on September 3, 1953. Cardoza testified that he signed the agreement without reading it. Clause 2 of the agreement provided: "The parties agree to transfer to the corporation all of the partnership assets, subject to all of the liabilities of the partnership business, and shall receive stock of the corporation in return, in amounts equivalent to the respective *net worth* of the parties." (Emphasis added.) Cardoza testified that he did not understand the meaning of the phrase "net worth" and no one attempted to explain it to him. As of the accounting period ending August 31, 1953, Millington's capital account stood at $38,969.80 and Cardoza's at $37,091.66, a difference of $1,878.14. The increase in difference since December 31, 1952, resulted solely from the withdrawal during such period of only $6,600.80 by Millington as against $8,028.69 by Cardoza. Cardoza testified that his understanding was that such difference merely gave Millington the right to withdraw this amount from the partnership funds and did not change the equal ownership of the business or create any increased proprietary interest in Millington. It might be noted that the balance sheet of August 31, 1953, shows cash in the amount of $17,978.17 and current liabilities in the amount of $11,404.14. The only additional liability shown was a deferred payment note on which the balance due was $22,121.45. The assets, after depreciation of the building and equipment, totaled $109,587.05. Millington admitted at the trial that he could have withdrawn the $1,878.14 at any time and thus have equalized his capital account with that of Cardoza's.

The corporation came into existence with the filing of its articles with the Secretary of State on October 2, 1953. At the organization meeting, held on October 5, 1953, Cardoza, Millington, and one Payne, an employee, were elected directors. Millington had previously explained to Cardoza that "it would be necessary to have one

more person on the Board of Directors in order to comply with the laws. In other words, we couldn't have a corporation unless we had one other person. However, we would operate the business the same as we had because the third person would be there as a *matter of form.*" (Emphasis added.) Cardoza further testified on cross-examination: "At that time he [Millington] said that you needed a third person. However, the third person wouldn't make any difference; that third person was a neutral person. After all, we were operating a 50–50 partnership and it would be the same type of operation afterwards. Q. And you believed that? A. I believed—let me put it this way: I believed Mr. Millington. I had no reason to doubt him." The trial court found that the partners were in a confidential relation. Millington does not attack this finding.

Millington prepared or directed the preparation of the minutes of all meetings of the corporation. The minutes of the first meeting recite that the directors voted to issue shares of stock as follows: 5,912 shares each to Cardoza and Millington as promotional shares; 5,980 shares to Millington and 5,795 shares to Cardoza as consideration for the transfer of their respective interests in the partnership; and 50 shares to the attorney as consideration for his legal services in connection with the incorporation. Millington testified that the difference of 185 shares between his holdings and those of Cardoza was due to the difference of $1,878.14 in their respective capital accounts. Cardoza testified that only the promotional shares were discussed at this meeting.

On December 17, 1953, the corporation obtained a permit to issue stock from the Commissioner of Corporations of the State of California and the shares were issued, as outlined above, on December 28, 1953.

The partnership continued to conduct the business up to and including December 31, 1953. Profits continued to be divided equally and Cardoza continued to have an equal voice in the management of the business. The corporation took over and commenced operating the business on January 1, 1954.

The second corporate meeting was held on January 25, 1954. Millington and Payne voted in favor of Millington's proposal that a general manager be put in charge of the business. Cardoza voted against it. The proposal was continued for further discussion to the next meeting, which was held on February 3, 1954. At this meeting, Millington moved that he be appointed the general manager. Payne seconded the motion and it was carried over Cardoza's objection. This was the first time there had been any dissension between the parties. Thereafter, Cardoza testified, he was treated as an employee and was never consulted about the conduct of the business.

He then went to an attorney, his present counsel, and this action was filed on May 17, 1954.

The complaint is in two counts. The first count is directed against Millington alone and seeks reformation of clause 2 in the agreement of September 3, 1953, on the ground that it did not express the actual agreement of the parties. Cardoza alleges that, prior to the execution of the agreement, the parties had agreed that each should receive an equal number of shares in the corporation and that control of the business would remain in them equally; that clause 2 erroneously provided that shares were to be issued "in amounts equivalent to the respective *net worth* of the parties"; and that, in not *excepting* the difference between the capital accounts due to difference in withdrawals, the clause in effect *includes* such difference and thus allows to Millington a greater number of shares than those allowed to him which is contrary to their actual agreement. Cardoza alleges that this error was caused by (1) fraud practised on him by Millington, (2) mutual mistake of himself and Millington, or (3) by his mistake alone, which was known or suspected by Millington.

The trial court found in favor of Cardoza on the theory of mutual mistake. In his proposed findings of fact Cardoza also included findings favorable to him on fraud and unilateral mistake. The trial court drew a line through these and made no

finding on either issue, although the evidence, much of which is not referred to herein, would amply support a finding of either fraud, or mistake by Cardoza alone, which Millington at the time knew or suspected. Civil Code, § 3399. Clause 2 was ordered to be reformed to provide as follows: "'The parties agree to transfer to the corporation all of the partnership assets, subject to all of the liabilities of the partnership business, and shall receive stock of the corporation in return, *in equal amounts* according to the respective capital accounts of the partners as of September 1, 1953, except that the sum of $1,878.14 accrued to Geoffrey H. Millington as distributable income in excess of John A. Cardoza's withdrawals as of September 1, 1953, shall be credited to Geoffrey H. Millington's drawing account in said corporation.'" (Emphasis added.) The latter part of the clause, as reformed, commencing with the words "'in equal amounts'", replaces the words, "in amounts equivalent to the respective net worth of the parties," as contained in the original agreement.

With respect to the clause in question, the trial court found: "That it is true that prior to the presentation of said agreement, plaintiff and defendant Geoffrey H. Millington had agreed that on incorporation of the Stanford Sport Shop, a copartnership, each should receive an equal number of stock shares in the corporation as represented by the equal capital accounts of the parties as of September 1, 1953, except that the sum of $1,878.14 accrued to defendant Geoffrey H. Millington as distributable income in excess of plaintiff John A. Cardoza's withdrawals as of said date would be credited to defendant Geoffrey H. Millington's drawing account in said corporation and would not be exchanged for stock in said corporation, the effect of which would be that plaintiff John A. Cardoza and defendant Geoffrey H. Millington would each receive the same number of cash stock shares in the corporation but the corporation would be liable to defendant Geoffrey H. Millington in the sum of $1,878.14 as unwithdrawn accrued distributable income. That it is true that by the mutual mistake of the plaintiff and defendant Millington, said written agreement did not embody the actual agreement theretofore made as aforesaid, but said provision relating to the equal issuance of stock in said Stanford Sport Shop, Inc. according to the respective capital accounts as of September 1, 1953, (excepting defendant Geoffrey H. Millington's $1,878.14 unwithdrawn accrued distributable income) of the parties was not included and the provision that stock be issued equivalent to the net worth (capital account including accrued distributable income of September 1, 1953) of the parties was erroneously incorporated in said agreement."

Millington attacks this finding on the ground that the evidence is insufficient to support it. He says, (1) Cardoza knew the fact, i. e., the stock was to be issued "in amounts equivalent to the respective net worth of the parties" but he may not have known the legal consequences, hence it was, if anything, a mistake of *law* and not of fact; (2) even if there was a mistake of fact, it was not mutual because he, Millington, knew what he intended and the written agreement correctly embodied his understanding; (3) the parties never even considered transferring the $1,878.14 to a drawing account in the corporation, let alone agreeing to it.

[1–3] Taking up the last point first, it is obvious that the only controversy between Cardoza and Millington is whether their agreement was that the stock should be issued in equal amounts and the control remain equal; that the partners considered control to be important is well illustrated by a clause in a partnership agreement drafted in 1952 by the same attorney who later handled the incorporation. This clause provided: "The consent of both partners shall be necessary to determine any question as to the conduct of the partnership business." Cardoza thought this agreement had been executed but he could not produce a signed copy. However, Millington himself testified that each had an equal voice in the management right up until the corporation took over, irrespective of any difference in their capital accounts. Cardoza has never questioned the right of Millington to the $1,878.14. Millington testified he could

have withdrawn it at any time. Cardoza testified that this amount was supposed to be taken care of on the transfer and the accountant testified that it was "completely feasible" to set it up on the corporation books as a credit in favor of Millington. The equity power in a reformation action is very broad. In Tomas v. Vaughn, 63 Cal.App.2d 188, at pages 195, 196, 146 P.2d 499, 503, the appellate court said: "Appellants' contention that the court committed error by inserting terms in the contract as reformed which were never contemplated by the parties nor supported by the pleadings and evidence, is without merit. * * * In the exercise of the broad equitable powers conferred upon the chancellor, the court, in order to avoid any prejudice to the assignee, permitted the 24 payments to be made to the latter and redressed the damage suffered by plaintiff by an award to him of a money judgment against the offending defendant Vaughn alone." The court in the cited case reformed the contract in such a way as to protect the innocent assignee, although some of the terms of the contract as reformed had never been contemplated by the parties. In the instant case, if Cardoza is entitled to reform clause 2 so as to provide for equal amounts of stock, equity would seem to require that the court make some provision for the protection of Millington's right to the $1,878.14. How can Millington claim that he has been prejudiced by the manner in which this was done? We are not unmindful of the rule that courts of equity have no power to make new contracts for the parties (22 Cal.Jur., p. 710) nor of the fact that the parties in this case did not in their discussions "spell out" the method of taking care of the $1,878.14. We do, however, repeat that if Cardoza is entited to have the same amount of stock as Millington, the incidental transfer of the latter's credit from the partnership books to the corporation's books cannot possibly prejudice Millington and the reformation ordered in this respect is in keeping with the implied understanding of the parties even though, as we have said, it was not expressly "spelled out" by them.

The real issue is whether the parties agreed that the stock would be issued in equal amounts. Cardoza testified that "the intent was that in transferring to a corporation it would be a 50–50 set-up, as it was as a partnership. That was the intent. * * * Because in our discussion of the matter it was to be transferred on a 50–50 basis, * * * in the same respect it had been as a partnership." On cross-examination of Cardoza, the following occurred: "Q. Let me read that again: [reading from complaint] 'That each partner should receive an equal number of stock shares in the corporation, as represented by the equal capital account of the parties, excepting each partner's accrued distributable income, which was subject to withdrawal by each respective partner.' A. Yes, that was the intent. Q. That was your intent? A. That was the intent. Q. I'm saying— A. The understanding. Q. That was your understanding, right? A. Yes, sir. * * * Q. Just explain the intent. Whose intent —when you say 'the intent'? A. *It was the intent and understanding between Mr. Millington and myself.*" (Emphasis added.) Cardoza also testified as to a conversation which took place between them in 1954, after the trouble started: "Mr. Millington told me that he had not been aware that there had been a difference of stock at the time of the transfer; had I said something at the time, that he would have done something about it, but it was too late at this time." From this it could be inferred that Millington shared the same mistake with Cardoza and thus the mistake was mutual. It is extremely significant that, when Millington followed Cardoza on the witness stand, he did not deny having made this statement to Cardoza.

[4] The second count of the complaint seeks dissolution of the corporation. The first paragraph thereof alleges: "This second cause of action is made and filed pursuant to the provisions of Sections 4650 and 4651 of the Corporations Code of the State of California." Section 4650 provides that a complaint for involuntary dissolution "may" be filed by "a shareholder or shareholders who have been *record holders* for a period of not less than six months and who hold not less than 33⅓ per cent of the number of outstanding shares." (Emphasis

added.) Paragraph IV of the second count alleges: "That plaintiff is and has been for a period of not less than six (6) months last past the record owner of not less than thirty-three and one-third percent (33⅓%) of the number of outstanding shares of the corporation." This allegation was denied in the answer and thus the issue was expressly before the trial court. There was no waiver of the defense such as that involved in Salinas Nat. Bank v. Cook, 101 Cal.App.2d 423, 225 P.2d 253, 254, where the plaintiff had failed to file a claim against the decedent's estate as required by section 716 of the Probate Code and the court held that such failure was in the "nature of a defense in abatement" which had to be raised in the trial court and, not having been so raised, was deemed to be waived.

Here, the record is without conflict that the corporation did not obtain a permit to issue stock until December 17, 1953, and did not issue any stock until December 28, 1953. This action was filed on May 17, 1954, less than five months after Cardoza became a shareholder of record of outstanding shares. Thus, he had no right on such date to commence an action under section 4650, the very section upon which he expressly alleges his action is being brought.

Cardoza argues that the use of the word "may" in section 4650 indicates that persons other than those enumerated therein are not barred from filing a dissolution action and that the time requirement therein was not intended as a limitation upon the powers of the court.

[5] Section 4650 of the Corporations Code was formerly section 404 of the Civil Code, which was enacted in 1931. Prior to this, only the state and not individual stockholders could maintain an action for involuntary dissolution of a corporation. Collins v. Consolidated Water Co., 122 Cal.App. 348, 349, 9 P.2d 872; Loney v. Consolidated Water Co., 122 Cal.App. 350, 352, 9 P.2d 888; Elliott v. Superior Court, 168 Cal. 727, 735, 145 P. 101. When such right was created by section 404 it was in derogation of the common law and the section should be strictly construed. (23 Cal.Jur. 799.)

We conclude that the judgment should be affirmed as to the first count and reversed as to the second count and it is so ordered. It is further ordered that Cardoza and Millington shall each bear their own respective costs on appeal and that the corporation shall recover its costs on appeal from Cardoza and Millington in equal shares.

PETERS, P. J., and FRED B. WOOD, J., concur.



In the Matter of the ESTATE of Fred Mason CARTER, Deceased.

AMERICAN CANCER SOCIETY, Shriners Hospital for Crippled Children, Santa Clara County Heart Association, Crippled Childrens Society of Santa Clara County, and National Foundation for Infantile Paralysis, Inc., Contestants and Appellants,

v.

CHURCH DIVINITY SCHOOL OF THE PACIFIC, and Bank of America National Trust & Savings Association, Respondents.

In the Matter of the ESTATE of Mabel C. CARTER, Deceased.

AMERICAN CANCER SOCIETY, Shriners Hospital for Crippled Children, Santa Clara County Heart Association, Crippled Childrens Society of Santa Clara County, and National Foundation for Infantile Paralysis, Inc., Contestants and Appellants,

v.

CHURCH DIVINITY SCHOOL OF THE PACIFIC, and Bank of America National Trust & Savings Association, Respondents.*

Nos. 16880, 16881.

District Court of Appeal, First District, Division 1, California.

May 22, 1956.

Rehearing Denied June 21, 1956.

Hearing Granted July 18, 1956.

Proceeding in the matter of the estates of a deceased husband and deceased wife.

The Superior Court, County of Santa Clara, M. G. Del Mutolo, J., entered orders determining that deceased wife had not exercised her power of appointment over corpus of trust established by deceased husband, and contestants appealed. The District Court of Appeal, Bray, J., held that testatrix, by residuary clause directing all the remainder of her estate to be divided equally among six named organizations, did not exercise her power of appointment over corpus of trust established by her husband, who predeceased her, in view of another provision in will being inconsistent with exercise of the power.

Orders affirmed.

1. Wills ⇐589

The section of probate code providing that devise or bequest of all of testator's real or personal property passes all such property which he was entitled to dispose of by will at time of his death, including property embraced in a power to devise, was a reenactment of civil code sections and provided a rule for construction of will. West's Ann.Probate Code, § 125.

2. Evidence ⇐65
Wills ⇐589

Testator is presumed to know the law and that the court will, if possible, read section of probate code providing that devise or bequest of all of testator's real or personal property passes all such property to which he was entitled to dispose of by will at time of his death, including property embraced in a power to devise, into the will. West's Ann.Probate Code, § 125.

3. Wills ⇐589

A devise of all one's property is presumed to include a general power of appointment, unless the contrary appears from the will.

4. Wills ⇐589

The intent to execute a power to devise property must be clear, so that such intent is not left in doubt.

5. Wills ⇐589

Testatrix, by residuary cause directing all the remainder of her estate to be divided equally among six named organizations, did not exercise her power of appointment over corpus of trust established by her husband, who predeceased her, in view of another provision in will being inconsistent with exercise of the power. West's Ann.Probate Code, § 125.

6. Wills ⇐487(2, 3)

Generally, circumstances under which a will is made may be shown, but oral declarations of testator as to his intentions may not. West's Ann.Probate Code, § 105.

7. Wills ⇐487(6)

Testimony of draftsman of will as to testatrix' instructions at time of drawing the will was admissible as an exception to the general rule and not violative of probate code. West's Ann.Probate Code, § 105.

8. Wills ⇐470

Different parts of a will must be harmonized, if possible, giving expression to all of the terms therein and forming from them one consistent whole.

9. Appeal and Error ⇐1056(5)

Trial court's refusal to consider testimony of attorney who drafted will in determining whether will was an exercise by testatrix of power of appointment over corpus of trust established by her husband, who predeceased her, on ground that will was not ambiguous, even if erroneous, did not require reversal, where trial court's conclusions were correct.

10. Appeal and Error ⇐854(1)

If judgment or order is right on any applicable theory, it must be sustained regardless of considerations which may have moved trial court to its conclusion.

Peart, Baraty & Hassard, San Francisco, for American Cancer Society.

Gerald S. Chargin, San Jose, for Foundation for Infantile Paralysis, Inc.

J. Clark Benson, San Francisco, for Shriner's Hospital for Crippled Children.

Richard G. Lean, San Jose, for Crippled Children's Society of Santa Clara County.

Douglas, Zingheim & Allen, San Jose, for Santa Clara County Heart Ass'n, Bruce F. Allen, San Jose, of counsel.

Ridley Stone, Berkeley, for Church Divinity School of the Pacific.

Rea, Frasse & Anastasi, San Jose, for Bank of America Nat. Trust & Savings Assn.

BRAY, Justice.

This is a consolidated appeal[1] from an order in the Estate of Fred M. Carter, deceased, instructing the trustee of the trust created by his will, and from an order in the Estate of Mabel Carter, deceased, instructing the executor of her will.[2]

Questions Presented.

The probate court, in the two orders appealed from, determined that Mabel Carter had not exercised her power of appointment over the corpus of the trust established by her husband, Fred. This interpretation gives respondent, the Church Divinity School of the Pacific, all the corpus of the trust. If Mabel did exercise her power of appointment, the respondent and the five appellants will each receive one-sixth of the corpus.

1. What is the effect of section 125, Probate Code?

2. Was extrinsic evidence admissible?

Facts.

Fred and Mabel Carter each executed wills on September 30, 1949. Later Fred executed a codicil to his will. He died September 7, 1951. Mabel executed nine codicils to hers. She died April 21, 1954.

Fred's will created two trusts herein referred to as Trusts A and B respectively. Trust A consisted of one-half the residue of Fred's estate. This trust provided that Mabel might transfer her own property to the trust at any time; that the trustee should pay to Mabel, for her life, the entire income from the trust; that the trustee, in its discretion, or upon the directions from Mabel, should pay to her any or all of the corpus; that the trust should terminate upon the death of Mabel, and that she should have a power of testamentary appointment over the corpus of the trust, and that, if there be a failure of disposition, there would be a gift over to Trust B. As to the power of appointment, Fred's will stated: "With respect to the said Trust A, my said wife is hereby granted a power to appoint the entire corpus thereof free of the Trust, in favor of her own estate or of any other beneficiary or beneficiaries whom my said wife may designate, which power shall be exercisable by my said wife alone, and in all events but shall be effective only if exercised by a valid will of my said wife."

Trust B consisted of the remaining one-half of the residue of Fred's estate. By this trust Fred directed the trustee to pay the income therefrom to Mabel for her life, and made provisions for invasion of the corpus. He also provided that this trust should terminate upon the death of his wife and, in the event his wife should predecease him or not exercise her power of appointment of Trust A, that the corpus of Trust B should be paid to the same persons named in his will to receive his estate.

Fred's will then listed 28 specific legacies, with the residue given to respondent Church Divinity School. He further provided that if his wife should survive him and should have not transferred her estate to Trust A or should have exercised the power of appointment over Trust A, 13 of the listed 28 legacies should have no effect because they were gifts personal to his wife and would be provided for by her will. One of the clauses which was to remain in effect in any event was that which gave the residue of his estate to respondent.

The pertinent parts of Mabel's will provided for the same 13 legacies which were to have no effect under Fred's will in the

1. By Santa Clara County Heart Association, Crippled Childrens Society of Santa Clara County, Inc., American Cancer Society (Santa Clara County Chapter), Shriners Hospital for Crippled Children, and National Foundation for Infantile Paralysis, Inc. (Santa Clara County Chapter).

2. Bank of America National Trust & Savings Association is the trustee of the trust created by Fred M. Carter, and the executor of Mabel Carter's will.

event she should survive him and should have not transferred her estate to Trust A or should have exercised the power of appointment over Trust A. She then left the residue of her estate to respondent. In a codicil dated March 1, 1953, the residue clause was amended to read: "All the rest, residue and remainder of my estate, whether the same be real, personal or mixed, and wheresoever the same may be situated, including any and all lapsed bequests under this will, I give devise and bequeath equally to the following organizations and institutions:" the five appellants and respondent.

Mabel did not transfer her estate to Trust A. The trustee and the executor petitioned for instructions as to whether Mabel had exercised her power of appointment. The probate court held that she did not intend to do so and had not done so. In so holding the court filed an opinion in which it stated that there was no ambiguity in Mabel's will, and hence the attorney's testimony "was not necessary."

[1] Section 125, Probate Code reads: "A devise or bequest of all the testator's real or personal property, in express terms, or in any other terms denoting his intent to dispose of all his real or personal property, passes all the real or personal property which he was entitled to dispose of by will at the time of his death, *including property embraced in a power to devise.*" (Emphasis added.) California Trust Co. v. Ott, 59 Cal.App.2d 715, 140 P.2d 79, 80, points out that the section is a reenactment of Civil Code sections 1330 and 1331 and is "one of interpretation." Childs v. Gross, 41 Cal.App.2d 680, at page 689, 107 P.2d 424, at page 429, is to the same effect, holding "Section 125 of the Probate Code provides a rule for the *construction of wills* * * *".

1. Section 125, Probate Code, Applies.

[2] In determining Mabel's intention we must read section 125 into the will. The testator is presumed to know the law and that the court will if possible read section 125 into the will. See In re Estate of Carroll, 138 Cal.App.2d 363, 291 P.2d 976, where we held that in determining whether a will is ambiguous and that extrinsic evidence should be considered, section 92, Probate Code (the antilapse statute) must be read into the will and that the testator is presumed to know that the court would read that section into the will. The testator's intention must be ascertained from the provisions of the will construed in the light of section 125, if possible.

[3] As said in Harvard Trust Co. v. Frost, 1927, 258 Mass. 319, 154 N.E. 863, at page 864, "It is well settled that a devise of all one's property is presumed to include a general power of appointment, *unless the contrary appears from the will.*" (Emphasis added.)

Section 125 provides that a devise or bequest of all a testator's real *or* personal property in express terms passes "property embraced in a power to devise." The codicil of March 1st devised all the remainder (the other portion of her property being devised and bequeathed in other portions of the will) of her estate, real, personal and mixed. Thus the will and codicil constituted a devise or bequest of *all* testator's property including the property subject to her power to devise. In California Trust Co. v. Ott, supra, 59 Cal.App.2d 715, 140 P.2d 79, the husband and wife created a trust agreement, with a power of appointment in the husband. Thereafter, the husband made a will in which he said " 'I give, devise and bequesth to my beloved wife * * * all the rest and residue of my estate, both real, personal and mixed * * *.' " The will having been executed prior to the adoption of section 125 of the Probate Code, the court applied sections 1330 and 1331 of the Civil Code, and held that properly interpreted the will was "an exercise of the power, to devise the trust property, which the trustor-husband had retained." 59 Cal.App.2d at page 717, 140 P.2d at page 80. In Childs v. Gross, supra, 41 Cal.App.2d 680, 107 P.2d 424, the testator was one of the beneficiaries of a trust. His will devised and bequeathed all of his property, both real and personal, to an individual. The court applied section 125, Probate Code, to this clause and held that it constituted an exercise of his power of appointment of his interest in the trust. Here, the will disposes of testatrix' entire estate and

therefore, under section 125, would appear to include "property embraced in a power to devise", but an examination of the entire will indicates a contrary intent.

Respondent concedes that section 125 should be read into the will. It contends, however, that doing so and then construing the will as a whole it appears on the face of the will (1) that Mabel did not exercise her power of appointment, or (2) the will is ambiguous and it cannot be determined therefrom whether she did or did not exercise that power. It points particularly to paragraph sixth where it is provided that if at the time of her death she has transferred her estate into the trust provided in her husband's will, then the 13 legacies provided in paragraph fifth shall lapse "for the reason that the said bequests will have been provided for under the terms of my said husband's will." However, and his will, in which he bequeaths exactly the same amounts to these same legatees, these bequests were to be effective only if Mabel not only transferred her estate to the trusts but also failed to exercise her power of appointment. Thus, if Mabel were to transfer her estate to the trusts and also exercised her power of appointment, the 13 legatees would get nothing from either estate—nothing from her estate because she had caused the bequests to lapse believing they would come from her husband's estate, and nothing from the latter estate because she had exercised her power of appointment. It must be presumed that Mabel knew the contents of her husband's will because she refers to it, and it is evident that as to these 13 bequests she did not want the legatees to take both under his and her will. She, however, did want them to take under one will or the other. Thus, so far as the effect on paragraph sixth is concerned, it is clear that Mabel did not intend that the provisions of the will should constitute the exercise of her power of appointment. However, in other provisions of her will she provided 34 specific bequests and a residue to six charities, which, in the event mentioned in paragraph sixth, namely, that she transferred her estate into the trusts, could not be satisfied unless she did exercise her power of appointment. Thus, we have one part of the will consistent with her exercising her power, and another part inconsistent therewith.[3]

[4, 5] Appellants argue that Mabel never at any time intended to transfer her estate to the trusts and hence paragraph sixth should not be considered. However, we cannot disregard the plain language of that paragraph which provided for the contingency of her doing so, and which is inconsistent with an exercise of her power of appointment. As said in Childs v. Gross, supra, 41 Cal.App.2d 680, 690, 107 P.2d 424, 430, quoting from Morffew v. San Francisco & S. R. R. Co., 107 Cal. 587, 40 P. 810, " 'the intent to execute a power must be clear, so that such intent is not left in doubt.' " In view of the conflict between the provisions of paragraph sixth and the other provisions of the will read with section 125, we cannot say that the testatrix evidenced a clear intent one way or the other.

2. Extrinsic Evidence.

While the court admitted extrinsic evidence,[4] it is interesting to note that in its opinion it stated that the clause in Mabel's will relied upon as an exercise by her of her power of appointment was not ambiguous and therefore the attorney's evidence was not necessary.

3. It is interesting to note that under Fred's will, after providing for care for his wife for life, the only dispository language is dependent upon the two conditions, (1) that Mabel transfer her estate to the trusts, and (2) that she *not* exercise her power of appointment. As she did not transfer her estate there was a complete intestacy under Fred's will. This was cured in the decree of distribution in his estate by appropriate language.

4. The attorney who drafted the wills and several of the codicils, particularly that of March 1st which it is claimed constitutes an exercise of the power of appointment, testified over objection that in talking with Mabel concerning said codicil she stated she did not intend by making it to exercise the power of appointment and that he advised her that to exercise the power she would have to do so in express terms.

[6–10] To determine this question the circumstances under which the will was made may be considered. Probate Code, § 105. In Morffew v. San Francisco & S. R. R. Co., supra, 107 Cal. 587, at page 600, 40 P. 810, at page 815, the court said: "'For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret.' Code Civ.Proc., § 1860." It is the general rule and is set forth in section 105, Probate Code, that while the circumstances under which a will is made may be shown, the "oral declarations of the testator as to his intentions" may not. Here, the probate court admitted the testimony of the draftsman of the will as to testatrix' instructions at the time of drawing the will. Such evidence is an exception to the general rule and has been held not violative of section 105. "There is, of course, a broad difference between testimony of the casual remark of a man as to his intention to leave a portion of his estate to this person or the other, and the positive instructions which he has given to his attorney in the very performance of the testamentary act, and in any proper case such instructions may be received, without doing violence to section 1340 of the Civil Code [now Probate Code, § 105]." In re Estate of Dominici, 151 Cal. 181, 185, 90 P. 448, 450. See In re Estate of Greenwald, 19 Cal.App.2d 291, 297, 65 P.2d 70; In re Estate of Nunes, 123 Cal.App.2d 150, 158, 266 P.2d 574. Thus the testimony of the attorney was properly admitted. The judge in his "Memorandum of Opinion" stated that the will was not ambiguous, that the attorney's testimony was not necessary,[5] and that "From the tenor of the will and the surrounding circumstances" it appeared that Mabel did not exercise her power of appointment. "It is a well recognized rule that different parts of a will must be harmonized if possible, giving expression to all of the terms therein and forming from them one consistent whole." In re Estate of Halsell, 133 Cal.App.2d 665, 671, 284 P.2d 821, 825. The construction of the will given by the probate court harmonizes the entire will, preventing the lapse of any bequest. Assuming that the court erred in holding that the will is not ambiguous,[6] such error is not important. With the addition of the attorney's testimony and the requirement that the provisions of the will be harmonized if possible, the court could only have reached the same conclusion that it did. Therefore it will not be necessary for the case to be returned to the probate court for further proceedings. Its conclusions are correct. "If the judgment or order is right on any applicable theory, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion. In other words, it is judicial action, and not judicial reasoning or argument, that is the subject of review, and if the former is correct, the reviewing court is not concerned with the faults of the latter." 4 Cal.Jur.2d p. 391; see also Lincoln v. Superior Court, 22 Cal.2d 304, 315, 139 P.2d 13.

The orders are affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

5. The court never formally ruled on appellants' objections to this testimony. Appellants contend that the court considered it in spite of its statement that the testimony was unnecessary.

6. The only statement that the will is not ambiguous appears in the court's memorandum decision. Normally such opinion cannot be considered "'as indicating what operated upon its (the trial court's) mind in coming to a conclusion as to the ultimate facts of the case. * * * The deliberations of the court are conclusively merged in the judgment. The findings of fact and conclusions of law constitute the decision which is the final, deliberate expression of the court.'" Oldis v. La Societe Francaise, 130 Cal.App.2d 461, 279 P.2d 184, 192, quoting from DeCou v. Howell, 190 Cal. 741, 214 P. 444.

Leiah MULLER, Plaintiff and Respondent,
v.
William MULLER, Defendant and Appellant
(three cases).
Civ. 16709, 16755, 16756.

District Court of Appeal, First District, Division 1, California.
May 23, 1956.
Rehearing Denied June 22, 1956.
Hearing Denied July 18, 1956.

Quiet title action. The Superior Court, San Mateo County, A. R. Cotton, Louis B. Dematteis, and Murray Draper, JJ., entered orders adverse to defendant, and defendant appealed. The District Court of Appeal, Peters, P. J., held that, where action was commenced in county in which parties resided and the realty was located, defendant was not entitled to immunity from service of process in such action while defendant was attending a court hearing in another county, and, therefore, such service was good.

Orders affirmed.

1. Appeal and Error ⇐1011(2)

Trial court's rulings on factual matters, which were passed upon on conflicting affidavits, were conclusive on appeal.

2. Process ⇐118

Under public policy independent of statute, nonresident present within state as a suitor or as witness in an action pending in state, is immune from service of process while present in state for such purpose, and such rule also applies between counties where county in which service is had to assert jurisdiction over a nonresident of the county, but, where person is served in adjoining county in an action pending in county of his residence, such element of forced venue does not exist, and the service will be good.

3. Process ⇐119

Where quiet title action was commenced in county in which parties resided and the realty was located, defendant was not entitled to immunity from service of process in such action while defendant was attending a court hearing in another county, and, therefore, such service was good.

4. Pleading ⇐336

Clear and unambiguous affidavit of plaintiff's attorney to effect that copy of complaint in quiet title action had been mailed defendant was sufficient to sustain trial court's finding of compliance with order requiring copy of complaint in such action to be mailed defendant, even though office associate of plaintiff's attorney averred that complaint in a "divorce case" had been mailed to defendant by plaintiff's attorney.

5. Process ⇐5

Jurisdiction was secured over defendant in quiet title action by service of summons and complaint on him, not by subsequent mailing of another copy to him.

6. Pleading ⇐336

Proof of mailing of complaint could be made orally as well as by affidavit of mailing.

7. Process ⇐127

Fact of service, not how such fact is proved, confers jurisdiction.

8. Judgment ⇐153(1)

If default judgment is secured by extrinsic fraud, six months' limitation on relief from judgment taken by mistake, inadvertence, surprise, or excusable neglect would not be applicable. West's Ann.Code Civ.Proc. § 473.

9. Judgment ⇐375

Charge that allegations of complaint in quiet title action and plaintiff's testimony at hearing were false and perjured and that plaintiff failed to inform court at hearing that there were pending three actions filed by defendant involving title to the property constituted charges of "intrinsic fraud", not "extrinsic fraud".

See publication Words and Phrases, for other judicial constructions and definitions of "Extrinsic Fraud" and "Intrinsic Fraud".

10. Judgment ⇐138(2)

Where defendant had been validly served with process and informed that his

default would be taken if he did not file an answer, and plaintiff did nothing to prevent defendant from defending the action, defendant was not entitled to have default judgment vacated.

11. Motions ⇐36

Trial judge is not required to listen to oral arguments in support of a motion but may, in his discretion, decide it solely on basis of supporting affidavits.

12. Motions ⇐37

In passing on a motion trial court may refuse to listen to oral testimony and may decide a case on affidavits alone. West's Ann.Code Civ.Proc. §§ 1963, subd. 16, 2009.

13. Motions ⇐36

Where motion was not only without merit but obviously frivolous, trial court was well within its powers in summarily denying it.

14. Judges ⇐51(1)

Defendants' attempt to peremptorily challenge judge under section which had been held unconstitutional was properly denied. West's Ann.Code Civ.Proc. § 170.5.

15. Judgment ⇐495(1)

In a proper case, attack may be made collaterally on a judgment more than six months after its entry, but, on such collateral attack, there is a presumption that the judgment is valid, that is, that the court had jurisdiction of the person and subject matter, and, therefore, person relying upon the judgment need not plead or prove the jurisdictional facts, but person attacking the judgment has burden of showing lack of jurisdiction. West's Ann.Code Civ.Proc. § 1963, subd. 16.

16. Judgment ⇐499

In showing lack of jurisdiction on a collateral attack, challenger is limited, at least as to domestic judgments, to the judgment roll and may not show lack of jurisdiction by evidence outside the judgment roll. West's Ann.Code Civ.Proc. § 670.

17. Judgment ⇐482

Where there appeared in judgment roll summons, with affidavit or proof of service, complaint with memorandum endorsed thereon that default of defendant "in not answering was entered," and copy of the judgment, defendant, who had failed to file an answer, could not legally make collateral attack upon the judgment. West's Ann.Code Civ.Proc. §§ 670, 1963, subd. 16, 2009.

18. Attorney and Client ⇐62

Litigant, who appears in propria persona, is entitled to the same, but no greater, consideration than litigants and attorneys, and such type of appearance affords no excuse for permitting litigant to abuse legal processes.

William Muller, in pro. per.

Charles Reagh, San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff, Lelah Muller, former wife of defendant, William Muller, brought an action in San Mateo County to quiet title to certain property. According to the affidavit of service, personal service in that action was had on defendant in San Francisco on November 17, 1952. Growing out of this action the San Mateo Superior Court made three separate orders adverse to defendant. From these orders defendant, *in propria persona,* appeals. The three appeals have been consolidated. 1 Civil No. 16,755 is an appeal from an order made by Judge Draper on October 13, 1954, denying defendant's motion to set aside a default judgment in the quiet title action. 1 Civil No. 16,709 is from an order made by Judge Cotton on October 25, 1954, denying defendant's "motion to set aside submission sua sponte and reopen cause for the reception of evidence." 1 Civil No. 16,756 is an appeal from an order made by Judge Dematteis on December 29, 1954, denying defendant's motion "to set aside default and to vacate default judgment coram non judice by way of collateral attack." Most of defendant's lengthy arguments on these appeals are highly technical and are dilatory in nature. All of them are without merit.

The original quiet title action was filed in May of 1952 in San Mateo County. In

December of 1952 appellant applied to the trial court and secured an extension to January 17, 1953, "within which to move" in that action. On January 16, 1953, defendant moved to quash the service of summons in the quiet title action mainly on the ground that at the time of service the papers were thrown at defendant by the process server while defendant was in attendance in the Municipal Court of San Francisco on an entirely different civil matter, and was, therefore, so it is claimed, exempt from service.

On March 23, 1953, respondent's attorney and appellant appeared before Judge Draper to argue about some demurrers in three actions appellant had brought against respondent involving the title to the property involved in the quiet title action. Appellant was then moving to have service of these demurrers set aside on the basis that such service had been made by registered and not by regular mail. At this hearing respondent's attorney, in open court and in the presence of appellant, complained that the county clerk had refused to enter appellant's default in the quiet title action. Appellant told the court that he had no copy of the complaint.[1] Judge Draper directed respondent's attorney to send appellant, by mail, a copy of the complaint and to wait 10 days before attempting to have the default entered. At the same time, unknown to appellant, Judge Draper entered a minute order that appellant was granted 10 days from the mailing date to file an answer or cross-complaint. Respondent's attorney avers that on March 23, 1953, he mailed a copy of the complaint in the quiet title action properly stamped and addressed to appellant, and that this was done in the presence of his office associate. The office associate corroborates respondent's attorney except that in his affidavit he refers to the mailed document as a "complaint in a divorce case."

On April 24, 1953, the motion to quash the service of summons in the quiet title action came before Judge Draper, and was denied. Immediately thereafter, in the presence of appellant, respondent's attorney requested the court to enter appellant's default. The judge told the attorney, in the presence of appellant, that he had the court's permission to request the county clerk to enter the default. Respondent's attorney immediately proceeded to the clerk's office, followed by appellant, and appellant's default was entered while appellant was standing nearby.

On September 9, 1953, respondent's attorney sent a letter, properly stamped and addressed, to appellant informing appellant that the default had been entered, that the time to move to vacate the default would expire on October 24, 1953, and that if appellant would secure an attorney he, respondent's attorney, would recommend to his client that she consent to vacating the default. No answer was received.

On May 13, 1954, the quiet title action came on for hearing before Judge Dematteis on respondent's motion for judgment after default. At this hearing a deed to the property involved, signed by appellant, whose signature was identified by respondent, was introduced into evidence, and the respondent testified as to the circumstances under which it was signed. The deed had not been acknowledged, which was the reason for the quiet title action. On May 18, 1954, the court entered its judgment quieting title to the property involved, after finding the pertinent facts as set forth above. On September 21, 1954, which was four months after this judgment was entered, and a year and five months after appellant's default had been entered, appellant moved to set aside the default judgment on the grounds that service of summons was defective; that respondent had not mailed him a copy of the complaint; that the judgment was secured by extrinsic fraud, in that respondent's pleading and evidence were false, and that pertinent facts, known to respondent, had not been revealed to the court. Appellant claimed by affidavit that he had never received a copy of the complaint, and that he did not learn of the default until just after respond-

1. Summons and a copy of this complaint were served on appellant on November 17, 1952, according to the affidavit of the process server.

ent took possession of the premises. Annexed to the motion is a verified answer and cross-complaint setting forth his version of the facts under which the deed was executed which, if true, would have been a defense to the quiet title action. Respondent's affidavit set forth the facts favorable to her.

The hearing of appellant's motion to vacate the default came on for hearing before Judge Draper on October 6, 1954. Appellant was permitted to file a counter-affidavit in which he challenged all of the basic facts already set forth, denying that he had been served, heard counsel ask for a default, heard the court tell respondent's counsel to have the clerk enter it, followed respondent's counsel to the clerk's office, and denied ever receiving the letter above mentioned from respondent's counsel. On October 13, 1954, Judge Draper denied the motion to set aside the default by a memorandum decision finding that service had been properly made, and that appellant was in default. A formal order to this effect was entered October 14, 1954. From this order appellant has appealed—1 Civil No. 16,755.

On October 18, 1954, appellant moved to set aside the submission of his previous motion to vacate, and to reopen the cause for further evidence, claiming that submission of the motion was against his will, that Judge Draper refused to permit him to present his case, and that the judgment was secured by extrinsic fraud. This motion came before Judge Cotton on October 25, 1954. At that time appellant attempted to pre-emptorily challenge Judge Cotton under section 170.5 of the Code of Civil Procedure. The challenge was denied. Judge Cotton then summarily denied the motion, and, after a heated exchange, ordered the bailiff to escort appellant from the courtroom. An appeal was taken from this order—1 Civil No. 16,709.

On November 26, 1954, the appellant filed a motion to set aside the default judgment. This motion was, of course, filed more than the six month's period prescribed by section 473 of the Code of Civil Procedure. This motion urged many grounds in its support, most of which were a rehash of points already set forth. This motion was heard by Judge Dematteis and, after extensive argument, was denied by him on December 29, 1954. An appeal was taken from that order of denial—1 Civil No. 16,756.

[1] In support of his various appeals appellant has filed briefs totalling over 200 pages, raising some 40 points of what are claimed to be points of law. Most of them involve factual matters that have been passed upon by the lower courts on conflicting affidavits. These need not be considered. The rulings of the trial courts on these issues are conclusive.

Appeal 1 Civil No. 16,755.

The only real legal point raised by appellant on this appeal is that he was immune from service because when served he was in fact in attendance in the San Francisco Municipal Court as a suitor in other actions.

[2] There can be no doubt that it is the rule in California that a non-resident of the state present in this state as a suitor or as a witness in an action pending here, is immune from service of process while present in this state for such purposes. Hammons v. Superior Court, 63 Cal.App. 700, 219 P. 1037; Gerard v. Superior Court, 91 Cal. App.2d 549, 205 P.2d 109; Franklin v. Superior Court, 98 Cal.App.2d 292, 220 P.2d 8. This is a rule of general application which is based upon public policy independent of statute.

In the present case the main action was filed in San Mateo County, which was the county of the residence of the parties, and service was had on him in that action while he was attending the Municipal Court in San Francisco as a suitor. While the general rule above set forth as to non-residents of the state, also applies between counties where the county where the service is had is seeking to assert jurisdiction over a non-resident, see cases collected 42 Am.Jur. 127, § 146, the generally accepted rule is that where a person is served in a county where he is appearing as a suitor or as a witness in an action pending in his own county of residence, the reason for the rule

exempting him from service does not exist, and the rule does not apply. In other words, the general rule is predicated upon the fundamental rule of fairness that when a suitor or witness is attending a trial in a county or state other than his residence, he should not be required to submit to a forced jurisdiction that were it not for his attendance at the trial would not have jurisdiction. But where a person is served in an adjoining county in an action pending in his county of residence this element of forced venue does not exist. In such cases the courts, generally, have refused to apply the exemption and have held the service good. Mertens v. McMahon, 334 Mo. 175, 66 S.W.2d 127, 93 A.L.R. 1285; Massey v. Colville, 45 N.J.L. 119, 46 Am.Rep. 754; Fisher v. Bouchelle, 134 W.Va. 333, 61 S.E.2d 305. California, at least by dicta, has indicated that the immunity does not apply between counties. Page v. Randall, 6 Cal. 32, 33.

[3] This exception to the immunity rule is based on common sense and fairness. The rationale of the immunity rule is that witnesses and parties ought to be able to attend trials without the threat of being subjected to lawsuits away from the county of their residence. But where this reason does not exist the rule should not apply. Where a quiet title action is commenced in San Mateo County, the county of the residence of the parties, and the realty is located there, no possible legal reason exists for granting immunity to that defendant from service while such defendant is attending a court hearing in San Francisco.

[4] Appellant next points out that the office associate of respondent's counsel avers that a complaint in a "divorce case" was mailed by respondent's counsel to appellant, and contends that this conclusively establishes that there was no compliance with the minute order requiring a copy of the complaint in the quiet title action to be mailed to appellant. The affidavit of respondent's attorney is clear and unambiguous to the effect that a copy of the complaint in the quiet title action was mailed to appellant. This affidavit, which the trial court found to be true, supports the finding of compliance with the order.

[5–7] Appellant next objects to the fact that respondent's attorney did not file an affidavit of mailing the complaint ordered mailed by Judge Draper. The point is without merit. Jurisdiction was secured over appellant by the personal service of the summons and complaint in San Francisco, not by the later mailing of another copy to appellant. If it were a condition precedent to the entry of the default that such complaint be mailed, the proof of such fact could be made orally as well as by an affidavit of mailing. It is the fact of service and not how such fact is proved that confers jurisdiction. Herman v. Santee, 103 Cal. 519, 37 P. 509; Drake v. Duvenick, 45 Cal. 455.

[8–10] It is next urged that the default judgment was secured by extrinsic fraud and therefore should be set aside. Of course, if the judgment was so secured the six-month limitation in section 473 of the Code of Civil Procedure is not applicable. Miller v. Cortese, 110 Cal.App.2d 101, 242 P.2d 84; People v. One 1941 Chrysler 6 Touring Sedan, 81 Cal.App.2d 18, 183 P.2d 368. The fraud here alleged is that the allegations in the complaint in the quiet title action of respondent, and her testimony at the hearing, were false and perjured, and that respondent failed to inform the court at that hearing that there were then pending three actions filed by appellant involving title to the property. These are classical charges of intrinsic and not extrinsic fraud. Pico v. Cohn, 91 Cal. 129, 25 P. 970, 27 P. 537, 13 L.R.A. 336; La Salle v. Peterson, 220 Cal. 739, 32 P.2d 612; Westphal v. Westphal, 20 Cal.2d 393, 126 P.2d 105; Chung Gee v. Quan Wing, 103 Cal.App.2d 19, 229 P.2d 50; Hammell v. Britton, 19 Cal.2d 72, 119 P.2d 333. Appellant, as already held, was validly served with process, and had been informed that his default was to be taken if he did not file his answer. Respondent did nothing to prevent him from defending the action. Thus, the motion to vacate was properly denied.

Appeal 1 Civil No. 16,709.

[11, 12] This appeal is from an order denying a "motion to set aside submission

sua sponte and reopen cause for the reception of evidence." In form and effect the motion was one asking the court to reconsider the denial of the previous motion. In support of this motion it is argued that appellant did not submit the motion previously denied, was prevented from arguing it, and was prevented from presenting oral evidence in support of it. It is, of course, the law, that a trial judge is not required to listen to oral arguments in support of a motion, but may, in his discretion, decide it solely on the basis of the supporting affidavits. Morel v. Simonian, 103 Cal.App. 490, 284 P. 694; Collins v. Nelson, 41 Cal. App.2d 107, 106 P.2d 39; People v. Carpenter, 3 Cal.App.2d 746, 40 P.2d 524. It is equally clear that the trial court may refuse to listen to oral testimony and may decide the case on affidavits alone. § 2009, Code Civ.Proc.; Cowan v. Cowan, 72 Cal. App.2d 868, 166 P.2d 21.

[13] Thus, the motion now under consideration was not only without merit, but obviously frivolous. Under such circumstances, the trial court acted well within its powers in summarily denying it.

[14] In connection with this motion appellant attempted to peremptorily challenge Judge Cotton, purporting to act under section 170.5 of the Code of Civil Procedure. There was no charge of bias. That section, insofar as it deals with a peremptory challenge, has been held to be unconstitutional. Austin v. Lambert, 11 Cal.2d 73, 77 P.2d 849, 115 A.L.R. 849; Daigh v. Shaffer, 23 Cal.App.2d 449, 73 P.2d 927; Bulcke v. Superior Court, 14 Cal.2d 510, 94 P.2d 1006.

Appeal 1 Civil No. 16,756.

[15–17] This is an appeal from a denial of appellant's motion to "set aside default and to vacate default judgment coram non judice by way of collateral attack." While such an attack, in a proper case, may be made collaterally on a judgment more than six months after its entry, Wells Fargo & Co. v. City & County of San Francisco, 25 Cal.2d 37, 152 P.2d 625; Henderson v. Henderson, 85 Cal.App.2d 476, 193 P.2d 135; Moran v. Superior Court, 35 Cal.App. 2d 629, 96 P.2d 193, on such collateral attack there is a presumption that the judgment is valid, that is, that the court had jurisdiction of the person and subject matter. Thus, the person relying on a judgment need not plead or prove the jurisdictional facts. § 1963(16), Code Civ.Proc.; Fletcher v. Superior Court, 79 Cal.App. 468, 250 P. 195; In re Eichhoff's Estate, 101 Cal. 600, 36 P. 11. The burden rests on the person attacking the judgment to show lack of jurisdiction. In showing lack of jurisdiction, in a collateral attack, the challenger, at least as to domestic judgments, is limited to the judgment roll, and may not show lack of jurisdiction by evidence outside the judgment roll. Kaufmann v. California Mining & Dredging Syndicate, 16 Cal.2d 90, 104 P.2d 1038; In re Estate of Wise, 34 Cal.2d 376, 210 P.2d 497; Hogan v. Superior Court, 74 Cal.App. 704, 241 P. 584; Phelan v. Superior Court, 35 Cal.2d 363, 217 P.2d 951. Under section 670 of the Code of Civil Procedure the judgment roll, where defendant fails to file an answer, consists of the "summons, with the affidavit or proof of service; the complaint with a memorandum indorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment." All of these here appear on the judgment roll. Thus, appellant cannot, legally, collaterally attack that judgment. Moreover, most of the points raised on this appear are simply a rehash of points raised on the other two appeals and held to be without merit. They need not be reconsidered. The other points are so obviously without merit that further discussion is unnecessary.

[18] If it were not for the point relating to service of the summons while appellant was in attendance in the Municipal Court in San Francisco (which, while without merit, is reasonably debatable), this court would be inclined to hold that these appeals are frivolous and to impose an appropriate penalty. While appellant is appearing *in propria persona,* that affords no excuse for permitting him to abuse the legal

processes. A litigant appearing *in propria persona* is entitled to the same, but no greater, consideration than other litigants and attorneys.

The orders appealed from are affirmed.

BRAY and FRED B. WOOD, JJ., concur.



142 Cal.App.2d 47

Robert J. BAILEY and Alberta Bailey, Husband and Wife, Petitioners,

v.

The SUPERIOR COURT of the State of California, IN AND FOR the COUNTY OF SHASTA, Respondent.

Joseph S. Ball and Avesta Ball, Husband and Wife, Real Parties in Interest.

Civ. 8875.

District Court of Appeal, Third District, California.

May 31, 1956.

Rehearing Denied June 28, 1956.

Original proceeding in certiorari against the Superior Court of State of California in and for the County of Shasta, Richard B. Eaton, J., to review an order made in a contempt proceeding arising out of violations of an injunctive decree theretofore made in a civil action. The District Court of Appeal, Van Dyke, P. J., held that in contempt proceeding for violation of injunctive decree enjoining interference with irrigation ditch, trial court, even by consent of parties, could not adjudicate as to nature, location or extent of servitude of ditch, its size, capacity, or duty of its maintenance, which things had been finally adjudicated between the parties by the injunctive decree.

Adjudications and orders of Superior Court annulled in accordance with opinion, and cause remanded.

1. Contempt ⇐67

Certiorari lies to review and annul a contempt order rendered without or in excess of jurisdiction.

2. Contempt ⇐40

A contempt proceeding is not a "civil action" but is of a "criminal" nature even though its purpose is to impose punishment for violation of order made in a civil action.

See publication Words and Phrases, for other judicial constructions and definitions of "Civil Action" and "Criminal Action".

3. Contempt ⇐67

No presumptions of validity may be indulged in support of judgments in contempt as would be the case with respect to ordinary judgment.

4. Contempt ⇐67

On certiorari to review contempt order, examination will be made of the whole record before trial court to determine whether there was any substantial evidence before it to sustain its exercise of jurisdiction.

5. Contempt ⇐54(1), 58(1)

In proceeding for constructive contempt, affidavit on which proceeding is based constitutes the complaint, affidavit of defendant constitutes the answer of plea, and the issues of fact are thus framed by respective affidavits serving as pleadings.

6. Contempt ⇐40

A contempt proceeding is not a civil action either at law or in equity, but is a separate proceeding of a criminal nature and summary character in which court exercises but a limited jurisdiction, and in which the people of the state prosecute the action.

7. Waters and Water Courses ⇐264

In contempt proceeding for violation of the injunctive decree enjoining interference with irrigation ditch, where trial court properly found that persons against whom proceedings were brought were in contempt because of destroying original ditch and attempting to substitute another ditch therefor, there remained nothing for trial court save only to declare punishment to be in-

flicted because of the contempt, and, if it deemed it proper to do so, to make such orders preventive of further contempt as seemed called for. West's Ann.Code Civ. Proc. § 1218.

8. Evidence ⇐43(2)

Both Superior Court and District Court of Appeal in a contempt proceeding arising out of violation of injunctive decree may take judicial notice of the record in the injunction action.

9. Easements ⇐16, 53

Where owner of land divides it into two parcels and sells, there is implied grant of all obviously used easements, and such easements carry secondary easement such as right to repair, etc., but there is no implied duty of owner of servient tenant to maintain and repair the right of way.

10. Judgment ⇐526

In construing a judgment, resort may be had to the pleadings and findings of fact.

11. Judgment ⇐524
Motions ⇐62

The same rules of interpretation apply in ascertaining meaning of a court order or judgment as in ascertaining meaning of any other writing.

12. Judgment ⇐524

When question of meaning and effect of judgment or order is raised, the entire document is to be construed as a whole to determine the purpose and intent, just as in case of a contract or other document.

13. Judgment ⇐470

Although a judgment is but the original debt or liability in a new form, it has a certain finality, and although it may be set aside through some form of direct attack permitted under law it may not be indirectly attacked.

14. Evidence ⇐386(1)

Parol evidence is not admissible to change legal effect of a judgment or the record of it in any material respect.

15. Waters and Water Courses ⇐264

In contempt proceeding for violation of injunctive decree enjoining interference with irrigation ditch, trial court, even by consent of parties, could not adjudicate as to nature, location or extent of servitude of ditch, its size, capacity or duty of its maintenance, which things had been finally adjudicated between the parties by the injunctive decree. West's Ann.Code Civ. Proc. § 1218.

Chenoweth & Leininger, Redding, for petitioners.

R. P. Stimmell, Frank W. Shuman, Redding, for real party in interest.

VAN DYKE, Presiding Justice.

This is a proceeding in certiorari to review an order made in a contempt proceeding arising out of violations of an injunctive decree theretofore made in a civil action. The civil action was brought in respondent court by Joseph S. and Avesta Ball, husband and wife, as plaintiffs, against Robert J. and Alberta Bailey, husband and wife, as defendants. Plaintiffs in the civil action are the real parties in interest here, and for convenience will be referred to as "real parties". We shall call the Baileys "petitioners". By the complaint in the civil action it was alleged and the answer admitted that petitioners were owners of certain real property, and that real parties were the owners of real property adjoining; that petitioners had formerly owned the whole and had granted to the real parties the portion now owned by the latter. It was further alleged that when real parties purchased from petitioners and took possession there existed and for long had existed a large ditch which conveyed water across the remaining land of petitioners and to the land deeded to real parties where the water was used for the benefit of real parties' land; that the deed contained no express grant of easement; that the property of real parties was located in the Anderson-Cottonwood Irrigation District and that they had no other means of securing water therefor except from the canal of the irrigation district and by the use of the ditch. By a second count, it was alleged that real parties were then in the process of purchasing an additional parcel of land from petitioners, which parcel likewise had been and

was being served with needed water through the same ditch; that, although demand had been made upon petitioners that the deed conveying said latter parcel should contain an express provision for an easement for the continued transportation of water across the remaining land of petitioners, the petitioners had refused, claiming no such easement right existed. The cause proceeded to trial, and the court made findings of fact upholding the contentions of real parties. The court specifically found that by means of said ditch the property of real parties had received in times past an "accustomed flow of water sufficient for the irrigation of said parcels according to the use and practice of the Anderson-Cottonwood Irrigation District"; and that real parties had a right to receive such accustomed flow of water through the ditch for use on their property; that the right was an easement appurtenant to their two parcels of land even though the easement was not specifically described in either the deed to the first parcel, or in the contract of sale for the second parcel; "that the plaintiffs [real parties] have the right to the accustomed flow and allotment of water from the supply of the Anderson-Cottonwood Irrigation District to and upon said Parcels B and C at the point where said ditch crosses the north line of said Parcel C." (Parcel C, as thus referred to, was the land owned by real parties.) It was further found that real parties were entitled to have said accustomed flow and allotment of water to their premises "at the said point where said ditch crosses the North line of said Parcel 'C', and that the Defendants [petitioners] * * should be restrained from interfering with the accustomed flow and allotment of water"; that the ditch referred to was and had been obviously, permanently and openly used for the benefit of the property of real parties. Attached to the findings was a plat showing the three parcels referred to and showing the existing ditch, its course through petitioners' land, and its point of entry upon the land of real parties. A judgment was entered, pertinent portions of which follow: It was adjudged that real parties had "the right in perpetuity to receive, at the point where the existing ditch shown on Exhibit A crosses the north line of Parcel C, the accustomed flow of water in said ditch at said point, sufficient for the irrigation of Parcels B and C according to the use and practice of the Anderson-Cottonwood Irrigation District". It was further decreed that petitioners and their successors in interest of any part of their retained property were "restrained in perpetuity from acts in derogation of aforesaid right".

No appeal was taken from the aforementioned judgment, it became final, and thereafter a proceeding in contempt was initiated by real parties through filing in the action in which the judgment had been rendered an affidavit in support of a request for citation for contempt. The affidavit made apt references to the judgment in the civil action and particularly to that portion thereof which enjoined petitioners from committing any acts in derogation of the rights declared by the judgment and then asserted that, in derogation of those rights, petitioners had destroyed the existing ditch across their land; had constructed a new ditch along their boundaries to a point where the old ditch had entered upon the land of real parties; that the new ditch was inadequate; that the result had been real parties were not receiving and could not receive the accustomed flow of water delivered by the old ditch. The affidavit contained a prayer that petitioners be punished for disobeying the injunction. A contempt citation was issued and petitioners filed a verified answer. Therein they admitted that they had destroyed the old ditch, because, as they said, they had sold the land over which the ditch extended, and the land so sold was being used for residential subdivision purposes. They averred that in selling the land, they had reserved a right of way ten feet wide for a ditch to serve real parties which took a different route from the old ditch and went along the westerly and southerly boundary of the property of petitioners to the point where the old ditch had entered the land of real parties. They alleged that they had made this ditch entirely adequate in size and grade to furnish more than the amount of water which real parties had received from

the old ditch, and that under the judgment they had a right to change the ditch and to substitute a new ditch provided the new ditch properly transported water sufficient in quantity for the irrigation of the land of real parties.

Hearings were held in the respondent court, and an order was entered adjudging the petitioners guilty of contempt, in that they had "wrongfully and unlawfully, in derogation of the judgment and decree heretofore rendered, violated the terms thereof in that the plaintiffs [real parties] did not receive, at the point where the existing ditch shown on Exhibit 'A' of the judgment and decree made and entered herein on July 14, 1953, crosses the north line of Parcel C, the accustomed flow of water at said point sufficient for the irrigation of Parcels B and C, as provided in said decree". Having adjudged petitioners guilty of contempt, the court did not stop, but went on to other matters. The court declared: That real parties were entitled to the accustomed flow in the ditch at the point of its entry to their lands in sufficient quantities so that they and their successors in interest might irrigate their property "east of the swale located on their property" in accordance with irrigation practices "in 7 hours"; that petitioners had sold and conveyed a portion of their property across which the original ditch had existed and were contemplating selling the rest, and that if this were done, real parties would have no adequate method of enforcing the judgment and decree; that the accustomed flow of water called for in the original decree was a quantity sufficient to irrigate real parties' land east of the swale under normal former methods of irrigation in 7 hours; that by reason of the acts of petitioners 27 additional hours were required to irrigate said property at a cost to real parties of $1.50 per hour or the total sum of $40.50; that a flow of 3¾ cubic feet per second was the quantity of water sufficient to irrigate real parties' land east of the swale in 7 hours. It was ordered that petitioners may purge themselves of contempt by (a) paying the cost of whatever had been done on the new ditch and by paying the plaintiffs $40.50 damages; that the accustomed flow of water as those words were used in the original judgment be defined as not less than 3¾ cubic feet of water per second; "that *the duty to deliver water* as set forth in the original decree be charged as a continuing duty against Defendants [petitioners], and their successors in interest"; that "so long as Plaintiffs [real parties] and their successors in interest shall require said water to irrigate for agricultural or horticultural use, the *duty* of the *Defendants* [petitioners] to *supply* water as set forth in the original Judgment and Decree, and fixed herein as not less than 3¾ cubic feet per second, be charged as a burden running with the land of the Defendants, described in Exhibit 'Z' hereunto annexed and made a part of this Order and Judgment." (Emphasis ours.) (Apparently, exhibit Z thus referred to is the same map attached to the judgment in the civil action and to the findings therein.) It was declared that petitioners had constructed a new ditch in place of the old ditch through which the land of real parties had theretofore obtained water from the Anderson-Cottonwood Irrigation District; that the new ditch extended along the westerly and southerly sides of petitioners' land to the east boundary thereof and thence along a 10-foot strip approximately 330 feet to the point where the new ditch entered the land of real parties which point was the same point where the old ditch had entered. It was recited that petitioners had stipulated that real parties might go upon petitioners' land and along the new ditch for the purpose of turning water into the ditch from the lateral of the irrigation district. It was further adjudged that real parties had the obligation of turning the water required for their irrigation purposes from said lateral canal into said ditch or such other conduit as petitioners might thereafter install for the delivery of the water allotted to real parties; and that petitioners "and their successors in interest in and to the above described land *shall have the obligation of cleaning, maintaining and keeping said ditch, or other conduit, in repair at their own cost and expense.*" (Emphasis ours.) It was further decreed that if at any time in the future real parties, or their successors in interest, should no longer require water

to irrigate their said lands for agricultural or horticultural use, they or their successors in interest should execute and acknowledge a termination or other document in writing eliminating said burden running with the land of petitioners as prescribed in the decree.

It is at once perceived that a proceeding which started out as a contempt proceeding based upon an alleged violation of an injunctive decree in the original action finally resulted in many other things additional to a finding of contempt. Contending that the respondent court had acted in excess of jurisdiction in doing more than acting upon the issue of contempt, the Baileys petitioned this court for a writ of certiorari to review the respondent court's contempt proceedings. Responsive to their petition, this court ordered out its writ.

[1–6] It is settled that certiorari lies to review and annul a contempt order rendered without or in excess of jurisdiction; that a contempt proceeding is not a civil action but is of a criminal nature even though its purpose is to impose punishment for violation of an order made in a civil action; that no presumptions of validity may be indulged in support of judgments in contempt as would be the case with respect to ordinary judgments; that an examination will be made of the whole record before the trial court to determine whether there was any substantial evidence before it to sustain its exercise of jurisdiction; that in a proceeding for constructive contempt the affidavit on which the proceeding is based constitutes the complaint, the affidavit of defendant constitutes the answer or plea, and the issues of fact are thus framed by the respective affidavits serving as pleadings. Freeman v. Superior Court, 44 Cal.2d 533, 536–537, 282 P.2d 857. As said in Hotaling v. Superior Court, 191 Cal. 501, 504, 217 P. 73, 29 A.L.R. 127, contempt of court is a specific criminal offense. A contempt proceeding is not a civil action, either at law or in equity, but is a separate proceeding of a criminal nature and summary character in which the court exercises but a limited jurisdiction, *and in which the People of the State prosecute the action.* In H. J. Heinz Co. v. Superior Court, 42 Cal.2d 164, 266 P.2d 5, where, in a contempt proceeding arising out of a judgment theretofore rendered in a civil action, the respondent court had not only found that contempt had been committed but had proceeded also to award compensatory damages to the person in whose favor the violated decree had run, and to direct the contemnor to do certain affirmative acts preventive of further violations, the Supreme Court said, 42 Cal.2d at pages 173–175, 266 P.2d at page 11:

> "On the question of the propriety of awarding compensatory damages, that is, damages suffered by plaintiff by reason of defendant's violation of the injunction, petitioner contends that the court had no authority in a contempt action to award such damages. This contention must be sustained. In this state 'the power of the Courts to punish for contempt has been regulated by statute * * *' since 1851 * * *. Section 1218 of the Code of Civil Procedure provides that '* * * a fine may be imposed on him (one guilty of contempt) not exceeding five hundred dollars, or he may be imprisoned not exceeding five days, or both * * *.' Section 1219 authorizes imprisonment as a coercive measure where the contempt consists of a refusal to perform an ordered act. These provisions have been the law since their enactment in 1851 and have been recognized by the courts as establishing the limits within which a court may punish for contempt. * * *
>
> * * * * * *
>
> "The injured person's property rights may be adequately protected through recourse to the remedies provided by other statutory law. * * * In 39 California Law Review, at page 560, the author states that 'California has no provision for compensatory contempt proceedings. Civil damages may be collected in an ordinary civil action for an act otherwise a contempt.' The enforcement of an order of contempt in this state is not for the vindication of a private right but is for the maintenance of the dignity and authority of the

court, and to preserve the peace and dignity of the people of the State of California. * * * Insofar as the contempt is against the authority of the court, section 1218 of the Code of Civil Procedure is adequate to compel the enforcement of its order since each day's violation is a separate offense.

"To allow compensatory damages in the contempt proceeding would have the effect of turning it into an action for damages. In an action for damages, the parties are ordinarily entitled to a trial by jury and an appeal, neither of which has been accorded the petitioner in this proceeding."

[7] From what has been said it appears that in the contempt proceeding, the respondent court had limited issues upon which it had power to act. The initial sworn pleading or affidavit in support of the citation for contempt charged merely that certain rights had been accorded to them under the decree in the civil action; that the defendants in that action had been enjoined to do nothing in derogation of those rights; and that they had, in violation of the decree, destroyed the ditch through which real parties had the right to receive water for their land; and had attempted to substitute therefor another and inadequate ditch. The verified answering pleading of the petitioners admitted the destruction of the original ditch. Under claim of right to do so, they asserted that they had constructed an adequate substitute ditch and pleaded further that the judgment in the original action was so uncertain and ambiguous that contempt proceedings could not be based upon it. As we shall point out, neither of these two defensive contentions was sound. The judgment was not uncertain as against the charge petitioners had wrongfully destroyed the ditch; and the judgment, properly construed, gave petitioners no right, without consent or acquiescence of real parties, to substitute a new ditch or conduit for the old ditch. The trial court found, and properly found, that the acts of petitioners constituted a violation of the injunctive order of the court in the civil action, and that therefore petitioners were in contempt. In that situation nothing remained for respondent court save only to declare the punishment to be inflicted upon the petitioners because of their contempt, and, if it deemed it proper to do so, to make such orders preventive of further contempt as seemed called for. H. J. Heinz Co. v. Superior Court, supra. In the cited case a divided court held that the court might in the contempt proceeding order the contemnor to destroy certain apparatus used in violating the decree. It is to be noted that, having found petitioners to have been in contempt, the respondent court pronounced no judgment as punishment therefor. It could fine, it could imprison, or it could do both, and had its finding of contempt been followed by pronouncement of judgment therefor within the limits of Section 1218 of the Code of Civil Procedure, it would thereby have exhausted its jurisdiction, except perhaps for preventive action as in the Heinz case.

[8] Respondent court took, and this court may here take, judicial notice of the record in the civil action. Ex parte Ah Men, 77 Cal. 198, 200, 19 P. 380. In the cited case, in a contempt proceeding wherein the affidavit in support of the contempt citation had not set forth the terms of the injunction alleged to have been violated, the court said:

"* * * In this state, although contempt of court is a specific criminal offense, and a judgment of conviction thereof the same as a judgment in a criminal case, * * * the practice has always been to prosecute a matter of contempt in the cause or proceeding out of which it arose, and not as a separate proceeding, with a title of its own. It is therefore unnecessary in the affidavit to set forth the pendency of the cause or proceeding, or the provisions of the order which has been violated. The court takes judicial notice of those matters." See, also, Mattos v. Superior Court, 30 Cal.App.2d 641, 647, 86 P.2d 1056.

Turning now to the judgment roll in the civil action within the embrace and under

the title of which this contempt proceeding was prosecuted, we are advised of the following: Therein the plaintiffs counted for their causes of action upon the provisions of Section 1104 of the Civil Code, reading as follows:

> "A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed."

[9] McKinney's Digest, Vol. 9, under the heading "Easements", Section 16, cites many cases holding that where an owner of land divides it into two parcels and sells there is an implied grant of all obviously used easements. Such easements carry secondary easements such as the right to repair, etc., but there is no implied duty of the owner of the servient tenement to maintain and repair the right of way. See, also, 9 McKinney's Digest, "Easements", Secs. 36, 37. It is obvious from those portions of the complaint, the findings and the judgment in the civil action which we have set out, that the object of the plaintiffs was to have a declaration of implied easement. The judgment rendered in the civil action declared that, by virtue of their ownership of the lands conveyed and agreed to be conveyed to them by petitioners, real parties and their successors in interest were entitled to the right in perpetuity to receive at the point where the existing ditch crossed their north line the accustomed flow of water in said ditch sufficient for the irrigation of their land. Along with this went, of course, the usual secondary easement for maintenance and repairs of that ditch. But this was a fixed and certain servitude upon petitioners' land in favor of real parties' land and its implied creation cast no personal duty on petitioners save a negative duty to respect it. Without the consent of all owners interested the existing ditch could not be moved nor the burden of its use increased.

[10] If construction be needed as to the meaning and effect of this decree permissible reference to the pleadings and to the findings suffices to make the judgment clear, in so far as the nature of the easement be concerned. In construing a judgment resort may be had to the pleadings and findings of fact.

> "* * * 'If the entry of a judgment is so obscure as not to express the final determination with sufficient accuracy, reference may be had to the pleadings and to the entire record. If, with the light thrown upon it by them, its obscurity is dispelled, and its intended significance made apparent, it will be upheld and carried into effect. In cases of doubt regarding the signification of a judgment, or any part thereof, the whole record may be examined for the purpose of removing the doubt. One part of the judgment may be modified or explained by another part; and uncertainties in the judgment may become certain under the light case upon them by the pleadings or other parts of the records.'" Brown v. Superior Court, 110 Cal.App. 464, 466–467, 294 P. 428, 429. See also Verdier v. Verdier, 121 Cal.App.2d 190, 192, 263 P.2d 57.

[11] In Ex parte Ambrose, 72 Cal. 398, 14 P. 33, 35, the Supreme Court said:

> "* * * [T]he same rules of interpretation apply in ascertaining the meaning of a court order or judgment as in ascertaining the meaning of any other writing, * * *." See, also, Rinaldo v. Board of Medical Examiners, 123 Cal.App. 712, 715, 12 P.2d 32.

[12] Said the District Court of Appeal in the case of In re Carr, 65 Cal.App.2d 681, 684, 151 P.2d 164, 166:

> "* * * When the question of the meaning and effect of a judgment or order is raised, the entire document is to be construed as a whole to determine the purpose and intent, just as in a case of a contract or other document."

[13, 14] In Kirkpatrick v. Harvey, 51 Cal.App.2d 170, 172–173, 124 P.2d 367, 368, it is said:

> "While a judgment is but the original debt or liability in a new form * * *, it has, under our system, a certain finality and although it may be set aside through some form of direct attack permitted under our law it may not be indirectly attacked. * * *
>
> "* * * Parol evidence is not admissible to change the legal effect of a judgment or the record of it in any material respect."

In what we have said we have herein applied the foregoing rules.

[15] It appears that the judgment was indefinite as to the amount of water that had customarily been served to the land of real parties through the ditch across the servient property and was uncertain also as to the times during which such water was delivered. Concerning these ambiguities, it would have been proper in a proper proceeding for the respondent court to have taken evidence concerning such accustomed flow and use, but neither in this proceeding in contempt nor in a civil or equitable action, save one perhaps for reformation on appropriate grounds, could the trial court have changed in any manner the nature, location or extent of the servitude of the ditch, its size, capacity or the duty of its maintenance. These things had been finally adjudicated between these parties. We have discussed these matters because real parties, responsive to the contention of petitioners that the respondent court had exceeded its jurisdiction in that it departed from the contempt proceeding and went into other fields, here contend that respondent court was urged to do so by petitioners who may therefore not now complain. Certainly, it appears that petitioners acquiesced, participated in and to a certain extent urged the trial court to thus depart from the issues posed in the contempt proceeding. But from what we have said it must be held that the parties themselves were not capable of conferring jurisdiction upon the court in this proceeding over such matters. It cannot be that in a contempt proceeding, even by consent of the parties, a court may render judgments of a civil nature affecting the rights of the parties and this for the reasons expressed in the Heinz case, supra. The contempt proceeding cannot be broadened to include adjudications concerning such matters. Nothing done here was done to prevent future contempts. If petitioners here have so acted as to destroy the ditch existing when they conveyed, if it cannot be restored because innocent third parties' rights have intervened, if real parties have suffered civil damages, a civil action is the proper remedy. Contempt will not serve.

For the reasons advanced herein, all adjudications and orders of the court in the contempt proceeding under review, other than the finding that by their acts petitioners were in contempt of the existing judgment in the civil action, are annulled. The cause is remanded to the trial court to proceed in the contempt proceeding to inflict such punishment in contempt, within the terms of Section 1218 of the Code of Civil Procedure, as the court shall deem requisite to adequately punish the contempt found to have been committed. Neither petitioners nor real parties in interest shall recover costs heretofore expended by them.

SCHOTTKY, J., and McMURRAY, J. pro tem., concur.

142 Cal.App.2d 12

Morris EISENBERG and Rose Eisenberg, Petitioners,

v.

SUPERIOR COURT OF the State of CALIFORNIA IN AND FOR the COUNTY OF LOS ANGELES; Lloyd S. Nix, Judge of the Superior Court of the State of California, in and for the County of Los Angeles; Michael Omansky, Real Party in Interest, Respondents.

Civ. 21740.

District Court of Appeal, Second District, Division 1, California.

May 29, 1956.

Original proceeding seeking a writ of mandate to compel the respondent judge to settle the statement on appeal. The District Court of Appeal, White, P. J., held that under the circumstances, the trial judge improperly exercised his discretion to require the petitioners to incur an expense of some $1,300 in furnishing a complete transcript of the reporter's notes as a condition for settling the statement on appeal.

Peremptory writ of mandate issued.

1. Appeal and Error ⇐671(6)

Where petitioners in their proposed settled statement on appeal set forth five issues raised by them as grounds for appeal they thereby were confined to a consideration of those points only. West's Ann.Rules on Appeal, rule 7.

2. Appeal and Error ⇐607(1)

Where an appeal is taken pursuant to the Rule, full and plenary power over a record is reposed in the trial judge subject only to the limitation that he does not act arbitrarily. West's Ann.Rules on Appeal, rule 7.

3. Appeal and Error ⇐610

The purpose of the Rule is to permit the filing of a narrative statement in lieu of the reporter's transcript thus obviating records on appeal being many times longer than there is any necessity for. West's Ann.Rules on Appeal, rule 7.

4. Appeal and Error ⇐607(1)

Trial judge may not arbitrarily refuse to settle a statement unless there is some justification therefor. West's Ann.Rules on Appeal, rule 7.

5. Appeal and Error ⇐607(1)

Before a litigant can be compelled to expend a substantial sum for a complete reporter's transcript, trial judge should specify wherein the statement as offered and amended is deficient and he cannot arbitrarily refuse to settle the record without disclosing a single item of relevant testimony that was omitted from the proffered statement on appeal. West's Ann.Rules on Appeal, rule 7.

6. Appeal and Error ⇐571, 607(1)

Where petitioners proposed statement on appeal in the usual form and amendments offered by the respondent were not declined and there were only five matters as to which the court need any transcript rather than the partial transcripts which petitioners offered to furnish and the matters referred to testimony which the judge could either settle between the parties by reference to his own memory, his notes or having the reporter's notes read back to him, trial judge improperly exercised his discretion in requiring the petitioners to incur an expense of some $1,300 in furnishing a complete transcript of the reporter's notes as a condition for settling of the statement on appeal and writ of mandate would issue requiring the judge to settle statement on appeal. West's Ann.Rules on Appeal, rule 7.

Stanley Sapiro, Glendale, for petitioners.

Hahn, Ross & Saunders, Saul Ross, Los Angeles, for respondent, Michael Omansky.

WHITE, Presiding Justice.

In this original proceeding petitioners seek a writ of mandate to compel the respondent Judge of the Superior Court of Los Angeles County to settle a statement on appeal under Rule 7, Judicial Council Rules on Appeal.

The petitioners were plaintiffs in an action brought against one Omansky to re-

cover damages for alleged fraudulent misrepresentations made by Omansky in the sale of an apartment house. Findings were made and judgment entered in favor of defendants.

Following rendition of judgment and denial of their motion for a new trial, petitioners herein duly and regularly filed notice of appeal and of their election to proceed under Rule 7, Rules on Appeal. Thereafter, petitioners duly served their proposed statement on appeal, and respondent Omansky served and filed proposed amendments in which he suggested 43 changes in petitioners' proposed statement, these being about equally divided between portions he desired stricken and additional matters he wanted inserted.

At the hearings held for the purpose of settling the statement and by letters addressed to counsel for respondent Omansky and the court, petitioners agreed to 18 of the changes requested by Omansky. As to 17 of the matters which respondent Omansky desired stricken, petitioners offered to submit partial reporter's transcripts, made during the trial, from which Omansky could verify the narrative statements set forth in the proposed settled statement. As to one matter petitioners agreed to clarify the language used in the proposed settled statement. As to five matters, petitioners requested the trial judge to refer to his notes or have the reporter read his notes to the judge so that the latter might decide upon the validity of respondent Omansky's objections and settle the statement.

Respondent Omansky also objected to the form of the settled statement, asserting that it was not a narrative statement of the testimony of witnesses, but a statement of facts. This objection lacks substance though it might be conceded the narrative statement would have been in better form if the testimony of the witnesses was set forth, as far as possible, in the first person.

The court refused to settle the statement unless and until he had been furnished with a complete reporter's transcript of the oral proceedings.

The trial of this action consumed eight court days and twenty-two witnesses were examined. It is undenied that the cost for a complete reporter's transcript would approximate $1,300.

[1] Pursuant to the provisions of Rule 7, Rules on Appeal, petitioners, in their proposed settled statement, set forth five issues raised by them as grounds for appeal, thereby confining them to a consideration of those points only, Rule 7, Rules on Appeal. They are: (a) That the court failed to make findings on two matters set forth in plaintiffs' complaint; (b) That the court made certain Findings of Fact in the form of negatives pregnant; (c) That certain Findings of Fact were contrary to uncontradicted testimony; (d) That the decision was against the law insofar as representations set forth in the termite report were concerned; (e) That the court committed prejudicial error in refusing to allow plaintiffs to cross-examine defendant and respondent Michael Omansky as to differences between his testimony under Code of Civil Procedure 2055 and his testimony on direct examination.

A partial hearing on settlement of the proffered statement on appeal was held on February 6, 1956, at which time respondent judge requested counsel to endeavor to reach an agreement upon as much of the settled statement as was possible, and continued the hearing until February 23, 1956. In the interim counsel for petitioners mailed a letter to respondent Omansky and respondent judge wherein petitioners agreed to stipulate to the inclusion in the settled statement 16 of the items requested in the proposed amendments of respondent Omansky and agreed to the additions of the "vital portions" of two other items requested to be added by respondent Omansky. It is alleged in the petition that, "* * * Petitioner did in said letter set forth the exact page and line numbers in Partial Transcripts then in possession of said respondent Michael Omansky wherein eighteen of the matters sought to be stricken by said Michael Omansky were set out. * * That attorney for said Michael Omansky did state that he objected to petitioners appealing on a Settled Statement in this matter; and he did object to the form of some of the matter set forth in petitioners'

Proposed Statement. That petitioners' attorney did then agree to make any changes in form suggested by respondents, but no such suggestions were ever received." In his answer to the foregoing, respondent Omansky asserts that said proposals were several times discussed with petitioners' counsel and that, "During the course of these conversations, counsel for respondent very clearly gave his response orally to said letter and made clear the many and large areas of differences between them with respect to the proposed settled statement.", but we are not advised by respondent Omansky of the nature or character of these "large areas of differences" claimed to exist.

On February 23, 1956, the hearing was by stipulation continued to March 1st, at 9 a. m., but on the latter date counsel for petitioners was five minutes late and the case was called in his absence. The minute order relating to this hearing is as follows:

"3–1–56. Settlement of Statement on Appeal is called for hearing. Saul Ross appearing for defendant and, later, Stanley Sapiro appearing for plaintiffs. Upon the statement by Mr. Ross that no agreement has been reached between counsel as to the settlement of the Statement on Appeal the Court rules that it will not settle the Statement unless a complete transcript of the testimony is made available to the court."

Following this hearing, petitioners' counsel addressed a letter to respondent judge with copy thereof to the attorneys for respondent Omansky, wherein reference was made to the foregoing minute order, entered in the absence of petitioners' counsel, claiming that the latter was unavoidably delayed but had telephoned the court clerk of his predicament that he would be "a little late". The letter further stated, "* * * it has occurred to me that there are certain vital facts that have not been made available to you.

"On February 14, 1956 (Mr. Ross having previously requested such a letter), I wrote counsel for defendant and discussed each and every objection made by him to my proposed statement. I have enclosed a carbon copy of that letter. (The pen written changes regarding item 35 were made while in Court on the previous date set for settling the statement, at which date you were unable to be present). I have received no answer to that letter, but I have no doubt of Mr. Ross' cooperation therein.

"You will note that I agreed to add 17 items requested by Mr. Ross. Furthermore, I pointed out the exact page and line on partial transcripts now at our disposal, where 18 items sought to be stricken by Mr. Ross were set out in the testimony. This letter of February 14th further indicated my willingness to make some type of adjustment regarding three other items.

"This left exactly *five* (5) items wherein there can be any controversy whatsoever that might require search by the Court into his own notes or recollection.

"In that the Court took extensive notes and paid close attention to all the testimony given in the above cause, I do not feel that there should be any difficulty whatsoever regarding those *five* items. (Emphasis included.)

* * * * * *

"I do not feel that appellant must abandon his appeal because of inability to produce the thousands of dollars necessary for a Reporter's Transcript when those five items of dispute may be resolved without difficulty. Our rules of Court entitle him to appeal in this manner; and we intend to insist upon this method of procedure.

"I am certain that if the Court had been apprised of the contents of the letter of February 14, 1956, his order of March 1, 1956 would not have been given. I am ready to offer to the Court for its perusal my copies of the Partial Transcripts of the testimony of Rose Eisenberg, Morris Eisenberg and Walter Nichols, if Mr. Ross claims that any of the statements in the February 14th letter concerning the page and line numbers of testimony are incorrect."

The court then reset the hearing on the settlement of said statement for March 20, 1956. As to what occurred at this hearing we have been furnished with a reporter's transcript of the proceedings, which shows that petitioners' counsel agreed to strike from the proposed statement the portions

thereof objected to in respondent Omansky's Item 22. As to certain other objections, petitioners' counsel called the court's attention to pages and line numbers in the partial transcripts covering the testimony in question and offered to present said partial transcripts to the court. After the foregoing discussion, the record reveals the following:

"Mr. Sapiro (Petitioners' counsel): Now, that leaves us with two major items of dispute. First, there is Mr. Ross's objection Number 21, which seeks to strike from page 13, lines 9 through 20 of the proposed statement, a statement by Mr. Eisenberg that he believed in the representations made to him by Mr. Omansky, that he believed in the termite report, and that he believed in the statements made in the termite report as far as the structural condition of the building was concerned.

" Now, that is the first big item of contention, unless Mr. Ross has changed his attitude toward it.

" The only other big item of contention is as far as his objections 32 and 33 are concerned. Now, both of those deal with the termite report that was furnished to Mr. Eisenberg. Mr. Ross seeks to add to the statement these words:

" 'The termite report furnished by Mr. Omansky stated that there were no visible defects. Mr. Dagg testified that such defects as he may have found were invisible and had to be uncovered to become visible.'

" Then he wishes to change a statement made in our proposed settled statement in which we stated that the conditions that Mr. Dagg observed were visible, I think, and he wishes to change it to put the words 'were not visible.'

" As far as the question of the termite report is concerned, according to my recollection and my notes, I believe Mr. Dagg stated that although the termites themselves were not visible, that the condition was visible; that is, the earth would contact what is visible, and to him that was a sign of termite infestation.

" Perhaps Mr. Ross's notes are different, but on that I have a distinct recollection.

" Now, those are the two big issues, as I see it, that are still undetermined, as far as the record is concerned.

" First, as to the statement of the termite man as to whether or not the conditions were visible or not and whether or not the defects were visible or invisible, and second, whether or not Mr. Eisenberg testified that he relied upon the statements of Mr. Omansky and whether or not he relied upon the statements in the termite report, of which my recollection and notes state that he did so testify.

" It is my belief that a reading back of the record on those two particular items would settle those particular items; would settle the matter for everybody.

" The Court: I feel that it is impossible to settle this statement without a transcript, counsel, and the former order will stand.

"Mr. Sapiro: Your Honor, could I be heard just one second on this?

"The Court: You may.

"Mr. Sapiro: As far as those items are concerned, I would like to know if there are any other items, because if those are the only items—

"The Court: The Court has made the ruling, counsel.

"Mr. Sapiro: Could I ask a question—whether or not if we ordered the transcript on those particular items on which we have not had them covered—

"The Court: No, the entire transcript, counsel.

"Mr. Sapiro: Even though we are confined on our settled statement to just appeal on those—

"The Court: I don't think you are, counsel. That is my thought on the matter."

A minute order was thereupon entered reading in part as follows:

"After argument of both counsel the Court finds that it is impossible to settle the statement without a complete transcript of the testimony. The order made March 1 shall stand."

As set forth in Paragraph XI of the Petition for a Writ of Mandate, and unchallenged by respondents' answer, "Said

item 21 involves the question as to whether or not petitioner Morris Eisenberg testified that he believed representations made by Michael Omansky and the representations in the termite report concerning termite conditions, the foundation and structural condition of the building, were true.

"Said items 32 and 33 involve the question as to whether or not petitioners' witness Louis Dagg, a structural pest control contractor, testified that the conditions relating to termite infestation observed by him were visible and open to view. The Court took copious notes at the trial and if his memory should prove inadequate, there would be little difficulty in having the Official Court Reporters read back to the Court the two matters in controversy."

Reference to the foregoing excerpts from the reporter's transcript of the final hearing on settlement of the proposed statement, indicates that the court did not deny statements made by petitioners' counsel that the last mentioned items were the only ones in question wherein a partial reporter's transcript might be required, and when petitioners' counsel asked if there were any additional items the court did not answer the inquiry and as to counsel's offer to have a partial transcript prepared as to those items, the court declined the offer.

[2] The rule is now well settled in this state that where an appeal is taken pursuant to Rule 7 of Rules on Appeal, full and plenary power over such a record is reposed in the trial judge, subject only to the limitation that he *does not act arbitrarily*. Burns v. Brown, 27 Cal.2d 631, 636, 166 P.2d 1; Averill v. Lincoln, 24 Cal.2d 761, 765, 151 P.2d 119; Lande v. Southern California Freight Lines, 78 Cal.App.2d 417, 420, 177 P.2d 936; St. George v. Superior Court, 93 Cal.App.2d 815, 817, 209 P.2d 823. We are, therefore, confronted with the question of whether in refusing to settle the statement on appeal under Rule 7 of the Rules on Appeal, unless furnished with a complete transcript of the testimony, the trial judge acted in an arbitrary manner. We are persuaded that he did. We are here confronted with a much different situation than appears in the foregoing cases relied upon by respondents. Petitioners herein proposed the statement on appeal in the usual form. Amendments were offered to it by respondent Omansky and petitioners did not decline, but on the contrary agreed to include many of these amendments in the statement and as to others involving the testimony of certain witnesses, offered to furnish partial reporter's transcripts containing the testimony given by them.

[3, 4] As was said by this court in Keller v. Superior Court, 100 Cal.App.2d 231, 236, 223 P.2d 309, 312: "The very purpose of Rule 7 of Rules on Appeal as stated therein is to permit the filing of a narrative statement 'in lieu of a reporter's transcript,' thus obviating records on appeal being many times longer than there is any necessity for, and which very greatly increases the costs to litigants as well as the labors of the appellate court without any corresponding benefit." A trial judge may not arbitrarily refuse to settle a statement unless there is some justification. "To so hold would place it in the power of the trial judge to deprive a litigant of his right of appeal by simply refusing to perform a plain duty." Sansome v. Myers, 80 Cal. 483, 486, 22 P. 212, 213.

In the instant proceeding there are only five matters as to which the court needs any transcript other than the partial transcripts which petitioners have offered to furnish. These matters are pinpointed in that they refer to the testimony of witnesses, and the judge can either settle the dispute between the parties by reference to his memory, his own notes made during the trial, or having the reporter's notes in those five instances read back to him.

In the case now engaging our attention, without particularizing any deficiencies in the statement proposed and the amendments offered thereto, the trial judge contents himself with saying: "I feel that it is impossible to settle this statement without a transcript", and when petitioners' counsel asked, "As far as those items are concerned, I would like to know if there are any other items, because if there are any other items, because if those are the only items * *"

the trial judge answered, "The court has made the ruling, counsel." And when petitioners' counsel asked, "Could I ask a question—whether or not if we ordered the transcript on those particular items on which we have not had them covered—", the trial judge interrupted to say, "No, the entire transcript, counsel."

[5] As was said in Keller v. Superior Court, supra, 100 Cal.App.2d at page 235, 223 P.2d at page 312: "Before a litigant can be compelled to expend the sum of $325 for a complete reporter's transcript surely the trial judge, in the interests of justice, should specify wherein the statement as offered and amended is deficient. While a trial judge has undisputed power to settle as the record anything he wants therein, he cannot arbitrarily refuse to settle the record without disclosing a single item of relevant testimony that was omitted from the proffered statement on appeal. Under the facts here present, the respondent judge should either have allowed the amendments and ordered the statement prepared accordingly, or required such other changes as would make it conform to the facts. In ordering amendments to the statement on appeal the trial judge has available (1) the suggestions of the respondents on appeal; (2) the judge's own memory, Vatcher v. Wilbur, 144 Cal. 536, 78 P. 14; (3) notes made by the judge during the trial, 4 Corpus Juris 257, 4 C.J.S., Appeal and Error § 846; and (4) the right to recall a witness to repeat testimony, 4 Corpus Juris 257, 4 C.J.S., Appeal and Error § 846; and (5) the right to have the reporter reread such of his notes as may prove helpful." See also Western States Const. Co. v. Municipal Court, 38 Cal.2d 146, 149–151, 238 P.2d 562.

As was further stated in Keller v. Superior Court, supra, 100 Cal.App.2d at page 236, 223 P.2d at page 312: "Respondent judge was not required to sign the proposed statement, it was his duty merely to settle it, and this implied that he should amend it, or cause it to be amended, so as to make a fair statement. If he knows wherein the proposed statement and amendments offered thereto are deficient he should point out such deficiencies and the reasons for requiring a complete reporter's transcript in order to settle a fair statement."

[6] Under the circumstances present in the instant case, we are satisfied it was not a proper exercise of the discretion vested in respondent judge to require petitioners herein to incur an expense of some $1,300 in furnishing a complete transcript of the reporter's notes as a condition for settling the statement on appeal.

Let a peremptory writ of mandate issue requiring respondent judge to settle the statement on appeal in accordance with the views herein expressed.

DORAN and FOURT, JJ., concur.



141 Cal.App.2d 833

John G. OPPENHEIMER, Plaintiff and Appellant,

v.

Irving GORDON, Nora M. Gordon, Automobile Club of Southern California, a corporation, etc., et al., Defendants.

Automobile Club of Southern California, a corporation, Respondent.

Civ. 21418.

District Court of Appeal, Second District, Division 3, California.

May 24, 1956.

Hearing Denied July 18, 1956.

Action for damage to automobile and loss of use thereof as a result of collision, wherein registered owner of other automobile involved in collision filed a cross-complaint. The Superior Court of Los Angeles County, Bayard Rhone, J., sustained without leave to amend a demurrer to complaint filed by alleged legal owner of automobile registered in names of cross-complainant and his wife and entered judgment of dismissal as to legal owner, and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that under exception contained in Permissive Use Statute, West's Ann.Vehicle Code, § 402(a, f), con-

ditional vendor or chattel mortgagee not in possession of automobile was not liable as legal owner for any negligence of registered owner in operation of automobile with permission of such vendor or mortgagee.

Judgment affirmed.

Automobiles ⇐192(1, 8)

Under exception contained in Permissive Use Statute, conditional vendor or chattel mortgagee not in possession of automobile was not liable as legal owner for any negligence of registered owner in operation of automobile with permission of such vendor or mortgagee. West's Ann. Vehicle Code, §§ 67, 402(a, f).

John G. Oppenheimer, in pro. per., for appellant.

Davis, Sanborn, Lindley, Cobb, Patterson, Laymon & Anderson, Los Angeles, for respondent.

SHINN, Presiding Justice.

Plaintiff appeals from a judgment of dismissal entered pursuant to an order sustaining, without leave to amend, a demurrer to his complaint filed by defendant Automobile Club of Southern California. What happened was this: Plaintiff brought an action in the Los Angeles Municipal Court for property damage to his car (and loss of use thereof) caused by a collision with a Studebaker car driven by defendant Irving Gordon. The complaint alleged, in paragraph I, that defendants Irving Gordon and Nora M. Gordon are the registered owners of the Studebaker. Paragraph II alleged that "the legal owners of said automobile are unknown to the plaintiff at this time, and therefore designated as defendants herein by fictitious names; upon ascertaining their identity, plaintiff will ask leave of Court to substitute and insert the true names of said defendants in the place and stead of fictitious names herein used." Paragraph III alleged that at the time of the collision, defendant Irving Gordon was driving the Studebaker "with the full knowledge and consent of each of the other defendants herein named."

Defendant Irving Gordon cross-complained, seeking recovery for personal injuries and other damages well over the jurisdictional amount of the municipal court and the cause was transferred to the superior court. Shortly thereafter, plaintiff filed an amendment to his complaint in which he alleged that the true name of the defendant designated in the complaint as "Doe Corporation" was the Automobile Club of Southern California and he thereby substituted the same in place of the fictitious name. Defendant Automobile Club demurred to the complaint on the grounds that the complaint failed to state a cause of action against said defendant; and that there was a defect or misjoinder of parties in that defendant Automobile Club was not a necessary or proper party to the action. We are of the opinion that the court did not err in sustaining the demurrer without leave to amend.

Plaintiff contends that his complaint states a cause of action against defendant Automobile Club under the Permissive Use Statute, Vehicle Code, § 402(a), since defendant Irving Gordon was operating the Studebaker with "the full knowledge and consent of each of the other defendants herein named. * * *" and Gordon's negligence is to be imputed to the other owners of the car. This argument is without merit.

Plaintiff sued the Gordons as the *registered* owners of the Studebaker, and sued the Automobile Club as the *legal* owner of the car. Section 67 of the Vehicle Code reads: " 'Legal owner' is a person holding the legal title to a vehicle under a conditional sale contract, the mortgagee of a vehicle, or the renter or lessor of a vehicle to the State, or to any county, city, district or political subdivision of the State, under a lease, lease-sale or rental-purchase agreement which grants possession of the vehicle to the lessee for a period of 30 consecutive days or more." Section 402 of the Vehicle Code which imposes liability upon *owners* for the negligence of one who is using or operating a motor vehicle with the permission of the owner contains the fol-

lowing exception: "(f) If a motor vehicle is sold under a contract of conditional sale whereby the title to such motor vehicle remains in the vendor, such vendor or his assignee shall not be deemed an owner within the provisions of this section, but the vendee, or his assignee shall be deemed the owner notwithstanding the terms of such contract, until the vendor or his assignee retake possession of such motor vehicle. A chattel mortgagee of a motor vehicle out of possession shall not be deemed an owner within the provisions of this section." Since Gordon was operating the automobile with the permission of the Automobile Club it follows that the latter was not a renter or lessor of the vehicle to the State or other public body and was either a conditional vendor or a chattel mortgagee out of possession. As the legal owner in this sense the Automobile Club was not responsible for the negligence, if any, of Gordon.

The demurrer was properly sustained.

The judgment is affirmed.

PARKER WOOD, J., concurs.

VALLÉE, J., did not participate.



141 Cal.App.2d 905

E. J. CECIL, Plaintiff and Respondent,

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association, and Western Frozen Foods Co., Inc., a corporation, Defendants and Appellants.

Civ. 5304.

District Court of Appeal, Fourth District, California.

May 28, 1956.

Rehearing Denied June 19, 1956.

Hearing Denied July 24, 1956.

Proceeding on motion to confirm award of arbitration board and on opposing motion to vacate the award. The Superior Court of Fresno County, Arthur C. Shepard, J., denied motion to vacate award and confirmed the award. Defendants appealed. The District Court of Appeal, Mussell, J., held that failure to give one of arbitrators notice of meeting at which amount of award was arrived at did not vitiate final award made, where arbitrator who was not present had ample opportunity to express his conclusions and to prepare and submit different award if he so desired.

Orders denying motion to vacate award affirmed.

Arbitration and Award ⇐32

Where contract provided for submission of any dispute which might arise under contract terms to arbitration by three-member board of arbitrators, and one of arbitrators was not given notice of meeting at which final decision as to issues in dispute was arrived at but such arbitrator was present at final meeting of arbitrators and had ample opportunity to express his conclusions and participate in proceedings and to prepare and submit a different award if he so desired, failure to give notice of the meeting did not vitiate award entered by board.

Samuel B. Stewart, San Francisco, for appellant Bank of America.

Stammer, McKnight & Barnum, Fresno, Bronson, Bronson & McKinnon, San Francisco, for appellant Western Frozen Foods Co., Inc.

Crossland, Crossland & Richardson, and Wm. C. Crossland, Fresno, Loeb & Loeb, and Herman F. Selvin, Los Angeles, for respondent.

MUSSELL, Justice.

On or about January 10, 1947, plaintiff and W. B. LeValley transferred certain farms to defendant Western Frozen Foods Company, Inc., (hereinafter referred to as "Western") with a written agreement and guaranty that Western would realize a certain amount from the operation of the farms. The agreement was thereafter assigned to defendant Bank of America Na-

tional Trust and Savings Association (hereinafter referred to as the "Bank") as security for an indebtedness owed to the Bank by Western. The agreement provided that any dispute which might arise under its terms should be submitted to arbitration by a three-member board of arbitrators; one to be appointed by Cecil, one by Western, and the third by the two arbitrators appointed by the parties. The agreement further provided that "The decision of a majority of said arbitrators shall be final and conclusive upon the parties."

A dispute arose between Western and Cecil as to the amount owed Western by Cecil under the agreement and it was submitted to arbitration pursuant to the arbitration clause in the agreement and a stipulation between the parties. Cecil appointed Milo Erwin as one of such arbitrators and Western appointed C. Ray Robinson. These two arbitrators were unable to agree upon a third member of the board, following which John A. Willey was appointed by the court. On November 6, 1950, Cecil filed a petition seeking the removal of Robinson as an arbitrator. The trial court denied this petition and its order was affirmed on appeal by this court in Cecil v. Bank of America, 107 Cal.App.2d 38, 236 P.2d 408.

On April 14, 1950, Cecil and Western entered into a stipulation to the effect that Western and the Bank claim that there was due from the guarantors as of December 31, 1949, the sum of $133,764.18; that the guarantors denied that there was any sum due; that the arbitrators should proceed and determine the amount due from the guarantors; whether the farms were properly operated, and if not, the amount of profits thereby lost; and whether the fault was chargeable to Western or to the guarantors. Hearings were then held by the arbitrators and on June 15, 1953, the matter was submitted to them for decision. Meetings of the arbitrators were then held, which culminated in the signing, on July 19, 1954, by Willey and Erwin, but not by Robinson, of the award here involved. Willey and Erwin decided that $112,932 was due Western or the Bank from the guarantors without reference to the breach of the agreement by Western or the Bank; that the properties were improperly operated and that the lost profits were $157,997.63; that the failure to properly farm the properties was wholly chargeable to Western and that there was nothing due from the guarantors. On October 8, 1954, Cecil filed with the court an application for an order confirming the award of July 19, 1954. Western and the Bank filed an opposing motion to vacate the award. These motions were heard together and on January 24, 1955, and on May 10, 1955, the court made its orders confirming the award and denying the motion to vacate it. Western and the Bank appeal from these orders and contend that the award is invalid because it is not that of the full board of arbitrators; that it was determined at two meetings held without notice to Robinson and without his presence; that Willey and Erwin refused to acquaint Robinson with the bases of their award and that Robinson was excluded from its preparation.

The first deliberative meeting of the arbitrators was held on September 16, 1953. Willey stated in his deposition that they had previously decided that the best procedure would be for the three of them, separately, to go through the transcript and briefs and make up items to be discussed; that he prepared notes and figures for the meeting and that Erwin had a similar list; that he read his notes to Robinson and that Robinson took notes therefrom; that no final computations were made at this meeting, although some of them may have been final from an accounting standpoint; that there was no decision at this meeting as far as he and Erwin were concerned as to either the amount due from Cecil or the amount of any lost profits. Erwin testified that figures were presented at this meeting pertaining to the accounting and also as to the matter of lost profits by reason of poor farming operations; that these figures were shown to Robinson and he joined in the discussion concerning them.

Robinson states in his affidavit that the accounting issues were discussed; that Erwin and Willey agreed that Western's claim should be reduced to approximately

$112,000 but that he did not agree with this deduction; that it was agreed that there was no merit in any of Cecil's contentions with respect to bad farming with the possible exception of one ranch. No decision was arrived at by the arbitrators at this meeting and they met for their second deliberative session on December 2, 1953. Willey testified that at that time he had computed the figure of $157,997.63 as lost profits and that there was no discussion of that amount at the meeting; that he believed Erwin had a rough totalized figure; that they did not arrive at any figure of lost profits but discussed various bases; that the matter of responsibility for the poor farming was discussed throughout the meeting but that no definite figure for lost profits was agreed upon; that at the conclusion of the meeting Robinson stated to Willey and Erwin, in effect, "To hell with it. You two go ahead and prepare your award, sent it to me and I will either sign it or do something else." In this connection Erwin testified that just before Robinson left the meeting he "Concluded his remarks by saying to Mr. Willey and I, 'You men prepare your findings and send it up to me. I will either agree with it or disagree with it', some words to that effect." On cross-examination he testified that Robinson said "'You two men get together'; that he did not say 'You hold a meeting', but that he did tell us to get together, come to our conclusions, and send it to him." These statements attributed to Robinson were denied by him in an affidavit filed herein.

On January 13 and 14, 1954, Willey and Erwin, without notice to Robinson, met and discussed the evidence and arrived at a final decision of the issues. When asked why he had not 'phoned to Robinson advising him of the meeting, Willey stated that he felt "It would be useless"; that Robinson had instructed them to go ahead and prepare an award; that he had been in complete disagreement with them on the basic principles involved in the arbitration and that "He had indicated to us so that I, at least, felt that he would not discuss any of the items, the smaller items, involved in making up the total, in arriving at a total figure."

Following this January meeting, Willey prepared and signed a proposed award. He forwarded it to Erwin and Robinson with a letter asking them to sign it before a notary public if they agreed with it, and if not, to attach their findings and award to one copy and return it to him. Before this proposed award was signed, Western requested that the matter be argued orally before the arbitrators. This was agreeable to all concerned and the matter was argued on July 12, 1954, before all three arbitrators. On July 16, 1954, the arbitrators held their final deliberative session and Robinson was notified and attended the meeting. There was further discussion of the figures arrived at by Willey and Erwin and Robinson was told that they had met and discussed these figures in January. He disagreed with the conclusions which had been reached by Willey and Erwin and asked for the supporting figures, but these were not furnished him. He also asked that detailed findings be placed in the award showing the individual items comprising the award, to which Willey replied that they were unnecessary and would be too much trouble. Robinson stated that there was no basis whatever for the findings of Willey and Erwin and left the meeting. Willey then prepared the award based on final computations made at the January meeting and he and Erwin signed it, on July 19, 1954. On July 29, 1954, Willey mailed this award to Robinson for his approval or disapproval. On August 3, 1954, Robinson wrote Willey and requested a breakdown of the award figures and Willey replied that the figures had been discussed generally and asked Robinson to forward to him the executed copy of the award with either his assent or dissent. On September 3, 1954, Robinson wrote to Willey, in part, as follows: "I am returning the findings and award proposed by you, which I have not signed. Enclosed also is the original and one copy of my objections in the matter." Willey returned to Robinson the document containing Robinson's objections and stated that he questioned whether it should be

filed but that Robinson could file it if he so desired. On or about September 13, 1954, Willey delivered the final award to the attorneys for Cecil.

Appellants state in their closing brief that this appeal is based upon the point that the arbitration was void because the third arbitrator was excluded from the deliberations. The assertion that Robinson was excluded from the deliberations is not supported by the record. He attended and participated in the meetings of September 16 and December 2, 1953. He attended the oral arguments with the parties on July 12th and the final meeting of the arbitrators on July 16, 1954. All of these meetings were held prior to the execution of the award on July 19, 1954. Erwin and Willey met on January 13 and 14, 1954. Robinson was not notified of this meeting and was not present. However, there is evidentiary support for the trial court's finding that at the previous meeting of December 2, 1953, Robinson stated, in effect, "To hell with it. You two go ahead and prepare your award, sent it to me and I will sign it or do something else"; and that this statement was intended by him to mean and did mean that he withdrew from further discussion; and that by such statement he instructed Erwin and Willey, without further notice to him, to prepare their figures for an award. Willey and Erwin could and apparently did reasonably consider that it was "useless" to notify Robinson of the January meetings at which they prepared the figures upon which the final award was based. They followed Robinson's instructions and thereafter Willey prepared and signed a proposed award and forwarded it to Erwin and Robinson with instructions to sign it if they agreed and if not, to attach their findings and award to one copy and return it to him. This was not the final award and was not signed by Erwin or Robinson. Thereafter, by agreement of the parties, the matter was argued before all of the arbitrators on July 12, 1954. The record is silent as to the nature of the arguments there presented but it is reasonable to infer that all of the issues were there fully discussed on the basis that no final award had then been made. On July 16, 1954, the final deliberative session of all the arbitrators was held and the record shows that Robinson was not in accord with the figures submitted by Erwin and Willey and that the three arbitrators could not agree on the terms of the award. Willey then prepared the final award, which he and Erwin signed on July 19, 1954, and it was mailed to Robinson on July 29, 1954. Robinson did not sign the award and submitted his written objections thereto. Since the arbitration agreement provided that the decision of a majority of the arbitrators should be final and conclusive upon the parties, it was not necessary that Robinson execute it.

In Griffith Co. v. San Diego College for Women, 45 Cal.2d 501, 509, 289 P.2d 476, where one of the arbitrators had announced his refusal to sign the award and dissented therefrom, it was held that it was not necessary that he be present when the two others sign. And in American Eagle Fire Ins. Co. v. New Jersey Ins. Co., 240 N.Y. 398, 148 N.E. 562, 563, 565, it was held that it was not the rule that one arbitrator may by wilful absence prevent an award by a majority; that all should meet and hear the proofs but that the report of two is valid, unless the third has been excluded from participation in the deliberations without fault on his part and that the withdrawal of one of the arbitrators on the threshold of a formal award does not end the authority of the other two. While it is stated in 6 C.J.S., Arbitration and Award, § 75(2) that an award signed by two arbitrators, without notice to the third, and without giving him an opportunity to be present at the execution of the award is void, the record here shows that Robinson was present at the final meeting of the arbitrators and there had ample opportunity to express his conclusions and participate in the proceedings, and to prepare and submit a different award if he so desired. He disagreed with the final conclusions of the other arbitrators and it does not appear that further discussion would have resulted in a different award. In 6 C.J.S., Arbitration and Award, § 67, it is said:

"* * * the refusal of one or a minority of a number of arbitrators,

having authority to render a majority award, to proceed further with the hearing or discussion of the case, after a disagreement has arisen, does not divest the majority of power to proceed, in the absence of the minority, with the hearing and to render an award in accordance with their authority."

We conclude that the failure to give Robinson notice of the January meeting, under the circumstances shown, did not vitiate the final award made.

The orders denying the motion to vacate the award of the arbitrators and confirming it are affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



142 Cal.App.2d 71

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Lonnie SHEPPARD, Defendant and Appellant.

Cr. 5571.

District Court of Appeal, Second District, Division 1, California.

June 4, 1956.

Defendant was convicted of assault. The Superior Court, Los Angeles County, Aubrey N. Irwin, J., rendered judgment, and defendant appealed. The District Court of Appeal, Doran, J., held that evidence sustained conviction.

Judgment affirmed.

Assault and Battery ⇐91

Evidence sustained conviction for assault.

Jefferson & Jefferson, Bernard S. Jefferson, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Appellant was charged by information with two counts of assault by means and force likely to produce great bodily injury. A prior conviction, which was also alleged, was admitted. A jury was waived and following a trial by the court defendant was adjudged guilty of simple assault on both counts.

It is contended on appeal that, "The evidence is insufficient to sustain the judgment of conviction because the prosecution's evidence against appellant presents a case of inherent improbability, and appellant's resultant conviction is based on passion and prejudice."

The victim of the alleged assault operated a dress shop. As recited in respondent's brief, "She testified that she had known defendant, Lonnie Sheppard, for around two years and three months, and that at one time they had lived together. She stated that defendant no longer lived with her.

"On June 12, 1955, the date alleged in Count I of the information, she said that defendant came to her store at about 10:30 on a Sunday; that she had not requested him to come to the store; that when defendant came in he asked her where her car was and that she asked him why and that he then said, 'Where is your car?' and Mrs. Deadmon said, 'Well, I haven't asked you where your car is. Don't ask me where my car is.'

"At this time defendant kicked her on her right knee; she was sitting on a chair beside the telephone and when she got up he kicked her on her left knee and then dragged her about fifteen feet from one side of the store to the other, i. e., from the dry goods to the toy department in the rear. She testified that defendant beat her until a customer came in; that she was hit on her left breast with a soda bot-

tle; that defendant hit her with his fist on her left side and shoulder and about the face." The first offense occurred on June 12th and the second on July 1st, in the same store. It would serve no purpose to detail the evidence.

A review of the record reveals no prejudicial error. That the evidence is sufficient to support the judgment there is no question. The trial judge stated at the time sentence was pronounced, "The events involved here were very aggravated. The defendant is very fortunate that he was not found guilty of a felony."

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.



142 Cal.App.2d Supp. 855

Yvonne BERGAN, Plaintiff and Appellant,

v.

Virginia D. BADHAM, Defendant and Respondent.

Civ. A. 8895.

No. 215735.

Appellate Department, Superior Court, Los Angeles County, California.

May 21, 1956.

Action upon assigned claim for services rendered by attorneys. From a judgment of the Municipal Court of Los Angeles Judicial District, Mark Brandler, J., plaintiff appealed. The Appellate Department of the Superior Court, Bishop, P. J., held that attorneys representing wife in divorce action brought by her against her husband did not waive their right to hold her for unpaid portion of their earned fee by executing substitution-by-consent, even though they expressed no objection to substitution and made no assertion of claim for fees at that time.

Reversed and remanded for new trial.

1. Attorney and Client ⇐75(2)

Attorneys representing wife in divorce action brought by her against her husband did not waive their right to hold her for unpaid portion of their earned fee by executing substitution-by-consent, even though they expressed no objection to substitution and made no assertion of claim for fees at that time. West's Ann.Code Civ.Proc. § 284, subd. 1.

2. Account Stated ⇐4

Appeal and Error ⇐991

Where attorneys, representing wife in divorce action under arrangement whereby they were to look to husband, acting under court orders, for their compensation, executed substitution-by-consent after receiving payments considerably less than reasonable value of services rendered, account stated could have come into existence, and whether it had or not was question for trial court in attorneys' assignee's action against wife upon assigned claim. West's Ann.Code Civ.Proc. § 284, subds. 1, 2.

Harmon G. Scoville, Westminster, for appellant.

Burke Mathes, Los Angeles, for respondent.

BISHOP, Presiding Judge.

The plaintiff, seeking to recover upon the assigned claim of partners who had served as defendant's attorneys, appeals from the judgment that she take nothing. The trial court found that the value of the assignors' services was greater than the sums that had been paid them, but nevertheless made no award against the defendant. We have reached the conclusion that a judgment should have been entered in plaintiff's favor.

The defendant employed plaintiff's assignors to represent her in a divorce action brought by her against her husband. The arrangement respecting counsel fees was that the assignors would look to the husband, acting under court orders, for their compensation. The complaint, in the divorce action, was filed February 25, 1953. In March, an order was made for the pay-

ment by the defendant in the divorce action, to plaintiff's assignors, of $350 as attorney fees, any balance to be fixed at time of trial. Subsequent proceedings provided for further payments until $700 was received. However, all the sums paid were $550 less than the amount of $1,250, found by the trial judge, with commendable, but not unexpected, fairness, to represent the reasonable value of the services rendered the defendant.

Under date of May 13, 1954, the defendant wrote plaintiff's assignors that she requested that Mr. Sidney Cherniss be substituted in their place, stating that she had lost confidence in them. Without expressing any objection to the substitution, and with no assertion of a claim against the defendant for fees, plaintiff's assignors joined in the execution of the familiar substitution-by-consent provided for in subdivision 1 of section 284, Code of Civil Procedure. Thereafter a property settlement was made in which the defendant in the divorce action was released from all liability for his wife's attorney fees. A divorce decree was awarded the defendant in this action in June, 1954, and a motion of plaintiff's assignors for further fees from the divorce defendant was denied.

[1] Had the relationship of attorney and client, existing between plaintiff's assignors and the defendant, continued without interruption to the end of their employment, they would have had no cause of action for attorney fees against her, because they had agreed to look to her husband. Sapiro v. Marquis, 1951, 102 Cal. App.2d 34, 226 P.2d 736. They would have had a cause of action, not upon any express contract, but for the reasonable value of their services up to the termination of the contract, had she discharged them either without cause, Neblett v. Getty, 1937, 20 Cal.App.2d 65, 70, 66 P.2d 473, 476; Echlin v. Superior Court, 1939, 13 Cal.2d 368, 375, 90 P.2d 63, 65, 124 A.L.R. 719, or even if with cause, see Salopek v. Schoemann, 1942, 20 Cal.2d 150, 153, 156, 124 P.2d 21, 24. See, further, Oliver v. Campbell, 1954, 43 Cal.2d 298, 304, 273 P. 2d 15, 19, 20. The question before us thus becomes this: Did plaintiff's assignors, by executing the substitution, waive their right to hold her for the unpaid portion of their earned fee?

A circumstance in the case last cited serves to narrow our question. In that case the plaintiff had ceased to be the attorney of a client (since deceased) by means of a substitution of counsel, signed by the plaintiff at the client's request. The substitution was not signed without verbal protestations on plaintiff's part, however, and it was accompanied by the statement that he would expect to be paid the balance of the reasonable value of his services. Concerning this the Supreme Court states: "* * * plaintiff in effect promptly notified [the client] of the rescission of the contract when he advised him that he would execute the substitution of attorneys when he was discharged by [the client] but told [the client] he would hold him for the reasonable value of his services." In this connection the trial court in the instant case found that "at no time from May 13, 1954, the date [plaintiff's assignors] voluntarily consented to the substitution of attorneys, up to the commencement of this action * * * did [the assignors] * * * claim in any manner that the request for substitution * * * was without justification or that the termination of their employment was wrongful." It was also found that the substitution was made with the "voluntary" consent of the assignors. As we have already noted, plaintiff's assignors made no protest when advised that the defendant had employed other counsel and wished them out of the case.

When confronted with the May 13 letter of their client, what courses were open to plaintiff's assignors? Their client, of course, with certain exceptions not here involved, had the absolute right to substitute other counsel, whether acting with good reason or caprice. Kirk v. Culley, 1927, 202 Cal. 501, 505, 261 P. 994; O'Connell v. Superior Court, 1935, 2 Cal.2d 418, 421, 41 P.2d 334, 335, 97 A.L.R. 918; Wright v. Security-First Nat'l Bank, 1939, 13 Cal. 2d 139, 141, 88 P.2d 125, 126; Echlin v. Superior Court, 1939, 13 Cal.2d 368, 372, 90 P.2d 63, 65, 124 A.L.R. 719; Davis v.

Rudolph, 1947, 80 Cal.App.2d 397, 402, 181 P.2d 765, 768. Faced with this fact, plaintiff's assignors could consent to the substitution, and so cooperate in effecting it as contemplated by subdivision 1 of section 284, or they could be uncooperative and, by refusing to give their consent, require the defendant to take the trouble, and put the court to the bother, of following the steps set forth in subdivision 2 of section 284. After expostulating, in Oliver v. Campbell (the last case cited), the plaintiff there gave the "consent" required by subdivision 1, but was, nevertheless, allowed to recover. We find in the failure of plaintiff's assignors to make a scene or to make a claim for compensation, no waiver of their right to compensation, and no basis for concluding that they had not been discharged but instead that there had been a mutual rescission of the contract of employment. A man condemned to the gas chamber may put up a fight, when his executioners call upon him, or he may bow to the inevitable and go along quietly. If he pursues the latter course, the consent that he gives is not voluntary, but without choice. So was the consent given by plaintiff's assignors in the case last cited and in this case.

[2] Our conclusion that the defendant was under a legal duty to recompense plaintiff's assignors for the balance due them for the services rendered, destroyed the premise for the trial court's conclusion that there was no account stated. We read Crane v. Stansbury, 1916, 173 Cal. 631, 636, 161 P. 7, and Parsons v. Segno, 1921, 187 Cal. 260, 269, 201 P. 580, as authorities for the principle that in such a case as this an account stated may come into existence. Whether it has or not remains a question for the trial court.

The judgment is reversed; and the cause is remanded for a new trial; plaintiff to have her costs of appeal.

PATROSSO and SWAIN, JJ., concur.

46 Cal.2d 528

E. E. WELLS and John M. Reynolds, Plaintiffs and Respondents,

v.

H. Thomas COMSTOCK and Grace E. Mendizza, also known as Grace Ellen Comstock Harris, Defendants and Appellants.

L. A. 23929.

Supreme Court of California.
In Bank.
May 22, 1956.

Action to recover the balance due on the contract for the sale of corporate stock issued in violation of the permit granted by the Commissioner of Corporations. Judgments for plaintiffs in the Superior Court, Los Angeles County, Paul Nourse, J., and the defendants appealed. The Supreme Court, Schauer, J., held that where the contract was illegal it was unenforceable by either party and the buyer was not entitled to recover the amount paid thereunder.

Judgment reversed.

Opinion, 286 P.2d 850, vacated.

1. Contracts ⇐138(1)

In the case of illegality which renders a bargain unenforceable, the courts will leave the parties where they were when the action was begun.

2. Contracts ⇐138(6)

Illegality which renders a bargain unenforceable has that effect whether the evidence of the illegality is produced by plaintiff or by defendant or whether the question of illegality is raised by either party.

3. Estoppel ⇐104

In the absence of special circumstances no person can be estopped from asserting the illegality of a transaction.

4. Appeal and Error ⇐846(6)

In action for balance of the price due on sale of stock issued contrary to the conditions of a permit from the Corporation Commissioner where the trial court's mistaken conclusion of estoppel of buyer was not supported by the facts found, it must be disregarded.

5. Action ⇐4

The test of whether a demand connected with an illegal transaction is capable of being enforced at law is whether plaintiff requires the aid of the illegal transaction to establish his case, and if plaintiff cannot prove his case without showing that he has broken the law, the court will not assist him.

6. Licenses ⇐39.15

Seller of corporate stock which had been issued to the seller in violation of the permit of the Commissioner of Corporations and wherein both parties appeared to have violated the penal sections of the Corporate Securities Act was not entitled to recover the balance of the purchase price. West's Ann.Corp.Code, §§ 26100, 26104.

7. Guaranty ⇐5

Where contract for the sale of corporate stock was unenforceable because of illegality in that the stock was issued in violation of the permit of the Commissioner of Corporations and both parties appeared to have violated the penal sections of the Corporate Securities Act, the guaranty of the contract was also unenforceable. West's Ann.Corp.Code, §§ 26100, 26104.

8. Licenses ⇐39.15

Where contract for sale of corporate stock was unenforceable because of illegality in that it was issued in violation of a permit of the Commissioner of Corporations and both parties appeared to have violated the penal sections of the Corporate Securities Act, buyer was not entitled to recover the amount paid under the contract on the ground that he did not receive full value for such amount. West's Ann.Corp.Code, §§ 26100, 26104.

William J. Currer, Jr., Los Angeles, for appellants.

Trihey & Mirich and Joseph M. Trihey, San Pedro, for respondents.

SCHAUER, Justice.

By written contract plaintiffs Reynolds and Wells agreed to sell and defendant Comstock agreed to buy 440 shares of corporate stock evidenced by described certifi-

cates, and defendant Mendizza guaranteed Comstock's performance. In this action for breach of contract plaintiffs recovered a money judgment against Comstock based on his refusal to pay the agreed price and against defendant Mendizza based on her guaranty.

The principal defense at the trial, and defendants' principal contention on this appeal, is that the contract is unenforceable because 380 of the shares were illegally issued. The trial court found that plaintiffs, officers of the issuing corporation, had caused 380 of the shares to be issued to plaintiff Reynolds in violation of the permit of the commissioner of corporations; that defendant Comstock "participated in and induced the issuance" of the 380 shares with knowledge that the permit was violated, and that Comstock is therefore "estopped" to assert that the shares were illegally issued. We have determined that the court's so-called "finding" of estoppel is an erroneous conclusion of law; that the contract is unenforceable not only because of the original illegality in the issuance of the 380 shares (Corp.Code, § 26100) but also because the contract itself violates penal sanctions of the Corporate Securities Act (Corp.Code, § 26104); and that the guaranty is also unenforceable because of the illegality of the principal obligation.

As will appear from the following summary, the evidence supports the findings of fact (although not the so-called "finding" that defendant is estopped to assert illegality) and refutes the assertions of both defendant Comstock and plaintiffs in their respective briefs that their respective conduct which resulted in the contract was in good faith:

Plaintiff Reynolds was president, plaintiff Wells was treasurer, and both were directors of Finance Control, a California corporation which was organized about July, 1952. Defendant Comstock, although he was not an officer or director of the corporation, was its active general manager and attended all meetings of the directors.

As defendant Comstock knew, the corporation applied to the commissioner of corporations for a permit to issue its stock for $10 cash a share. By permit of October 1, 1952, the corporation was authorized to issue to Reynolds or Wells 500 shares for $10 cash a share. The directors and officers of the corporation, however, agreed that stock would be issued to Reynolds not for cash but for services. At Comstock's request, Reynolds agreed that the stock issued to Reynolds would be held by Reynolds for Comstock.

Comstock arranged for his father-in-law to loan the corporation $3,800. The corporation gave the father-in-law a note for $3,800, which was subsequently paid. The corporation used the $3,800 to buy real estate. The records of the corporation falsely show that the $3,800 was paid by Reynolds for 380 shares of stock which were issued to him in December, 1952, and March, 1953. In fact Reynolds paid no cash for the issuance of these 380 shares. For 25 additional shares which were issued to Reynolds he paid $10 cash a share which was furnished by Comstock.

On June 19, 1953, plaintiffs Reynolds and Wells and defendant Comstock entered into the written contract here sued on, with defendant Mendizza guaranteeing Comstock's performance. Reynolds agreed to sell Comstock 405 designated shares and Wells agreed to sell Comstock 35 designated shares of the stock of Finance Control for $11,998.80, payable $2,000 upon execution of the agreement and $9,998.80 within 15 days. Of the 405 shares which Reynolds agreed to sell, 380 were the shares above described which were issued in violation of the permit of the commissioner of corporations, and 25 were the shares above described for which Comstock had furnished the cash. Plaintiffs transferred the 440 shares to Comstock. Comstock paid the $2,000 and refused to pay the balance.

Manifestly, as Comstock points out, the issuance of the 380 shares was in violation of the implied prohibition of the Corporate Securities Act found in section 26100 of the Corporations Code: "Every security of its own issue sold or issued by a company with the authorization of the commissioner but which has been sold or issued in nonconformity with any provision in the permit authorizing the issuance or sale of the security is void."

Furthermore, although the parties neglect to mention this fact, both plaintiffs and Comstock appear to have violated penal sanctions of the Corporate Securities Act, the provisions of section 26104 of the Corporations Code that "Every officer, agent or employee of any company and every other person, who does any of the following acts is guilty of a public offense * * * (a) Knowingly authorizes, directs, or aids in the issue or sale of * * * any security, in nonconformity with a permit of the commissioner then in effect authorizing such issue * * * (d) With knowledge that any security has been issued or executed in violation of any provision of this division [which includes Corp.Code, § 26100, supra], sells or offers the security for sale * * * (f) In any respect wilfully violates * * * any * * * permit * * * of the commissioner under this division. (g) With one or more other persons, conspires to violate any permit * * *." Enforcement of sales, and contracts growing out of sales, in violation of these penal sanctions can be denied. (Duntley v. Kagarise (1935), 10 Cal.App.2d 394, 397, 52 P.2d 560.)

[1, 2] Both parties advance arguments based upon the general purpose of the Corporate Securities Act to protect the public against fraudulent or unlawful stock schemes. Where, as here, both parties with full knowledge have joined in the illegal scheme, there can be no problem of applying the above quoted sections of the Corporate Securities Act to protect one from the other. (Cf. Regulation and Civil Liability under the California Corporate Securities Act: III, IV, T. W. Dahlquist, Member of the California Bar (1946), 34 Cal.L. Rev. 543, 695.) As in any other case of illegality which renders a bargain unenforceable, "The courts will leave them where they were when the action was begun." (Bank of Orland v. Harlan (1922), 188 Cal. 413, 422, 206 P. 75.) And illegality which renders a bargain unenforceable has that effect whether the evidence of the illegality is produced by plaintiff or by defendant (Loving & Evans v. Blick (1949), 33 Cal.2d 603, 607, 204 P.2d 23) and whether or not the question of the effect of the illegality is raised by either party (Domenigoni v. Imperial Live Stock, etc., Co. (1922), 189 Cal. 467, 475, 209 P. 36).

The policy against enforcement of illegal bargains (except in situations where the illegality of one party is less than that of another, or there are special circumstances not here present) is thus explained in the Restatement of the Law of Contracts, section 598, comment a: "the rule of public policy that forbids an action for damages for breach of such an agreement is not based on the impropriety of compelling the defendant to pay the damages. That in itself would generally be a desirable thing. When relief is denied it is because the plaintiff is a wrongdoer, and to such a person the law denies relief."

[3, 4] In the light of the foregoing principles, it is clear that (at least in the absence of special circumstances not shown here) no person can be estopped from asserting the illegality of the transaction. (Fewel & Dawes, Inc., v. Pratt (1941), 17 Cal.2d 85, 91, 109 P.2d 650.) Since the trial court's mistaken conclusion of estoppel is not supported by the facts found, it must be disregarded. (Hunter v. Sparling (1948), 87 Cal.App.2d 711, 721, 197 P.2d 807.)

[5] Plaintiffs rely upon C. I. T. Corp. v. Breckenridge (1944), 63 Cal.App.2d 198, 200, 146 P.2d 271, where it is said, " 'The test * * * whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the plaintiff requires the aid of the illegal transaction to establish his case. If the plaintiff cannot open his case without showing that he has broken the law, the court will not assist him, whatever his claim in justice may be upon the defendant.' " It does not appear that this language should be understood to mean that if a plaintiff can open his case without showing that he has broken the law,[1] the court will assist him even

1. Here, plaintiffs point out, they alleged and defendants admitted the execution of the written agreement of June 19, 1953, and Comstock's refusal to pay the balance due under the agreement. The illegality first appeared from the testimony of witnesses called by defendants.

though it subsequently appears that he is relying on a transaction in which he has broken the law. To attribute such meaning to the quoted "test" would be manifestly inconsistent with the above stated settled rules as to illegality.

[6] Plaintiffs assert that the contract sued upon is not itself illegal, and rely upon the rule stated in section 597 of the Restatement of the Law of Contracts: "A bargain collaterally and remotely connected with an illegal purpose or act is not rendered illegal thereby if proof of the bargain can be made without relying upon the illegal transaction." To this claim of plaintiffs there are two answers. First, as already indicated, by making the contract sued on plaintiffs and Comstock contravened the prohibition (Corp.Code, § 26104, subd. (d)) against sale of a security with knowledge that it has been issued in violation of permit. Second, the illegal issuance of the securities was intimately, not collaterally, connected with their subsequent sale to Comstock; plaintiffs issued them, and Comstock participated in their issuance, with the intent that they would be sold to Comstock. As stated in comment b to section 597, supra, "Even though a plaintiff's case can be made out without indicating anything unlawful, it may be shown that the bargain is illegal because of facts not brought out in the plaintiff's case, provided that the facts so offered show a close enough connection with an illegal transaction."

[7] Since the principal obligation of the contract is unenforceable because of illegality, the guaranty too is unenforceable. (Civ.Code, § 2810; Jack v. Sinsheimer (1899), 125 Cal. 563, 568, 58 P. 130; Restatement, Security, § 117.)

[8] Defendant Comstock cross-complained, alleging a common count for money had and received. Plaintiffs' answer to the cross-complaint consists of denials. At the trial defendants' counsel asserted that the "basis of the cross-complaint" is that Comstock "did not receive full value for the $2,000" which he admittedly paid under the contract. The trial court made no findings as to the cross-complaint. The parties make no point of this omission. From the foregoing discussion it is apparent that Comstock could no more have recovered from plaintiffs than they can recover from him.

For the reasons above stated, the judgment is reversed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SPENCE and McCOMB, JJ., concur.



46 Cal.2d 639

The PEOPLE of the State of California, acting by and through the DEPARTMENT OF PUBLIC WORKS, Plaintiff and Respondent,

v.

A. M. DUNN et al., Defendants and Appellants.

L. A. 23936.

Supreme Court of California.
In Bank.
June 6, 1956.

Action to condemn two parcels of land for highway purposes. The Superior Court of Kings County, Clark Clement, J., rendered judgment. Owners appealed. The Supreme Court, Gibson, C. J., held there was prejudicial error in court's instruction to disregard a lease in fixing the value of one of parcels.

Affirmed as to parcel 1 and reversed as to parcel 2.

Opinion, 287 P.2d 161, vacated.

Carter, Schauer, and Shenk, JJ., dissented in part.

1. Trial ⇐89

In condemnation proceeding, where it appears on cross-examination that witness' testimony as to market value of property is based upon improper considerations, such testimony may be stricken from the record.

2. Eminent Domain ⇐203(7)

Evidence of profits derived from a business conducted on the land condemned is too speculative, uncertain, and remote to

be considered as a basis for ascertaining market value.

3. Eminent Domain ⇐131

Income in the way of rents from property condemned is a proper element to be considered as a basis for ascertaining market value.

4. Evidence ⇐501(7)

In proceeding to condemn land which was subject to 25 year lease providing that owners should construct garage and that tenants should pay any increase in realty taxes, witness could testify that he considered bonus value of lease in appraising value of property.

5. Eminent Domain ⇐262(5)

In condemnation proceeding, where jury was instructed not to consider lease in fixing value of property, erroneous exclusion of evidence concerning lease was prejudicial even though some testimony was admitted concerning terms of lease.

6. Eminent Domain ⇐203(1)

In condemnation proceeding, testimony with regard to probable change in zoning ordinance affecting the parcels in the near future was admissible on issue of severance damages.

7. Eminent Domain ⇐202(1)

Where land is not presently available for a particular use by reason of a zoning ordinance or other restriction imposed by law, but there is a reasonable probability of a change in the near future, effect of such probability upon the minds of purchasers generally may be taken into consideration in fixing present market value for eminent domain purposes.

Sidney J. W. Sharp, Herbert M. Braden and Lawrence W. Clawson, Hanford, for appellants.

Daniel M. Fadenrecht, Hanford, for respondent.

GIBSON, Chief Justice.

Defendant owners have appealed from a judgment condemning two parcels of land for highway purposes. Parcel 1 consisted of several lots at the end of an unimproved block owned by defendants, and parcel 2 consisted of two lots separated from parcel 1 by an intervening street. The owners commenced construction of a garage on parcel 2 about August 1, 1953, and assertedly spent some $12,000 on the building prior to commencement of this action. On August 19 the Highway Commission adopted a resolution determining that public interest and necessity required the condemnation of the two parcels, and on August 25 this action was brought.

The People and the owners each produced two expert witnesses who gave conflicting opinions as to damages. With reference to parcel 1, the estimates of value ran from $8,340 to $32,000, the severance damage from nil to $4,000, and the benefit to the remainder of the property from nil to $5,000. As to parcel 2, the values ranged from $15,000 to $46,550. The jury, which viewed the premises, found that the value of parcel 1 was $11,000, the severance damage was $500, and the special benefit to the remainder was $2,000, and that the value of parcel 2 was $15,000. Judgment was thereafter entered awarding $11,000 for parcel 1 and $15,000 for parcel 2.

The principal question is whether the court erred in rejecting evidence concerning a lease on parcel 2. The lease, dated July 31, 1953, was for a term of 25 years, and it provided that the owners should construct a building for garage purposes and that the lessees should pay any increase in real property taxes after the first levy against the improvements. The lease was first mentioned during the direct examination of the owners' witness, Harrington, who testified that he had the lease in mind in appraising the value of the property. On cross-examination Harrington was asked to give a breakdown of the value of $46,550 which he placed on parcel 2. He said he arrived at that figure by allowing $18,970 for the land, $12,580 for the partially completed building and $15,000 for the "bonus value" of the lease. The court granted a motion to strike the valuation testimony of Harrington and instructed the jury, "The witness Harrington further testified among other things in substance that in assessing the value of Parcel Number 2, he took into

consideration a so-called bonus value of $15,000 on a lease on that property. You will disregard all of the testimony of the witness Harrington as to that lease to the same extent as though you never heard it." Later, when objection was made to a question asked on the direct examination of one of the lessees, the court ruled that, by analogy to cases holding that evidence of the net profit from property is not admissible, the lease would not be received in evidence.

[1] Where it appears on cross-examination that the witness' testimony as to market value is based upon improper considerations, it may be stricken from the record. City of Stockton v. Ellingwood, 96 Cal.App. 708, 716, 722, 275 P. 228; City of Redding v. Diestelhorst, 15 Cal.App.2d 184, 193 et seq., 59 P.2d 177; see Rose v. State of California, 19 Cal.2d 713, 742–744, 123 P.2d 505.

[2–4] It is settled that evidence of profits derived from a business conducted on the land is too speculative, uncertain and remote to be considered as a basis for ascertaining market value. Stockton & C. R. Co. v. Galgiani, 49 Cal. 139 [vineyard]; De Freitas v. Town of Suisun City, 170 Cal. 263, 265–266, 149 P. 553 [agricultural land]; City of Los Angeles v. Deacon, 119 Cal.App. 491, 494, 7 P.2d 378 [rock quarry]; 7 A.L.R. 163, 164; State v. Cerruti, 188 Or. 103, 214 P.2d 346, 16 A.L.R.2d 1113. On the other hand, it is the general rule that income from property in the way of rents is a proper element to be considered in arriving at the measure of compensation to be paid for the taking of property. See 1 Orgel on Valuation under Eminent Domain (2d ed., 1953), pp. 703–704, 708–712; 5 Nichols on Eminent Domain (3rd ed., 1952), pp. 212, 215–219; Jahr, Law of Eminent Domain (1953), pp. 226–228; 18 Am.Jur. § 344, p. 988; Lebanon & Nashville Turnpike Co. v. Creveling, 159 Tenn. 147, 17 S.W.2d 22, 65 A.L.R. 455; State v. Cerruti, 188 Or. 103, 214 P.2d 346, 16 A.L.R.2d 1113. The court erred in striking the evidence of Harrington and instructing the jury to disregard all his testimony with respect to the lease.

[5] It is argued that the error was not prejudicial because the essential terms of the lease were before the jury and because there was evidence that the lease was entered into for the purpose of increasing the amount of the award. The evidence with respect to whether the lease was made in good faith was conflicting, and the jury was not instructed on the subject. Although plaintiff's witnesses gave some testimony concerning the terms of the lease, the jury was precluded by the instructions from considering the lease as a factor in fixing the value of the property. We are satisfied that, in view of the entire record, the error was prejudicial.

[6, 7] As to parcel 1 it is contended that, in fixing the amount of severance damages, it was error to admit evidence of the probability of a change of zoning of the remainder of the block from which parcel 1 was taken. Where the land is not presently available for a particular use by reason of a zoning ordinance or other restriction imposed by law, but the evidence tends to show a "reasonable probability" of a change in the near future, the effect of such probability upon the minds of purchasers generally may be taken into consideration in fixing present market value. Long Beach City H. S. Dist. of Los Angeles County v. Stewart, 30 Cal.2d 763, 768–769, 185 P.2d 585, 173 A.L.R. 249, quoting with approval from 1 Nichols on Eminent Domain (2d ed.) § 219, p. 669. Here the People's experts testified that they had made investigations and that as a result they were of the opinion that a change of zoning was reasonably or highly probable. There was no error in the admission of such testimony.

The judgment is affirmed as to parcel 1 and reversed as to parcel 2.

TRAYNOR, SPENCE and McCOMB, JJ., concur.

CARTER, Justice (concurring and dissenting).

I concur in the judgment of reversal as to parcel 2, but dissent from the judgment of affirmance as to parcel 1. In my opinion nothing could be more speculative than

prospective action of a zoning authority. It is as changeable as the political fortunes of its members. The admission of such evidence was prejudicially erroneous.

I am still in accord with the views expressed by Mr. Justice Schauer in his dissenting opinion in Long Beach City H. S. Dist. v. Stewart, 30 Cal.2d 763, 775, 185 P.2d 585, 173 A.L.R. 249 that evidence of the adaptability and availability of land for all useful purposes, regardless of the purpose for which it is presently zoned, is admissible in an eminent domain proceeding.

I would therefore reverse the whole judgment.

SCHAUER, J., concurs.

SHENK, Justice (concurring and dissenting).

I concur in the affirmance of the judgment as to Parcel 1 but I dissent from the reversal of the judgment as to Parcel 2. Assuming that it was error to instruct the jury to disregard the portion of witness Harrington's testimony concerning the importance of the lease in determining market value, the error did not result in a miscarriage of justice. The terms of the lease were fully described by other witnesses and therefore they were otherwise before the jury.

Furthermore, the record indicates that the lease was made for the purpose of extracting an award in excess of the true market value of the parcel, and that it in fact had no proper bearing on true market value. It is conceded that the lease was executed only 26 days before the condemnation proceeding was brought and only 20 days before the Highway Commission adopted a resolution determining that public interest and necessity required the condemnation of the parcels. Witnesses for both sides agreed that at the time the lease was entered into it was common knowledge that the State was planning to make improvements on the parcels and that their acquisition was necessary to the project. The record also discloses substantial evidence that four or five months before the lease was entered into the State gave written notice to both the planning commission and the city council of the city in which Parcel 2 was situated that it intended to acquire the land; that the State's intention to acquire Parcel 2 was a matter of common knowledge well before the lease was entered into and the construction of the garage was begun; that at the request of the defendant the zone location of Parcel 2 was changed from residential to commercial after the State's intention to acquire the parcel had become commonly known; that the construction on the parcel continued to the very day when the condemnation action was filed despite the fact that it was known before that time that the State intended to acquire the parcel; that the chances that the lessees' business would succeed were not good; that the lessees were poor credit risks, and that the $500 monthly rent was out of proportion to the value of the parcel and to the amount of business the lessees could be expected to carry on. Under the foregoing circumstances, the exclusion of Harrington's testimony concerning the lease, even if error, was not prejudicial. The requirement of just compensation does not contemplate an enhanced award brought about by unconscionable tactics.



46 Cal.2d 596

Francis W. KEELER, Petitioner,

v.

SUPERIOR COURT OF the State of CALIFORNIA, IN AND FOR the COUNTY OF SACRAMENTO; The State Personnel Board of the State of California; Ford A. Chatters, president and member thereof, Emery E. Olson, Robert D. Gray, Glenn R. Baker, and Wilmer W. Morse, members thereof; and The Department of Fish and Game of the State of California, Respondents.

Sac. 6660.

Supreme Court of California.
In Bank.
June 1, 1956.

Mandamus proceeding to compel Superior Court to hear and determine petition

for mandate to State Personnel Board to proceed no further in matter of suspending the petitioner as civil service employee. The Supreme Court, Shenk, J., held that where no hearing was required in connection with the proceeding before the Board for ten-day suspension of the officer, the scope of review provided by statute relating to the use of writ of mandate for review of administrative orders or decisions was not applicable, even if hearing was actually afforded by the Board, and that a court has inherent power to control the course of litigation before it, including the power to remand a cause in mandamus for any further proceedings deemed necessary for proper determination.

Order to show cause discharged and requested relief denied.

Opinion, Cal.App., 288 P.2d 127, vacated.

1. Officers ⇐72(1)

State Personnel Board was not required to hold hearing relative to suspension of civil service employee without pay for period of ten days, and only an investigation was necessary. West's Ann.Code Civ. Proc. § 1094.5(a); West's Ann.Gov.Code, §§ 19575, 19576, 19578.

2. Mandamus ⇐81

Statute relating to use of writ of mandate for review of administrative orders or decisions is applicable when a hearing and taking of evidence, among other things, are required. West's Ann.Gov.Code, §§ 19575, 19576, 19578; West's Ann.Code Civ. Proc. § 1094.5.

3. Mandamus ⇐76

Where no hearing was required in connection with proceeding before State Personnel Board for ten-day suspension of civil service officer, scope of review provided by statute relating to use of writ of mandate for review of administrative orders or decisions was not applicable, even if hearing was actually afforded. West's Ann.Gov.Code, §§ 19575, 19576, 19578, West's Ann.Code Civ.Proc. § 1094.5(a, b, c).

4. Action ⇐66

A court has inherent power to control the course of litigation before it. West's Ann.Code Civ.Proc. § 187.

5. Mandamus ⇐187(10)

Court has inherent power to remand a cause in mandamus for further proceedings which are deemed necessary for a proper determination. West's Ann.Code Civ.Proc. § 1094.5.

James H. Phillips and Timothy W. O'Brien, Sacramento, for petitioner.

Edmund G. Brown, Atty. Gen., and Ralph W. Scott, Deputy Atty. Gen., for respondents.

SHENK, Justice.

This is a proceeding in mandamus to compel the respondent Superior Court to hear and determine a petition pending in that court for a writ of mandamus to order the respondent State Personnel Board to take no further action in the matter of the suspension of the petitioner Francis W. Keeler, a state employee in the respondent Department of Fish and Game.

The petitioner was suspended by the Director of the Department of Fish and Game for a period of ten days without pay because of his refusal to take part in a creel census, a temporary assignment. He claimed that the counting of fish was outside of his civil service duties in his classification as a hunter and trapper. The applicable job specifications are as follows: "Under the direction of the Supervising Predatory Animal Hunter and Trapper, to do hunting and trapping, and other work in connection with the control of predatory animals; and to do other work as required." He appealed to the State Personnel Board from the order of suspension. Gov.Code § 19575. The appeal was decided against him. Thereafter he filed in the respondent Superior Court a petition for a writ of mandate to compel the board to set aside the suspension and expunge all record of the action taken by the board. In its amended return the board pleaded, among other things, affirmative defenses that the assign-

ment of work was made pursuant to an emergency and therefore justified, and that the defendant had waived his right to seek relief. The merits of the suspension are not now before this court.

It appears that at the time of the proceedings before the board it did not, in accordance with its own rules, make findings of fact in proceedings such as the present one. But while the mandamus proceeding was pending in the Superior Court, the board modified its rules so as to require findings on all investigations undertaken or hearings conducted by it. § 68, Tit. 2, Admin.Code, p. 4.1. Thereafter the board made a motion in the mandamus proceeding for an order referring the matter back to it so that it could take evidence and make findings on the affirmative defenses. The motion was granted.

[1] The present petition challenges the authority of the Superior Court to make its order of reference where the matter is then before that court on a petition for a writ of mandate. The petitioner contends that the scope of review of an administrative order by means of mandamus is governed and limited by section 1094.5 of the Code of Civil Procedure; that under that section a reviewing court may consider only the record as constituted at the time of a petitioner's application for a writ of mandate, and that no provision is made pursuant to which the reviewing court may properly remand the matter for additional proceedings to the administrative body whose order is sought to be reviewed. The respondents contend that the scope of the Superior Court's review is not limited by section 1094.5. That section provided in subdivision (a) that where "the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal" proceedings shall be conducted in the manner there specified. Subdivision (b), on which the petitioner relies as a limitation on the authority of the reviewing court, begins with the expression: "The inquiry in such a case * * *." The other subdivisions also make it apparent that the whole or any part of the section is applicable only when the conditions set forth in subdivision (a) are present. As to the requirement of a hearing or the taking of evidence in the present case, section 19576 of the Government Code at the time of the proceeding before the Personnel Board and as pertinent here provided as follows: "Whenever an answer is filed by an employee who has been suspended without pay for ten days or less the board shall make an investigation with or without a hearing as it deems necessary * * *." Section 19578 of the Government Code provided in part as follows: "Whenever an answer is filed to a punitive action *other than* a suspension without pay for ten days or less, the board or its authorized representative shall within a reasonable time hold a hearing. * * *" (Emphasis added). Both of the above sections were amended in 1953, subsequent to the action taken by the board and as to matters not material to the issues herein. Stats.1953, ch. 1536, p. 3209. It thus appears from the plain language of the code sections that there was no requirement that the board hold a hearing following the suspension of the petitioner without pay for ten days, but that only an investigation was required.

[2] The petitioner contends that the board conducted a "hearing" of his appeal and for that reason he contends that section 1094.5 is applicable. It appears that the board assigned an investigator to inquire into the matter after the petitioner filed his answer to the suspension. Section 19575 provided that such an answer may be deemed "a request for hearing or investigation as provided." The investigator reported back to the assembled board which then denied the relief sought. Whether this constituted a hearing or merely an investigation is not important, as section 1094.5 is applicable only when a hearing and the taking of evidence among other things are required. Neither by statute nor by its own rules was such a hearing required.

[3] The petitioner contends, in a further effort to make applicable the provisions of section 1094.5, that in the proceedings before the Superior Court it was required to

determine the matter on the record before it and to give effect thereto in accordance with subdivisions (b) and (c) of that section, citing Boren v. State Personnel Board, 37 Cal.2d 634, 234 P.2d 981. But the holding in that case was based on the assumption that the proceedings before the Personnel Board were properly subject to review under section 1094.5 and the court recognized that in order to invoke the provisions of that section a hearing was required and a record of the proceedings be made. Here there was no record of such a proceeding and the provisions of the section relating to the scope of review provided for therein are therefore not applicable.

[4, 5] There is no question but that, consistent with proper regulations, a court has inherent power to control the course of litigation before it. § 187, Code Civ. Proc.; Tide Water Associated Oil Co. v. Superior Court, 43 Cal.2d 815, 825, 279 P.2d 35; Brydonjack v. State Bar, 208 Cal. 439, 442, 281 P. 1018, 66 A.L.R. 1507; Corum v. Hartford Accident & Indemnity Co., 67 Cal.App.2d 891, 897, 155 P.2d 710. This includes the power to remand a cause in mandamus for further proceedings which are deemed necessary for a proper determination. It is noted that section 1094.5 of the Code of Civil Procedure authorizes a reviewing court to "enter judgment * * remanding the case to be reconsidered in the light of" evidence "which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before respondent * * *." However, aside from statutory provisions, such a power to remand also exists under the inherent powers of the court. In Garcia v. California Employment Stabilization Comm., 71 Cal.App.2d 107, 161 P.2d 972, decided under the law prior to the enactment of section 1094.5, an order of the Employment Stabilization Commission was subject to review in a mandamus proceeding. The court concluded that there was an insufficiency of evidence in the record in support of the findings, and that such findings were in apparent conflict as to the evidence introduced. The court remanded the matter for the taking of further evidence.

In view of the present record the cause is not one in which the Superior Court is acting to review an administrative decision after a hearing and no reason appears why the court cannot, in the exercise of its inherent power, remand the case for further proceedings before undertaking to decide the petitioner's application.

The order to show cause is discharged and the relief requested is denied.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.



46 Cal.2d 608

Jack W. BRADSHAW, Petitioner and Appellant,

v.

CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION, James G. Bryant, C. A. Herbage, Edward Cain, Michael B. Kunz, Glenn V. Walls, as the members of said Commission, California Unemployment Insurance Appeals Board, Michael B. Kunz, Glenn V. Walls, and Edward Cain, as the members of said Board, James G. Bryant, as Director of Employment of the State of California, and Chronicle Publishing Company, a corporation, Respondents.

S. F. 19142.

Supreme Court of California.
In Bank.
June 4, 1956.

Rehearing Denied June 27, 1956.

Proceeding on petition for writ of mandate to vacate decision of California Employment Insurance Appeals Board. The Superior Court, City and County of San Francisco, H. A. van der Zee, J., entered judgment adverse to petitioner and petitioner appealed. The Supreme Court, Shenk, J., held that where dismissal pay-

ment was not made with respect to period before dismissal, receipt of dismissal pay temporarily prevented petitioner from qualifying for unemployment benefits under statute which provides that an individual is unemployed in any week during which he performs no services and with respect to which no wages are payable to him.

Affirmed.

Carter, J., Gibson, C. J., and Traynor, J., dissented.

Opinion, 286 P.2d 574, vacated.

1. Social Security and Public Welfare ⇐728

An unemployed person who satisfies requirements of Unemployment Insurance Act is entitled to receive from Unemployment Fund payments reasonably sufficient to tide him over until he can secure employment. West's Ann.Unempl.Ins.Code, § 100.

2. Social Security and Public Welfare ⇐728

The week with respect to which wage payment is made by employer to employee depends upon provisions of employment contract, however, interpretations of employment contracts and of Unemployment Insurance Act that result in duplication of payments to discharged employee are not encouraged. West's Ann.Unempl.Ins.Code, § 1252.

3. Social Security and Public Welfare ⇐728

Policy against duplication of payments would require an employee who claims what appears to be duplicating payments to show that there is no duplication.

4. Social Security and Public Welfare ⇐728

In proceeding for unemployment compensation, evidence was insufficient to establish that dismissal payments were made with respect to period before discharge and thus would not be duplicated by award of unemployment compensation. West's Ann.Unempl.Ins. Code, § 1252.

5. Social Security and Public Welfare ⇐385

Where dismissal payment was not made with respect to period before dismissal, receipt of dismissal pay temporarily prevented petitioner from qualifying for unemployment benefits under statute which provided that an individual is unemployed in any week during which he performs no services and with respect to which no wages are payable to him. West's Ann. Unempl.Ins. Code, §§ 1251, 1252.

Herbert Pothier, Marcel E. Cerf, Robinson & Leland, San Francisco, for appellant.

Arthur J. Goldberg, Nutter & Smith, Ralph Nutter, Los Angeles, and Charles P. Scully, San Francisco, as amici curiae on behalf of appellant.

Edmund G. Brown, Atty. Gen., Irving H. Periuss, Asst. Atty. Gen., William L. Shaw and Vincent P. Lafferty, Deputy Attys. Gen., Cooper, White & Cooper, Sheldon G. Cooper, George A. Helmer, Robert M. Raymer and Richard Logan, San Francisco, for respondents.

Downey, Brand, Seymour & Rohwer, Clyde H. Brand and J. Richard Glade, Sacramento, as amici curiae on behalf of respondents.

SHENK, Justice.

The petitioner-appellant appeals from a judgment entered after an order sustaining a demurrer to his petition for a writ of mandate to vacate a decision of the California Unemployment Insurance Appeals Board denying his claim for unemployment insurance benefits.

For reasons of economy the petitioner was discharged from his job with the San Francisco Chronicle on or about November 29, 1952. Pursuant to a collective bargaining agreement between his union and the Chronicle, he received upon his discharge three items of compensation in addition to his final week's salary: (1) pay for the fraction of his next annual vacation that had accrued as of the date of his discharge (hereinafter called "vacation pay"); (2) pay in lieu of two weeks' notice; and (3) "dismissal pay" in an amount dependent upon his length of service.

The petitioner filed for unemployment insurance benefits. The claims examiner of the Department of Employment decided that since he had received vacation pay, pay in lieu of notice and dismissal pay equal to

his salary for 41⅔ working days, he would not qualify for benefits until 41⅔ working days after his discharge. After a hearing, a Department of Employment referee affirmed the denial of benefits. The Unemployment Insurance Appeals Board in turn affirmed the referee's decision and denied benefits. Bradshaw petitioned the superior court for a writ of mandate under Code of Civil Procedure, section 1094.5, to vacate the decision of the Appeals Board and grant him benefits for the 41⅔ days covered by the supplemental payments. A demurrer to the petition was sustained, Brawshaw elected not to amend and judgment was entered for the respondents.

The petitioner does not now contest the decisions denying him benefits because he received vacation pay and pay in lieu of notice. This court will therefore consider only the propriety of denying unemployment benefits for a period equal to the number of days' dismissal pay he received.

This case calls for an interpretation of section 1252 of the Unemployment Insurance Code. In part, that section provides: "An individual is 'unemployed' in any week during which he performs no services and with respect to which no wages are payable to him * * *." Section 1251 provides that unemployment compensation benefits are payable to "unemployed individuals." It is conceded by the petitioner that dismissal payments under the contract are "wages" within the meaning of that term as used in section 1252. The question then is whether dismissal payments are payable "with respect to" a period before the employee's date of discharge or "with respect to" a period after that date. The petitioner contends that dismissal payments are made "with respect to" the weeks during which he admittedly performed services for the Chronicle. The respondents contend that such payments are made "with respect to" the weeks following the petitioner's discharge. Decisions in other states on the subject herein discussed are not helpful. It is stated in 25 A.L.R.2d at page 1070 that a general rule on the subject "is not justified."

[1] The state's purpose in providing unemployment insurance is "to reduce involuntary unemployment and the suffering caused thereby to a minimum." Unempl. Ins. Code, § 100. An unemployed person who satisfies the requirements of the Unemployment Insurance Act is entitled to receive from the Unemployment Fund payments reasonably sufficient to tide him over until he can secure employment.

The parties to the contract involved in this proceeding obviously intended the dismissal payments provided for therein to serve the same purpose as unemployment compensation, namely, to tide the discharged employee over until he could secure employment. Although dismissal pay coverage under the contract was broader than coverage under the Unemployment Insurance Act, the fact still remains that an award of unemployment benefits to the petitioner for the dismissal period would seem to duplicate the dismissal payments he has received.

[2] Section 1252 contemplates that wage payments are to be allocated to specific periods. The week "with respect to which" a wage payment is made by an employer to an employee depends upon the provisions of the employment contract. However, interpretations of employment contracts and of the Unemployment Insurance Act that result in duplication of payments to a discharged employee are not encouraged. This principle finds support in decisions of this court involving duplication of workmen's compensation by unemployment disability benefits. Garcia v. Industrial Acc. Comm., 41 Cal.2d 689, 263 P.2d 8; Aetna Life Ins. Co. v. Industrial Acc. Comm., 38 Cal.2d 599, 241 P.2d 530; Bryant v. Industrial Acc. Comm., 37 Cal.2d 215, 231 P.2d 32. The policy against duplication of payments should not be thwarted by any so-called liberal construction of the act, especially when such construction is not justified by the language of the contract. Unemployment insurance was not intended to protect employees already protected for the same period by their private contracts.

[3, 4] The policy against duplication of payments would require an employee who claims what appear to be duplicating payments to show that there is no duplication.

The petitioner has not done so. The record discloses that he has seen fit to rely solely on the language of the contract. That language alone is insufficient to establish that the dismissal payments were made "with respect to" a period before discharge and thus would not be duplicated by an award of unemployment compensation.

A holding that dismissal payments should be disregarded in determining whether an employee is entitled to unemployment benefits would create an anomalous distinction between dismissal pay on the one hand and "in lieu of notice pay" and "vacation pay" on the other. There is authority in this state to the effect that the receipt of "vacation pay" or "in lieu of notice pay" temporarily disqualifies an employee from claiming unemployment insurance benefits. See Shand v. California Emp. Stab. Comm., 124 Cal.App.2d 54, 268 P.2d 193; Jones v. California Emp. Stab. Comm., 120 Cal.App.2d 770, 262 P.2d 91. By analogy dismissal pay should have the same effect. The petitioner, however, notes that in Gilliam v. California Emp. Stab. Comm., 130 Cal.App.2d 102, 278 P.2d 528, one sort of supplemental payment was held not to disqualify the recipient from claiming unemployment insurance benefits. In that case the employees had the option of working without vacation and receiving pay in lieu thereof. Upon discharge they were given pay in lieu of a vacation they had not taken during a prior period. The court distinguished the Shand and Jones cases by pointing out that in those cases the employee while he was employed did not have the option of taking extra pay in lieu of vacation—he could only be sure of getting that extra pay if he was discharged. The factual situation was obviously different in the Gilliam case, and the court there concluded that "in lieu" vacation payments could be allocated to a period before discharge notwithstanding the Shand and Jones cases. The petitioner contends that dismissal pay is more analogous to "in lieu" vacation pay than to the normal vacation pay involved in the Shand and Jones cases. This contention is untenable. As noted, the basis for the Gilliam award was the employee's option while he was employed to receive the supplemental payments. In contrast, the dismissal payments made to the petitioner were not available to him unless and until his employment was terminated.

The petitioner complains that the Unemployment Insurance Appeals Board has taken inconsistent positions with respect to the treatment of dismissal pay. It is said that when determining whether a claimant has qualified for benefits by earning sufficient money during a base period prior to his discharge (see sections 1277 and 1281 of the Unemployment Insurance Code), the Appeals Board allocates dismissal pay to the period when it is received. It is enough to say that the propriety of the Board's practice in allocating dismissal pay for the purpose of determining the claimant's earnings during the base period is not involved in the present proceeding.

Both contracting parties contend that the allocation urged by the opposition is in violation of the constitutional prohibition against impairment of the obligation of contracts. An affirmance of the judgment in this case will not affect the rights of the petitioner under his employment contract. His right to dismissal payments will not be impaired. Nor would the employer be forced to make two payments under the employment contract in the event of a reversal.

[5] It is concluded that the Appeals Board and the superior court properly construed the statute and held that, as a matter of law on the undisputed facts, the receipt of dismissal pay temporarily prevented the petitioner from qualifying for unemployment benefits.

The judgment is affirmed.

SPENCE and McCOMB, JJ., concur.

SCHAUER, Justice.

I concur in the judgment and, generally, in the opinon except insofar as it may be deemed to indicate approval of Gilliam v. California Emp. Stab. Comm. (1955), 130 Cal.App.2d 102, 278 P.2d 528.

CARTER, Justice.

I dissent.

The majority opinion fails to give the liberal construction required of unemployment insurance laws, Garcia v. Industrial Accident Comm., 41 Cal.2d 689, 693, 263 P.2d 8, ignores the nature of dismissal pay and is contrary to the trend of authority elsewhere. It seems clear to me that where, as here, compensation for services performed is deferred until after an employee is discharged, and then paid to him, it does not constitute payment for such services during any period of time after discharge with respect to which wages are payable to him and hence he is entitled to unemployment compensation under Unemployment Insurance Code section 1252, from the date of his discharge.

We must examine the collective bargaining agreement under which petitioner was entitled to dismissal pay, vacation pay and two weeks' notice of discharge or pay, because the nature of those benefits is a factor in ascertaining the meaning of section 1252, infra, of the Unemployment Insurance Code, which defines "unemployment." That agreement provides that employees may be discharged for cause or economy. When the employer contemplates a discharge the "employee shall be given two (2) weeks' notice (or two (2) weeks' pay in lieu thereof). * * *"

"Section 7. Dismissal Pay. (a) When an employee other than those exempted from the terms of this contract as herein provided is discharged, he shall receive a cash dismissal payment *in a lump sum* in accordance with the following schedule *for years of continuous and uninterrupted employment:* * * *.

"(b) From the dismissal pay the publisher may deduct any levy or tax to which the employee is subject under local, state or federal legislation.

"(c) Dismissal pay shall be computed at the highest weekly salary (exclusive of bonuses and payments for special work) for the fifty-two (52) weeks previous to discharge. * * * Vacations. (a) Employees shall receive one week's vacation with pay after six months' continuous employment; two weeks' vacation with pay after one year's continuous employment. Employees who have been continuously employed for three years as of October 15th in the year which his vacation is scheduled shall receive three weeks' vacation with pay." (Emphasis added.) Thus it is seen the dismissal pay is payable in a lump sum and is computed on the length of prior service and the amount of pay during that service. This is, in effect, a payment of deferred wages or wages held back by the employer. It is not pay for the future after the employee is discharged. It is somewhat analogous to pensions which are considered as deferred compensation for services already rendered. Wallace v. City of Fresno, 42 Cal.2d 180, 184, 265 P.2d 884. No doubt, in the negotiations leading to the agreement in fixing wages, consideration was given to the dismissal pay.

In the above light we look at section 1252 which provides: "An individual is 'unemployed' in any week during which he performs no services and with respect to which no wages are payable to him * * *." Unemp.Ins.Code, § 1252. The employee—petitioner—performed no services and no wages were paid to him with respect to any week during which he performed no services because the dismissal pay was not for time after the discharge, it being deferred wages, and was not allocated to any week after discharge because it was payable in a lump sum. It may reasonably be said that the week with respect to which dismissal pay is payable, means weeks prior to the discharge during which the employee earned the benefits of the dismissal pay, and hence that pay is not for time after discharge; that the dismissal pay is like a compulsory savings plan and the employee who obtains the benefits of such a plan is no less eligible for unemployment compensation than a worker who can draw on his private savings. As I see the problem, the foregoing interpertation of the unemployment insurance law is soundly reasonable. That being the case, the liberal construction of those laws in favor of the employee, which is required, Garcia v. Industrial Accident Comm., supra, 41 Cal.2d 689, 693, 263 P.2d 8, compels the adoption of such construction of them. The majority seems to feel that if unemployment compensation is

allowed in this case there will be a double payment for the same thing—involuntary idleness—one from the state and the other from the employer. That is not true. Assuming that the sums payable under the agreement are for unemployment, still it is reasonable to say that it is in addition to unemployment compensation inasmuch as the latter is no more than a bare subsistence. Moreover, the argument of the majority is based on the false premise that unemployment compensation is payable only where the employee is needy when obviously his financial standing has nothing to do with it. He is entitled to the compensation no matter how much he is worth and, as seen, the sum payable under the agreement is in effect compulsory savings from his past wages where the employer acts as banker. He is not, therefore, being paid double, for the payment under the agreement is from his own money. Certainly if the employer had deposited a portion of the empolyee's wages in a trust fund to be paid to him only in the event of unemployment, it could not be claimed that he was not entitled to unemployment compensation. The provident as well as the improvident employee is entitled to unemployment compensation under the law. Why should he be any the less so when he is provident because an agreement between his union and his employer makes him so with the cooperation of his employer?

The construction of the statute in accord with the above discussion has been followed in other states. In Ackerson v. Western Union Tel. Co., 234 Minn. 271, 48 N.W.2d 338, 25 A.L.R.2d 1063, it was held that employees discharged because of mechanization and paid "severance" pay based on the period of prior service under a collective bargaining agreement, the same as the dismissal pay here, was entitled to unemployment compensation under an unemployment compensation statute the same as ours. The court said: "Section 268.04, subd. 23 [M.S.A.], provides that an individual shall be deemed unemployed in any week in which he performs no service *and* with respect to which no wages are payable to him. It is clear that from the use of the conjunctive 'and,' before an individual may be deemed to be unemployed, two things must exist: (1) He must perform no service during the week; and (2) he must be paid no wages for the week. In the case now before us, the first of those requirements clearly exists. Upon election to receive severance pay, the employment was completely severed. No claim is made that other employment was obtained. The employe was registered for work. So far as her former employer was concerned, she could do as she pleased from the date of separation. Relator claims, however, that the second prerequisite to 'unemployment' is lacking, in that severance pay constitutes wages for the number of weeks following the employe's separation which have been used to compute the amount thereof. * * * Suffice to say that it is the declared public policy of our state, as shown by the legislative declaration of public policy in the act, § 268.03, that benefits are intended to extend to those who are unemployed through no fault of their own. * * * In the case now before us, relator was not only legally obligated under its contract to make the severance payments upon the election of the discharged employes to receive them, but the payments were not designated as wages for a specific future period of time * * *. Severance pay was in no way related to or dependent upon the employe's employment status after separation. She received the payment even though she might secure a job the next day. It is true that the amount was measured by the length of service, but there may have been many reasons for adopting the length of service as the yardstick in determining the amount of severance pay due a discharged employe. * * * It is undoubtedly true that one of the objectives of dismissal or severance pay, such as we have to deal with here, is to ease the employe's financial burden while looking for a new job. However, there are other objectives which we must also keep in mind in considering the nature of such payment. Partial compensation for loss of seniority rights; loss of possible pension rights; compensation for retraining or acquiring new skills; and many others could be mentioned. Relator undoubtedly considered the

desirability of retaining its trained personnel until the job of mechanization could be completed. It is reasonable to assume that in arriving at a contract by collective bargaining, under which relator became obligated to make such payments, it did so with full knowledge of the advantages to be gained by it in making such payments, without any strings tied to it, in return for the continued service of its employes until the time arrived when such services could be dispensed with.

"Relator argues that to allow claimants to recover benefits under these circumstances is to penalize relator by imposing a double liability under the contract, namely, payment of severance pay, and the adverse effect it will have upon relator's contribution rate to the unemployment compensation fund. That may very well be true, but it strikes us that it is an argument which more properly should be addressed to the legislature than to the courts. Likewise, relator argues that payment of benefits gives the employe double benefits or double pay in allowing her to receive severance pay and at the same time collect unemployment benefits. That may or may not be true, depending upon the construction placed upon the nature of the severance pay. In any event, it is true, irrespective of the employment status of the employe after separation. If she procured a new position the day after separation, she would retain her severance pay and the wages so earned, and no one would contend that she should not be allowed to retain both. Unemployment compensation is merely intended to take the place of wages which could have been earned had she been employed." Ackerson v. Western Union Tel. Co., 234 Minn. 271, 48 N.W.2d 338, 340–342, 25 A.L.R.2d 1063.

To the same effect are Western Union Tel. Co. v. Texas Employment Comm., Tex. Civ.App., 243 S.W.2d 217; Dubois v. Maine Employment Security Commission, Me., 114 A.2d 359; see Keystone Mining Co. v. Unemployment Comp. Bd. of Rev., 167 Pa.Super. 256, 75 A.2d 3. It has been well said in approving the Ackerson case, supra: "First, need or actual indigency is not a requirement for eligibility for compensation. Receipt of income from other sources does not disqualify a claimant, for the purpose of these laws is to supplement a person's resources during periods of unemployment. Second, the claimant concededly would have received the severance payment even if she had obtained a new job immediately upon dismissal. Third, the contract specifically provided that acceptance of separation pay would terminate the employee's service with the company—rendering further untenable the company's position that the severance pay was in fact wages paid for the weeks subsequent to dismissal. Fourth, the reasons for unions seeking the inclusion of a severance-payment clause in working agreements extend beyond a mere attempt to ease the employee's immediate financial burden while looking for a new job. Severance pay is also intended as partial compensation for loss of seniority rights, loss of possible pension rights, and compensation for retraining or acquiring new skills, the latter being especially applicable in the present case. From the employer's viewpoint, severance pay clauses are included as a means of maintaining good will, both as to workers and to the community. These factors strongly suggest that the parties to the contract intended the severance payment clause to have no relation to the worker's employment status after dismissal, and, more significantly, that the court reached the proper result in concluding that, in view of the terms of the contract, there should be no relation between eligibility for unemployment compensation and receipt of severance pay." (100 U.Pa.L.Rev. 144, 145; see, also, 64 Harv.L.Rev. 681.)

The question here involved has broad implications in view of the so-called guaranteed annual wage arrangements which have been made notably in the automobile industry. In the Ford contract for illustration, there is a provision for payment to the employee when involuntarily laid off and such payment is defined as a supplementation which means the right to receive both payment from the employer and unemployment compensation from the state without reduction. Under unemployment insurance laws similar to ours, the state officials have said that such supplementation

is proper in Connecticut, Delaware, Massachusetts, Michigan, New Jersey and New York. (2 C.C.H. Unemp. Ins. Rep. (Conn.) para. 8380; id. Del. para. 8088; 4 id. (Mass.) para. 8188; id. (Mich.) para. 8522; 5 id. (N.J.) para. 8271; 36 Lab.Rel. Rep. 715; 69 Harv.L.Rev. 362.) The Attorney General of this State ruled on February 10, 1956, that the employer's payment under the Ford plan does not render the employee ineligible for unemployment compensation under our law. (27 Opinions of Atty. Gen. of Calif. 71.) The common theory in those determinations is that the payments by the employer are not wages paid with respect to the week for which unemployment compensation is sought. These official rulings should not be lightly brushed aside to the end that the guaranteed annual wage contracts, insofar as they purport to confer a benefit upon the employee, will be meaningless.

I would reverse the judgment.

GIBSON, C. J., and TRAYNOR, J., concur.

Rehearing denied; GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.



46 Cal.2d 601

Ena Dorothy LANGLEY, Plaintiff and Appellant,

v.

Spencer SCHUMACKER, Defendant and Respondent.

L. A. 23808.

Supreme Court of California.
In Bank.
June 4, 1956.
Rehearing Denied June 27, 1956.

Action against former husband to recover damages for fraud. The Superior Court, Los Angeles County, James G. Whyte, J., sustained a demurrer to amended complaint and entered judgment adverse to plaintiff, and plaintiff appealed. The Supreme Court, Shenk, J., held that amended complaint stated a cause of action for damages for fraudulently inducing plaintiff to resign her position and marry defendant in reliance upon knowingly false representations that he intended to consummate marriage and maintain a normal and natural marital relationship and that action was not barred by marital immunity from tort action by spouse.

Judgment reversed.

Spence, Schauer, and McComb, JJ., dissented.

Opinion, 283 P.2d 343, vacated.

1. Judgment ⇐585(3)

Action at law to recover damages for fraudulently inducing plaintiff to resign her position and marry defendant in reliance upon knowingly false representations that he intended to consummate marriage and maintain a normal and natural marital relationship was based on a cause of action different from that asserted in suit in equity for annulment of marriage on ground of fraud, though the same misrepresentations were involved in both suits, and hence cause of action for damages was not merged in or barred by decree of annulment under any theory of res judicata.

2. Breach of Marriage Promise ⇐14

Subdivision of Civil Code, which provides that no cause of action arises for breach of promise of marriage, was intended to abolish only causes of action based on an alleged breach of contract. West's Ann.Civ.Code, § 43.5(d).

3. Breach of Marriage Promise ⇐14

Cause of action for damages for fraudulently inducing plaintiff to resign position and marry defendant in reliance upon representations that he intended to consummate marriage and maintain a normal and natural marital relationship, allegedly made without any intention of doing so, was not barred by subdivision of Civil Code abolishing cause of action for breach of promise of marriage. West's Ann.Civ.Code, §§ 43.5(d), 1572, subd. 4.

4. Husband and Wife ⇐205(4)

Generally, the rule barring tort actions between spouses does not apply to tort actions involving injury directly to a property interest rather than to the person.

5. Fraud ⇐1

The tort inherent in the commission of fraud is a "property tort", that is, a tort involving injury directly to a property interest rather than to the person.

See publication Words and Phrases, for other judicial constructions and definitions of "Property Tort".

6. Husband and Wife ⇐205(4)

Enactment of statutes giving wife the right to separate property and to contract with husband concerning such property indicates legislative intent to abolish marital immunity from tort action by spouse insofar as it applied to actions concerning property rights. West's Ann.Code Civ.Proc. § 370; West's Ann.Civ.Code, § 158.

7. Husband and Wife ⇐205(2)

Marital immunity from action to recover damages for fraudulently inducing plaintiff to resign her position and marry defendant in reliance upon knowingly false representations that he intended to consummate marriage and maintain a normal and natural marital relationship did not attach when plaintiff and defendant were married and such action was not barred by rule barring tort actions between spouses. West's Ann.Code Civ.Proc. § 370; West's Ann.Civ.Code, §§ 158, 1572, subd. 4.

8. Fraud ⇐43, 46

Amended complaint stated a cause of action for fraudulently inducing plaintiff to resign her position and marry defendant in reliance upon knowingly false representations that he intended to consummate marriage and maintain a normal and natural marital relationship.

Maurice Rose, Beverly Hills, for appellant.

Crawford & Baker and J. Ames Crawford, Los Angeles, for respondent.

SHENK, Justice.

This is an appeal from a judgment entered following an order sustaining a demurrer to the plaintiff's second amended complaint.

Ena Langley, the plaintiff, brought this action to recover damages from the defendant, Spencer Schumacker, upon a cause of action for fraud. In her second amended complaint the plaintiff alleged that she was employed for some time prior to March 31, 1953, by an insurance company as personnel director and as secretary to its president, earning a salary which, by January, 1953, amounted to $425.00 per month, plus certain fringe benefits; that on or about January, 1953, the defendant fraudulently induced her to resign her position on representations that he intended to marry her, to consummate the marriage, and to maintain a normal and natural marital relationship; that in reliance upon such representations she resigned her position on March 31, 1953, and on April 17, 1953, she and the defendant went through a ceremony of marriage; that the defendant's representations were untrue and known by him to be untrue; that he never intended in good faith to consummate the marriage or maintain a normal and natural marital relationship, but on the contrary, that his preconceived plan and intention was not to consummate the marriage or maintain a normal and natural marital relationship, and that after the ceremony he refused to consummate the marriage by having marital intercourse and stated that he would never cohabit with her. On January 29, 1954, the plaintiff obtained a decree of annulment upon her complaint charging fraud in that the defendant had secretly intended not to consummate the marriage, that he had not consummated it, and that he never intended to do so. After that decree became final the plaintiff commenced this action to recover damages for the fraud thus practiced on her. Her action for damages is entirely independent of the annulment proceeding but is based upon essentially the same facts.

[1] In support of the trial court's order sustaining his demurrer, the defendant contends that according to the doctrine of res judicata any cause of action for damages that the plaintiff might have had was merged in the decree of annulment and no longer exists. This contention assumes that her suit for damages involves the same cause of action that was involved in her suit for annulment. But the fact that the same misrepresentations were involved in

both suits is not conclusive. The harm remedied by the decree of annulment is not the same as the harm sought to be remedied by the present action. The suit for annulment was brought in equity to determine the plaintiff's marital status. In contrast, the present suit seeks damages at law as compensation for an injury to a property right. The present action is based on a cause of action different from that asserted in the suit for annulment and therefore is not barred under any theory of res judicata.

[2, 3] A second ground asserted in support of the order sustaining the demurrer is that the present action is barred by section 43.5 subdivision (d) of the Civil Code, which provides that no cause of action arises for "breach of promise of marriage." However, the language of the code section indicates that it was only intended to abolish causes of action based on an alleged breach of contract. The plaintiff's complaint states a cause of action for fraud—the making of promises without any intention of performing them. Civ.Code, § 1572, subd. 4; Mack v. White, 97 Cal.App.2d 497, 218 P.2d 76; Schaub v. Schaub, 71 Cal.App.2d 467, 162 P.2d 966. Such a cause of action is not barred by section 43.5, subdivision (d). See Mack v. White, supra; Norman v. Burks, 93 Cal.App.2d 687, 209 P.2d 815.

[4, 5] The defendant's final contention is that the present action is foreclosed by the rule barring tort actions between spouses. American courts now generally agree that this rule does not apply to property tort actions—that is, to tort actions involving injury directly to a property interest rather than to the person. (See cases collected in Prosser, Torts, 2d ed. 1955, § 101, pp. 672–73; McCurdy, Torts Between Persons in Domestic Relation, [1930] 43 Harv.L.Rev. 1030, 1037–40; see also 3 Vernier, American Family Laws, § 180.) To the extent that the tort inherent in the commission of fraud has been characterized, it has been said to be a property tort. (See cases collected in Prosser, Torts, 2d ed. 1955, § 101, p. 672, n. 24; McCurdy, supra at 1039, n. 30, 1040, n. 44. But see McCurdy, supra at 1044, n. 63.)

[6, 7] There is also authority in this state indicating that the marital immunity does not apply to property torts. See Peters v. Peters, 156 Cal. 32, 34, 36, 103 P. 219, 23 L.R.A.,N.S., 699; Smith v. Stuthman, 79 Cal.App.2d 708, 711, 181 P.2d 123; People v. Graff, 59 Cal.App. 706, 712, 211 P. 829. The enactment of "statutes giving the wife the right to separate property and to make contracts with her husband concerning the same" indicates a legislative intent to abolish the immunity insofar as it applied to actions concerning property rights. Peters v. Peters, supra, 156 Cal. 32, 34, 36, 103 P. 219, 220, 23 L.R.A.,N.S., 699. See Civ. Code, § 158; Code Civ.Proc. § 370. Whatever may have been the scope of the immunity at common law it should not apply to interspouse property tort actions such as the present one. This conclusion makes it unnecessary to consider whether the annulment of a voidable marriage would remove an immunity that was operative while the marriage existed. No immunity from the present action attached when the plaintiff and the defendant were married.

[8] The second amended complaint states a cause of action and the demurrer was improperly sustained.

The judgment is reversed.

GIBSON, C. J., and CARTER and TRAYNOR, JJ., concur.

SPENCE, Justice.

I dissent.

In my opinion plaintiff's alleged cause of action is essentially one for damages for "breach of promise of marriage", within the meaning of section 43.5 of the Civil Code, which provides that "no cause of action arises" in such cases.

The majority opinion states: "However, the language of the code section indicates that it was only intended to abolish causes of action based on an alleged breach of contract. The plaintiff's complaint states a cause of action for fraud—the making of promises without any intention of performing them. * * * Such a cause of action is not barred by section 43.5, subdivision (d)." I cannot agree with this conclusion, as it permits a party to defeat the purpose of section 43.5 by the mere device of add-

ing an allegation that at the time of making the promise, the party had no intention of performing it, thereby purporting to convert the action into a tort action. The cited section does not confine itself to abolishing actions ex contractu, but it abolishes all actions for "breach of promise of marriage" regardless of the form which the action may take. In this connection, it is significant that actions for "breach of promise of marriage" have been treated as being in the nature of tort actions, Syfert v. Solomon, 95 Cal.App. 228, 272 P. 810; Lanigan v. Neely, 4 Cal.App. 760, 89 P. 441, and that section 43.5 abolishes actions for "breach of promise of marriage" and three other classes of tort actions.

In Thibault v. Lalumiere, 1945, 318 Mass. 72, 60 N.E.2d 349, 158 A.L.R. 613, plaintiff attempted to recover for alleged fraud in the face of a similar statute, and included a similar allegation of "lost employment" as an element of damage. The court there said at page 351: "Actions in tort for fraud have been held to be within the prohibition of such statutes and any other cause of action that originates in the breach of a promise of marriage. The plaintiff's cause of action arises out of a breach of promise of marriage, and she cannot circumvent the statute by bringing an action in tort for damages so long as the direct or underlying cause of her injury is the breach of promise of marriage. [Citing cases.]" Numerous authorities are collected in a note in 158 A.L.R. 618, where it is said at page 624: "Upon the general principle announced above, it has been held that where an action stems from, or arises out of, a breach of a marriage contract, the consequences of the statute abolishing actions for such a cause may not be avoided by bringing an action in tort for fraud or deceit."

The cases cited in the majority opinion, Schaub v. Schaub, 71 Cal.App.2d 467, 162 P.2d 966; Norman v. Burks, 93 Cal.App.2d 687, 209 P.2d 815; Mack v. White, 97 Cal. App.2d 497, 218 P.2d 76, do not support the conclusion reached by the majority. These cases merely allowed the restoration of property obtained through fraudulent representations. Such decisions may be justified on the basis of preventing unjust enrichment of the party perpetrating the fraud. In distinguishing the two situations, it was said in Norman v. Burks, supra, 93 Cal.App.2d at page 691, 209 P.2d at page 817: "Defendant's suggestion that this is a heartbalm action and barred by section 43.5 of the Civil Code is without merit." The present action, however, is essentially a "heartbalm" action seeking damages rather than the restoration of property.

While the majority opinion does not consider a further point in view of its conclusion that section 43.5 does not apply to an action in the nature of a fraud action, plaintiff urges that her action is not barred by said section because plaintiff and defendant went through a marriage ceremony. In other words, plaintiff claims that there can be no "breach of promise of marriage", within the meaning of the section, in a case where a ceremony has been performed. This claim places an unduly narrow construction upon the word "marriage" and upon the phrase "breach of promise of marriage", as the ordinary concept of marriage contemplates much more than the mere performance of a marriage ceremony. In fact, the marriage relation existed long before any ceremony was required, and the relation of husband and wife may still be created in some states without the formality of a ceremony. While such ceremony is required in California, Civ.Code, § 71, the ceremony merely evidences the only form of civil contract out of which the "personal relation" of marriage may be legally established in this state. "Marriage" is defined by section 55 of the Civil Code as "a personal relation arising out of a civil contract" and is to be distinguished from the contract itself. This distinction was made in Sharon v. Sharon, 75 Cal. 1, at page 9, 16 P. 345, at page 348, where the court said: "The section of the Code defines 'marriage,' * * * as distinguished from a present contract to marry, or the act of becoming married." (See, also, Armstrong, California Family Law, Vol. I, pp. 1–3.)

Plaintiff recognized the greater import of the term "marriage" in drawing her complaint. She alleged that defendant "by his said proposal of marriage impliedly represented to plaintiff that defendant * * *

intended * * * to have with plaintiff normal and natural marital intercourse and consummate said marriage." It is the alleged breach of this implied promise, or otherwise stated, the alleged falsity of the implied representation of an intention to consummate the marriage, which is the gist of plaintiff's alleged cause of action by which she seeks to recover damages. I am therefore of the opinion that "breach of promise of marriage", as that term is used in section 43.5, includes the breach of promise to consummate the marriage following a ceremony as well as the breach of promise to go through a ceremony; and that it is immaterial, for the purposes of section 43.5, whether the intention to breach the promise antedated, accompanied or followed the making of the promise.

While the New York statute contains somewhat different wording and has been construed as abolishing all types of actions based upon a "contract to marry," including actions for restoration of property obtained through fraud in connection with such a contract, Bressler v. Bressler, Mun.Ct., 133 N.Y.S.2d 38, 40; Hallstrom v. Erkas, Sup., 124 N.Y.S.2d 169; Nosonowitz v. Kahn, 201 Misc. 863, 106 N.Y.S.2d 836; Grunberg v. Grunberg, 199 Misc. 249, 99 N.Y.S.2d 771; Andie v. Kaplan, 263 App.Div. 884, 32 N.Y.S.2d 429, the rule in that state, which I believe should be followed under the circumstances presented here, is that it makes no difference whether or not the parties actually went through a marriage ceremony. Grunberg v. Grunberg, supra, 99 N.Y.S.2d 771, 773. As above indicated, I am therefore of the opinion that the failure to consummate the marriage following a ceremony is as much a "breach of promise of marriage", within the meaning of section 43.5, as is a failure to participate in a marriage ceremony. It follows that plaintiff's allegation that defendant "failed and refused to consummate said form of marriage" brings this action for damages within the class of actions which have been abolished by said section 43.5.

In view of my conclusion that plaintiff cannot prevail in this action because of the provisions of section 43.5 of the Civil Code, I deem it unnecessary to consider the other points discussed in the majority opinion. Mention should be made, however, of the majority's characterization of plaintiff's action as one for a "property tort." Plaintiff here sought "actual damages in the sum of $15,000.00" and "$10,000.00 for the sake of example and by way of punishing defendant," based upon her allegations that "plaintiff suffered intense humiliation, public disgrace, mental anguish, became ill, sick and disabled" as well as upon her allegations concerning loss of employment and expense incurred. Such allegations show that this is essentially a "heartbalm action" for damages for injuries to person rather than an action for injuries to property. It bears no analogy to any of the cases cited in the majority opinion in which the restoration of property was permitted in order to prevent the unjust enrichment of the defendant.

I would affirm the judgment.

SCHAUER and McCOMB, JJ., concur.

Rehearing denied; SCHAUER, SPENCE and McCOMB, JJ., dissenting.



46 Cal.2d 577

Harold McCARTHY, Plaintiff and Appellant,

v.

Thomas Seymour TALLY, Defendant and Appellant.

Thomas Seymour TALLY, Plaintiff and Appellant,

v.

Harold McCARTHY, Defendant and Appellant.

L. A. 23310, 23311.

Supreme Court of California.
In Bank.
June 1, 1956.

Actions, consolidated for trial, by lessee of summer resort against lessor for declaratory relief and alleged fraud in inducing execution of lease and by lessor against lessee to establish rights under lease and obtain appointment of receiver. The Su-

perior Court, San Bernardino County, R. Bruce Findley, J., entered judgment for lessor in action by lessee and against lessee in action by lessor, and both parties appealed. The Supreme Court, Carter, J., held that, where liquidated damages provided for upon breach of lease were not shown to represent a reasonable endeavor to estimate actual damage, nor was there any finding by trial court on such subject, but trial court made inconsistent findings as to why such damages could not be recovered, judgments would have to be reversed for further findings as to recovery of such damages, including finding whether breach which occurred was within contemplation of parties.

Judgments reversed.

Opinion, 289 P.2d 589, vacated.

1. Fraud ⇐58(1)

In action by lessee of summer resort against lessor for declaratory relief and fraud in inducing execution of lease, evidence was sufficient to sustain trial court's finding that the alleged fraudulent misrepresentations as to income from the resort had not been made.

2. Fraud ⇐58(1)

In action by lessee of summer resort against lessor for fraud in inducing execution of lease, evidence was sufficient to sustain trial court's findings that the alleged fraudulent representations concerning condition of ranch had not been made.

3. Appeal and Error ⇐931(1)

Generally, reviewing court will view evidence in light most favorable to respondent and will not weigh the evidence.

4. Appeal and Error ⇐931(1), 1010(1)

Reviewing court will indulge in all intendments and reasonable inferences which favor sustaining finding of trier of fact and will not disturb such finding when there is substantial evidence in the record in support thereof.

5. Damages ⇐78(6)

Ordinarily, provisions for liquidated damages will not lie for failure to pay rent as provided in a lease. West's Ann.Civ. Code, §§ 1670, 1671.

6. Damages ⇐189

In actions, consolidated for trial, by lessee of summer resort against lessor for declaratory relief and alleged fraud in inducing execution of lease and by lessor against lessee to establish rights under lease and obtain appointment of receiver, evidence was sufficient to sustain trial court's finding that goodwill of resort business had not been affected by lessee's failure to pay rent, as basis for recovery of liquidated damages.

7. Damages ⇐163(3)

Presumption that the amount of liquidated damages agreed upon is amount sustained may be rebutted by proof that no detriment whatever resulted from breach of agreement containing such provision for liquidated damages. West's Ann.Civ.Code, §§ 1670, 1671.

8. Appeal and Error ⇐1177(8)

Where, in actions, consolidated for trial, by lessee of summer resort against lessor for declaratory relief and alleged fraud in inducing execution of lease and by lessor against lessee to establish rights under lease and obtain appointment of receiver, liquidated damages provided for breach of lease were not shown to represent a reasonable endeavor to estimate actual damage, nor was there any finding by trial court on such subject, but trial court made inconsistent findings as to why such damages could not be recovered, judgments would have to be reversed for further findings as to recovery of such damages, including finding whether breach which occurred was within contemplation of parties. West's Ann.Civ.Code, §§ 1670, 1671.

9. Damages ⇐157(3), 163(3)

To recover on contract provision for liquidated damages, plaintiff must plead and prove that, at time contract was entered into, damages in event of breach would be impractical or extremely difficult of ascertainment, that sum agreed upon as liquidated damages represents a reasonable endeavor to ascertain what such damages would be, and that breach of such contract occurred, but actual damages would not have to be proved provided recovery of liquidated damages could otherwise be had.

10. Appeal and Error ⇐101(1), 870(4)

Order appointing receiver was appealable and would not be reviewed on appeal from final judgment in action in which receiver was appointed. West's Ann.Code Civ.Proc. § 963, subd. 2.

Combs & Hoose, Lee Combs and Harned Pettus Hoose, Beverly Hills, for Harold McCarthy.

Wilson & Wilson, San Bernardino, for Thomas S. Tally.

CARTER, Justice.

These two actions arose because of disputes concerning a ten-year lease of a summer resort known as Glenn Ranch owned by Tally and leased by him and his father to Mr. and Mrs. McCarthy.[1] In the first action Harold McCarthy sought declaratory relief and damages for fraud against Seymour Tally; Tally later brought an action against McCarthy in which he sought to establish certain rights under the lease in question and for the appointment of a receiver. The actions were consolidated for trial. The court made separate findings in each case and entered separate judgments. In the McCarthy case, the judgment was in favor of Tally; in the Tally case, judgment was rendered against McCarthy in the sum of $1,414.14 (unpaid rent and taxes), together with $2,000 as attorney's fees, $1,038.50 as costs and charges of the receiver appointed, $67.50 for certain other costs and disbursements, and it was concluded that plaintiff Tally was not entitled to recover any sum as liquidated damages. McCarthy was adjudged entitled to the sum of $821.32 for unearned premium of an insurance policy owned by him and retained by Tally. McCarthy appealed from the whole of the judgment in the McCarthy case except that portion denying Tally liquidated damages; Tally appealed only from that portion of the judgment in the Tally case denying him liquidated damages.

On July 17, 1944, T. L. Tally and Thomas Seymour Tally, as lessors, and Harold McCarthy and his wife, Barbara, as lessees, executed an agreement in writing by which the Tallys leased to the McCarthys certain real and personal property in the San Bernardino mountains, known as the "Glenn Ranch." The lease was for a term of ten years, at an annual rental of $10,000 and provided for the continuance of the operation of a hotel and summer resort then being operated by the Tallys.

The McCarthys entered into possession on August 1, 1944, operated the business and paid the rent until October 31, 1950. On or about November 28, 1950, Tally served McCarthy with a notice to pay rent or vacate the premises. On or about December 1, 1950, McCarthy served Tally with a notice that he had vacated and surrendered the property and that he was delivering possession to Tally. On January 4, 1951, a receiver was appointed to take charge of the business and the ranch.

[1] In the McCarthy action, McCarthy sought damages on the theory that certain false statements had been made by Tally to him to induce the execution of the lease and that he had relied on such false representations. It was alleged that Tally had told him that the Glenn Ranch had produced a net annual income of $27,000 in previous years, and that the ranch was in "excellent," "very good," "wonderful" condition, and that these representations were known by Tally to be untrue. Concerning both allegations of fraudulent representations, the evidence was in sharp conflict. With respect to the net income of the ranch, Tally testified that he had not made the alleged statements, but that he had stated that because of a decided increase in the business in the year in which the McCarthys took over, it was expected that the net income would better $27,000; that the maximum income he had ever made on the ranch was $22,000 the previous year. The trial court found that the alleged fraudulent misrepresentations as to income had not been made and the evidence is sufficient to support the finding.

[2–4] In connection with the alleged representations concerning the condition of

1. McCarthy succeeded to the interest of his co-lessee wife upon her death; Tally succeeded to the interest of his co-lessor father upon his death.

the ranch, the trial court found that Tally and his wife truthfully represented to the McCarthys that the property and facilities referred to in the lease were in "good operating condition." McCarthy testified that at the time he took over the operation of the summer resort the place was full of guests and reservations had been made for guests later in the year. The record shows that McCarthy had inspected the ranch; that he had been there as a guest of the Tallys on several occasions prior to leasing it; that his wife had been there almost every week in 1943 and quite often in 1944. The record also shows that the ranch was one which had been operated for many years as a summer resort and that McCarthy knew that some of the buildings were very old. This evidence is sufficient to support the finding of the trial court that the alleged fraudulent representations were untrue and that it was true that the ranch was in good operating condition. McCarthy's attempt to reargue the evidence and the weight thereof in this court is unavailing. As we have frequently said, it is the general rule on appeal that an appellate court will view the evidence in the light most favorable to the respondent and will not weigh the evidence. An appellate court will indulge all intendments and reasonable inferences which favor sustaining the finding of the trier of fact and will not disturb that finding when there is substantial evidence in the record in support thereof. Berniker v. Berniker, 30 Cal.2d 439, 444, 182 P.2d 557.

A more troublesome point is that relating to the provision for liquidated damages. Paragraph (28) of the lease provides:

"That it is and will be impracticable and extremely difficult to fix the actual damages to said Parcel Four[2] in the event of termination of this lease by the lessors for cause, or by reason of abandonment of the demised property by the lessees, and that the sum of $10,000.00 shall be and said sum is hereby fixed as the amount of the liquidated damages in the event of such termination or such abandonment; that said lessees have this day executed to the lessors a demand note for $10,000[3] secured by a deed of trust upon real property in Riverside County, California, to evidence and secure the payment of such liquidated damages; that said lessees may at any time deposit with the lessors the sum of $10,000.00 in lieu of said note and deed of trust;

"That in the event said lessors successfully prosecute proceedings to terminate this lease for cause, the Court may, in addition to actual damages by reason of loss with respect of Parcels One, Two and Three, award to said lessors liquidated damages in the sum of $10,000.00 by reason of loss with respect to Parcel Four;

"That in the event said lessees abandon and give up possession of said demised property to the lessors, said lessees shall be liable to the lessors for actual damages by reason of loss with respect to Parcels One, Two and Three, plus liquidated damages in the sum of $10,000.00 by reason of loss with respect to Parcel Four;

"That in the event of such termination or such abandonment, the liquidated damages aforesaid shall be paid to the lessors from said deposit or from the proceeds derived from a sale under said Deed of Trust; that the payment of actual and liquidated damages, as aforesaid, shall fully satisfy all obligations of lessees under and by virtue of the provisions hereof."

Paragraph (29) provides "That default shall not be deemed to have occurred with respect to any of the terms, covenants and conditions herein set forth, other than the payment of the aforesaid installments of rental, unless the lessees, within ten days after written notice of the nature of the asserted breach, shall have failed to cure such breach."

2. Parcel Four is described in the lease as "The said business and the goodwill thereof, and the right to the use of the trade name of Glenn Ranch."

3. Cash had been substituted therefor prior to trial.

Section 1670 of the Civil Code provides that "Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section."

Section 1671 provides that "The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage."

Tally alleged, and the trial court found, that under the circumstances existing at the time the contract was entered into, it would have been impracticable or extremely difficult for actual damages to be fixed in the event of a breach of the conditions of the lease. In the McCarthy action, however, the trial court in amended findings found that in the event of a breach the damages would *not* be difficult of ascertainment. It has been held that whether or not damages would be impracticable or extremely difficult to fix is a question of fact in each case for the trier of fact, Rice v. Schmid, 18 Cal.2d 382, 385, 115 P.2d 498, 138 A.L.R. 589; Better Food Markets v. American District Telegraph Co., 40 Cal.2d 179, 184, 253 P.2d 10, 42 A.L.R.2d 580; Atkinson v. Pacific Fire Extinguisher Co., 40 Cal.2d 192, 195, 253 P.2d 18, unless the circumstances existing at the time of making the stipulation are not in dispute and permit of but one conclusion.

[5] Ordinarily, provisions for liquidated damages will not lie for failure to pay rent as provided in the lease. Rez v. Summers, 34 Cal.App. 527, 529, 168 P. 156; Webster v. Garrette, 10 Cal.App.2d 610, 615, 52 P.2d 550; Jack v. Sinsheimer, 125 Cal. 563, 566, 58 P. 130; Knight v. Marks, 183 Cal. 354, 357, 191 P. 531. This is so because in such a case there is no presumption that the amount of damages which may result from a tenant's breach of a covenant to pay rent is impossible or extremely difficult to fix. In the present case, however, while the breach was failure to pay rent, the liquidated damage provision in the lease related to a possible injury to the goodwill of the business of operating a summer resort. Where a contract providing for the sale of the goodwill of a business was concerned, it has been held that an agreement for liquidated damages was proper and that the plaintiff was required only to prove a breach of the contract in order to recover such liquidated damages. Potter v. Ahrens, 110 Cal. 674, 43 P. 388; Franz v. Bieler, 126 Cal. 176, 181, 56 P. 249, 58 P. 466; Streeter v. Rush, 25 Cal. 67, 72; Nash v. Hermosilla, 9 Cal. 584, 587.

[6] We have here a breach of the contract occasioned by McCarthy's failure to pay rent. The record shows that the breach occurred in November after the summer resort had been closed for the season. The court found, specifically, that "there is no evidence establishing any damage to or loss of said goodwill" and concluded that Tally was not entitled to recover the agreed-upon sum of $10,000 as liquidated damages for the possible injury to the goodwill of the business. The record bears out the finding of the trial court that the goodwill of the business had not been affected by McCarthy's failure to pay rent.

[7] In Kelly v. McDonald, 98 Cal.App. 121, 125, 276 P. 404, 406, it was held: "While the term 'liquidated damages' does imply that the parties have ascertained and agreed upon a sum which they assume will adequately compensate for a breach of the contract, this does not necessarily mean that the amount specified must be paid whether damages result from the breach or not. The very term of 'damages' contemplates an injury sustained or detriment resulting from the breach of a contract or the nonperformance of a duty. As the court said in Starr v. Lee, supra [88 Cal.App. 344, 348, 263 P. 376]: 'We find authorities holding that recovery cannot be had when the evidence shows that no damage at all resulted from the breach.' The exception to the general rule to the effect that the predetermined amount of damages for the breach of an obligation is void, as that exception is expressed in section 1671 of the Civil Code does not purport to declare that an amount of liquidated damages agreed upon shall be *conclusively* presumed to be the exact figure which will adequately com-

pensate for the breach of contract. This section merely asserts that it is 'presumed to be the amount of damages sustained.' *This presumption may be rebutted by proof that no detriment whatever resulted from the breach.*" (Emphasis added.)

[8] We held in Better Food Markets v. American District Telegraph Co., 40 Cal. 2d 179, 187, 253 P.2d 10, 15, 42 A.L.R.2d 580, that the amount agreed upon as liquidated damages "must represent the result of a reasonable endeavor by the parties to estimate a fair average compensation for any loss that may be sustained". Dyer Bros. Golden West Iron Works v. Central Iron Works, 182 Cal. 588, 189 P. 445; Rice v. Schmid, 18 Cal.2d 382, 386, 115 P.2d 498, 138 A.L.R. 589; Rest.Contracts, § 339, p. 554.[4] There is nothing in the record to show that the sum of $10,000 agreed upon as liquidated damages represented a "reasonable endeavor" to estimate the actual damage to be sustained in the event of a breach nor is there any finding on the subject by the trial court. As we have heretofore pointed out, the trial court in the Tally case found that damages would be difficult of ascertainment; in the McCarthy case, it was found that such damages would not be difficult of ascertainment. In the Tally case the trial court's conclusion that liquidated damages were not recoverable was obviously based on its finding that no actual damage had been sustained; in the McCarthy case, the conclusion was based on the finding that the provision for liquidated damages was void and ineffectual because damages were not difficult of ascertainment. Because of these inconsistent findings it is impossible for us to determine which of the two theories motivated the trial court's judgment in each case and we must, therefore, reverse the judgments.

The general rule in the United States with respect to provisions for liquidated damages appears to be that the plaintiff must plead and prove that at the time the contract was entered into damages in the event of a breach of the contract would be difficult of ascertainment; that the sum agreed upon represented a reasonable attempt to ascertain what such damages would be; and that a breach of the contract had occurred. A note in 34 A.L.R. 1336, 1341, points out that "The majority of the cases hold that the amount stipulated in the contract as liquidated damages for a breach thereof, and which is regarded by the courts as liquidated damages, and not as a penalty, may be recovered in the event of a breach of the contract, even though no actual damages are suffered as a consequence of such breach" (listing cases from Arkansas, Florida, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Michigan, Minnesota, New York, Oregon, Pennsylvania, Texas, Washington, West Virginia and Canada). The following statement from 15 Am.Jur., Damages, section 263, pages 696-697, is to the same effect:

> "The majority of the cases hold that the amount stipulated in the contract as liquidated damages for a breach thereof, and which is regarded by the courts as liquidated damages, and not as a penalty, may be recovered in the event of a breach of the contract, even though no actual damages are suffered as a consequence of such breach. In many of the cases there are statements to the effect that actual damages need not be pleaded or proved in order to recover the stipulated amount. According to this view, the only evidence proper or necessary on this point is that the contract has been broken. In support of this rule it is said that the question of reasonableness is to be determined as of the time of the making of the contract—that is, in regard to any possible amount of damages which may be conceived to

4. This reasonable endeavor to ascertain, in advance, the loss which may result from a possible breach distinguishes a provision for liquidated damages from one for a penalty since the characteristic feature of a penalty is its lack of any proportionate relation to the damage which may actually stem from the breach of a contract. Muldoon v. Lynch, 66 Cal. 536, 6 P. 417; People v. Central Pacific R. Co., 76 Cal. 29, 18 P. 90; Dyer Bros. Golden West Iron Works v. Central Iron Works, 182 Cal. 588, 189 P. 445.

have been within the contemplation of the parties at that time—and that neither the intention of the parties nor the construction of the contract can depend upon occurrences happening afterward, which were not in their contemplation when the contract was made.

"Some courts, however, have held that where no damage has been sustained from the breach of the contract, the amount which the contract stipulates as liquidated damages cannot be recovered, even upon the assumption that the provision is to be regarded as one for liquidated damages, rather than a penalty, and that a mere technical breach resulting in nominal damages is not sufficient, although, in some of the cases apparently so holding at least, the real explanation of the result would seem to be that the court, in view of the lack of actual damages, regarded the provision in question as one for a penalty, although denominated by the contract itself as 'liquidated damages.'

"Under a provision construed to be a penalty nothing can be recovered for a breach of the contract where no actual damages appear."

[9] We hold that in order to recover on a contract provision for liquidated damages the plaintiff must plead and prove that at the time the contract was entered into damages in the event of a breach would be impracticable or extremely difficult of ascertainment; that the sum agreed upon represented a reasonable endeavor to ascertain what such damages would be; and that a breach of the contract had occurred. In other words, no actual damage is necessary in order to recover under a liquidated damages provision provided that the case is, in other respects, a proper one under the conditions set forth in section 1671 of the Civil Code. As we have heretofore pointed out, there is, in the case under consideration, no finding that the sum of $10,000 represented a reasonable endeavor by the parties to ascertain what the damages would be in the event of a breach, and the findings as to whether, at the time the contract was entered into, the damages would be extremely difficult or impracticable of ascertainment in the event of a breach were fatally inconsistent.

The liquidated damages provision here involved related to the goodwill of a summer resort business. As we have heretofore pointed out, it has been held that a breach affecting the goodwill of a business may cause damages which, at the time the contract was entered into, may be impracticable or extremely difficult of ascertainment. Whether or not a breach such as occurred here in the non-operating months of the summer resort was within the contemplation of the parties is an issue to be pleaded and proved on a re-trial of the actions. It appears to us that if such a breach was within the contemplation of the parties, that the sum of $10,000 might not represent a reasonable endeavor to ascertain what the damages would be in the event of such a breach and that the provision might be invalid because of the time at which the breach occurred.

Any language in Kelly v. McDonald, 98 Cal.App. 121, 276 P. 404, and Starr v. Lee, 88 Cal.App. 344, 263 P. 376, contrary to the views herein expressed is disapproved.

[10] McCarthy contends that the court erred in appointing a receiver and that the court wrongfully determined the costs and charges of such receiver. The clerk's transcript in the Tally case shows that the receiver was appointed on January 4, 1951, and that no appeal was taken from the order appointing the receiver. Such an order is appealable, Code Civ.Proc. § 963(2), and will not be reviewed on appeal from the final judgment. 22 Cal.Jur., § 61, p. 476; Weygandt v. Larson, 130 Cal.App. 304, 310, 19 P.2d 852.

Other contentions of the parties do not merit discussion.

The judgments are reversed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, SPENCE, and McCOMB, JJ., concur.

46 Cal.2d 619

Bertha J. MESSENGER, Plaintiff and Appellant,

v.

Thomas T. MESSENGER, Defendant and Respondent.

L. A. 23276.

Supreme Court of California.
In Bank.
June 6, 1956.

Wife brought action for divorce and obtained a divorce decree incorporating by reference a property settlement agreement. Thereafter the divorced wife applied for an order of execution for claimed arrearages and secured an order to show cause why divorced husband should not be held in contempt for failing to make overdue payments. The divorced husband then secured an order to show cause why payments provided for in the decree should not be reduced. The Superior Court of San Diego County, Dean Sherry, J., entered a decree adverse to the divorced wife, and she appealed. The Supreme Court, Traynor, J., held that where property settlement agreement, which was incorporated in divorce decree, was for a permanent and lasting division of all rights of husband and wife in separate as well as community property, and the wife waived all rights to future maintenance and support, except as provided in the agreement, the provisions for support and maintenance were an integral and inseparable part of the property settlement agreement, divorced husband was not thereafter entitled to have support provisions modified, even if divorced wife be deemed to have received about the same amount of property under the agreement as the divorced husband.

Judgment reversed in part and affirmed in part.

Schauer and Shenk, JJ., dissented.

Opinion, 281 P.2d 549, vacated.

1. Divorce ⇐286

In absence of conflicting extrinsic evidence as to meaning of property settlement agreement, which was incorporated by reference in divorce decree, trial court's interpretation of the agreement was not binding on the Supreme Court on appeal.

2. Divorce ⇐245(2)

Proof that divorced husband received the greater part of the community property under property settlement agreement, which was incorporated in divorce decree, would be some indication that the support provisions of the agreement were in lieu of part of the divorced wife's share of the community property, and that support provisions could not be modified.

3. Divorce ⇐245(2)

For purpose of determining meaning of property settlement agreement which was incorporated in divorce decree, the value which the parties gave to accounts receivable, which were assigned to husband under the agreement, rather than their value three years later, was the material value in determining whether divorced husband received the greater part of the community property and was not entitled to have support provisions modified.

4. Divorce ⇐245(2)

Where property settlement agreement, which was incorporated in divorce decree, was for a permanent and lasting division of all rights of husband and wife in separate as well as community property, and the wife waived all rights to future maintenance and support, except as provided in the agreement, the provisions for support and maintenance were an integral and inseparable part of the property settlement agreement, and divorced husband was not thereafter entitled to have support provisions modified, even if divorced wife be deemed to have received about the same amount of property under the agreement as the divorced husband. West's Ann. Code Civ.Proc., § 1858.

5. Divorce ⇐269(9)

Where divorced husband was twice married after the divorce, and he had no assets other than the income from his medical practice, on which an execution could be levied, and he had suffered a partial stroke necessitating loss of time from his medical practice, trial court was justified in finding that divorced husband, though in

arrears in payment of support to divorced wife, was not in contempt of court.

6. Divorce ⇐263

The trial court has discretion under statute to determine in each case whether execution is an appropriate remedy for enforcing its support order in divorce suit. West's Ann.Civ.Code, § 139; West's Ann. Code Civ.Proc., § 1007.

7. Divorce ⇐263

Where trial court found on sufficient evidence that to permit issuance and enforcement of writ of execution to enforce compliance by divorced husband with order for support of divorced wife, would discredit divorced husband professionally and impair his ability as a physician to make monthly payments to divorced wife and discharge arrearages, trial court did not abuse its discretion in conditioning the issuance of execution on noncompliance by divorced husband with order to discharge arrearages in installments. West's Ann. Civ.Code, § 139; West's Ann.Code Civ. Proc., § 1007.

James A. Moore, Oceanside, and Geo. A. Westover, San Diego, for appellant.

George C. Hadley, R. B. Pegram, Herbert J. Williams, Albert J. Day, Los Angeles, and Joseph A. Montoya, Northridge, for respondent.

TRAYNOR, Justice.

Plaintiff and defendant were married in 1936 and separated in 1950. On January 3, 1951, they executed a property settlement agreement. Thereafter plaintiff filed a complaint for divorce, and on January 8, 1951, an interlocutory decree was granted to her on the ground of extreme cruelty. The decree approved and incorporated by reference the provisions of the agreement and expressly ordered defendant to pay $500 per month "as agreed in said property settlement agreement." The final decree was entered on January 16, 1952.

In December, 1953, plaintiff applied for an order of execution for claimed arrearages of $6,700 plus interest and secured an order to show cause why defendant should not be held in contempt for failing to make the overdue payments. Defendant then secured an order to show cause why the payments provided for in the decree should not be reduced to $300 per month. The three matters were heard together, and the trial court entered judgment reducing the monthly payments and finding that defendant was not in contempt for failure to make the overdue payments. The court also concluded that an execution should not be issued against the defendant, on the grounds that he "has no properties or monies against which such execution could be successfully levied, that the only manner in which such execution could be served would be by placing a constable in charge of the daily receipts of the defendant; and, as the defendant is a professional man, this Court finds that such an action would result in considerable discredit to the defendant; and the court further believes that, if such action were taken, that the earning ability of the defendant [as a physician and surgeon] would be reduced to such a degree that it would materially affect the ability of the defendant to pay to the plaintiff the reduced alimony as set by this Court." The court ordered that the property settlement agreement be amended to provide for the payment of $375 per month, and income tax on an income of $4,500 per year instead of $500 per month and income tax on an income of $6,000 per year. It found that the amount due plaintiff from defendant to March 10, 1954, was $5,668 and ordered defendant to pay $800 on or before that date and $50 per month in addition to the reduced alimony payments to be applied on the balance due. The issuance of execution was suspended so long as defendant made these payments, but in the event of default, an execution was to issue forthwith.

Plaintiff appeals. She contends that the provisions for monthly payments and income tax payments were an integral and inseparable part of the property settlement agreement of the parties and are therefore not subject to modification.

In their agreement the parties provided:

"Whereas, the parties hereto are husband and wife, and that said parties

hereto have agreed to divide all property and property rights between them; and

"Whereas, said parties do not make any arrangement or arrangements as to any divorce proceedings by either of the parties to this agreement, leaving the determination of such action to the Court, but make and enter into this agreement for the purpose of fixing and adjusting their personal and property rights; and

"Whereas, the [husband] has represented that he has fully disclosed to the [wife] all of the community property of every kind and nature, and that the same is being and has been divided as between the parties under the terms and conditions of this agreement as hereinafter set forth.

"Now Therefore, for and in consideration of the permanent and lasting division and settlement of all their property rights of every kind and nature, whether separate or community property, they hereby mutually covenant and agree, each with the other as follows, to wit:"

Paragraphs 1 and 2 then provided for a division of the property, and in the present proceeding the trial court found that plaintiff received property worth $32,850 and that defendant received property worth $31,375.

Paragraph 3 provided "That the husband agrees to pay to the wife for her care, maintenance and support, the sum of Five Hundred ($500.00) Dollars per month, payable monthly in advance, commencing on January 3rd, 1951, receipt of which first month's alimony is hereby acknowledged, such obligation to pay to continue until the wife dies or remarries."

Paragraph 15 provided "That the husband agrees that from date hereof he will pay to the wife a sufficient amount over and above the Five Hundred ($500.00) Dollars per month alimony, herein agreed to be paid, to pay the income tax, if any, to be paid by the wife on said alimony payment. * * *"

The agreement also provided that "It is further understood and agreed that the wife waives, relinquishes, abandons, and releases all of her right, title and interest in and to any and all property which is hereinbefore agreed shall be set apart to and become the property of the husband, and to any and all property of every nature which said husband now has or that he may hereafter acquire or own, and all right to future maintenance and support from or by the said husband, except as herein otherwise expressly provided, and hereby waives, relinquishes and releases all right to inherit any property whatsoever which said husband now owns or possesses or which he may hereafter own or possess, or of which he may die seized or possessed, and all property which is hereinbefore set apart to him shall be and remain forever as between the parties hereto the separate property of the husband." A similar provision related to the husband, except that his waiver of all right to future support and maintenance was not qualified by the clause, "except as herein otherwise expressly provided."

Plaintiff's complaint referred to the $500 per month payments as alimony and prayed that the court approve the property settlement agreement, make it part of the decree, and order defendant to pay $500 per month "for the care, maintenance and support of the plaintiff, as therein agreed." The interlocutory decree approved the agreement, made it part of the decree by reference, and expressly ordered defendant to pay $500 per month "for the care, maintenance and support of the plaintiff, as agreed in said property settlement agreement." The final decree provided that "It is further ordered and decreed that wherein said interlocutory decree makes any provision for alimony" said provision "be and the same is hereby made binding on the parties affected thereby the same as if herein set forth in full, and that wherein said interlocutory decree relates to the property of the parties hereto, said property be and the same is hereby assigned in accordance with the terms thereof to the parties therein declared to be entitled thereto.

"It is further ordered adjudged and decreed, that the community property of the parties hereto is ordered divided, in accordance with the property settlement agreement approved in the Interlocutory Decree entered herein and the order for support payments as are provided for therein are hereby ratified and confirmed."

Since the final decree merely confirms the provisions of the interlocutory decree and the property settlement agreement, and since the interlocutory decree ordered that the payments be made "as agreed in said property settlement agreement," we must examine the agreement to determine whether the provisions for monthly payments and income tax payments are separable from the provisions that divide the property, or whether they are an integral and inseparable part of the division of property and therefore an inseparable part of the consideration for the property settlement. If they fall into the latter category they cannot now be modified. Dexter v. Dexter, 42 Cal.2d 36, 40–41, 265 P.2d 873; Adams v. Adams, 29 Cal.2d 621, 625, 177 P.2d 265.

In support of his contention that the provisions fall within the former category defendant stresses the fact that the monthly payments for the wife's support are expressly referred to in paragraphs 1(h),[1] 3,[2] and 15[3] as alimony and have one of the principal characteristics of alimony in that they terminate if the wife dies or remarries. Similar contentions were rejected in Dexter v. Dexter, 42 Cal.2d 36, 41, 265 P.2d 873, 876,[4] and in Fox v. Fox, 42 Cal.2d 49, 52–53, 265 P.2d 881, 883,[5] where it was pointed out that the labels adopted by the

1. "It is understood and agreed as to this policy [life insurance] that if, due to financial reverses or other reasons beyond the control of the husband, it is necessary to borrow money thereon for the purpose of paying the *alimony* hereinafter agreed to be paid by the husband, but for no other purpose, the husband may borrow on said policy for the purpose of paying said *alimony*, but for no other purpose. * * *" (Italics added.)

2. "That the husband agrees to pay to the wife for her care, maintenance and support, the sum of Five Hundred ($500.00) Dollars per month, payable monthly in advance, commencing on January 3rd, 1951, receipt of which first month's *alimony* is hereby acknowledged, such obligation to pay to continue until the wife dies or remarries." (Italics added.)

3. "That the husband agrees that from date hereof he will pay to the wife a sufficient amount over and above the Five Hundred ($500.00) Dollars per month, *alimony*, herein agreed to be paid, to pay the income tax, if any, to be paid by the wife on said *alimony* payment. * * *" (Italics added.)

4. "Plaintiff contends, however, that since the monthly payments were to terminate on her death or remarriage and were described as alimony in the prayer of her complaint, they should be so treated. She points out that if they were intended as a division of property it would have been more reasonable for the agreement to provide that they should continue until a given amount had been paid. These considerations would be more persuasive if the issue presented was whether, on the one hand, the monthly payments were solely part of a division of the community property, or, on the other hand, solely alimony. When, as in this case, however, the parties have made the provision for support and maintenance an integral part of their property settlement agreement, the monthly payments will ordinarily have a dual character. To the extent that they are designed to discharge the obligation of support and maintenance they will ordinarily reflect the characteristics of that obligation and thus have the indicia of alimony. [Citations.] On the other hand, to the extent that they represent a division of the community property itself, or constitute an inseparable part of the consideration for the property settlement, they are not alimony, and accordingly cannot be modified without changing the terms of the property settlement agreement of the parties."

5. "Plaintiff contends, however, that since the payments were labeled alimony, were to cease on her remarriage, and were subject to modification in the event of a reduction of defendant's pension, there is evidence to support the trial court's implied finding that they were solely alimony subject to modification. * * * The labels adopted by the parties are not conclusive, since the agreement must be considered as a whole. [Citations.] Moreover, as pointed out in the Dexter

parties are not conclusive and that it is not controlling that the monthly payments for support have some of the indicia of alimony.

In this case as in Fox v. Fox, supra, Dexter v. Dexter, supra, Flynn v. Flynn, 42 Cal.2d 55, 60–61, 265 P.2d 865, and Finnegan v. Finnegan, 42 Cal.2d 762, 765, 269 P.2d 873, the parties have made the provision for support an integral part of their property settlement agreement. Not only did they "enter into this agreement for the purpose of fixing and adjusting their personal and property rights" but they made the provisions for support "an inseparable part of the consideration for the property settlement," Dexter v. Dexter, supra, 42 Cal.2d at pages 41–42, 265 P.2d at page 876, by expressly agreeing that the support and maintenance provided in paragraph 3, like the division of property provided in paragraphs 1 and 2, was "for and in consideration of the permanent and lasting division and settlement of all their property rights of every kind and nature, whether separate or community property. * * *"

Moreover, as in Fox v. Fox, supra, 42 Cal.2d at page 52, 265 P.2d at page 883, the wife waived "all right to future maintenance and support from or by the said husband, except as herein otherwise provided," i. e., in paragraph 3. Her express promise not to seek alimony except as provided in the agreement could not "be abrogated without changing the property settlement agreement of the parties." Ibid. Similarly, since this waiver was part of the consideration for the husband's agreement to make the support payments, he likewise could not seek a modification thereof without changing the property settlement agreement of the parties. It is clear, therefore, that if the parties meant the maintenance and support provisions to be alimony separable from a division of the property they would not have included this waiver, see Helvern v. Helvern, 139 Cal.App.2d 819, 294 P.2d 482, for an order allowing alimony is subject to revision at any time. Hough v. Hough, 26 Cal.2d 605, 612, 160 P.2d 15.

[1, 2] In the absence of conflicting extrinsic evidence as to the meaning of the agreement, the trial court's interpretation of it is not binding on this court. Fox v. Fox, 42 Cal.2d 49, 52, 265 P.2d 881; Estate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825. The evidence offered and introduced in this case was concerned primarily with defendant's ability to pay, his various expenditures, his financial arrangements with his father, and with the money and other property the husband and wife received under the agreement. The only extrinsic evidence offered that had any bearing on the meaning of the property settlement agreement was that showing the value of the property received by the parties. Proof that defendant received the greater part of the community property would be some indication that the support provisions were in lieu of part of plaintiff's share of the community property. There are two reasons, however, why the trial court's finding that defendant did not receive the greater part of the community property does not support its conclusion that the support provisions were not part of the consideration for the division of the property and were therefore subject to modification.

[3] (1.) That finding was based on a re-evaluation of the accounts receivable assigned to defendant under the agreement. In the agreement the parties estimated the value of the accounts at $15,000. The trial court estimated their value at $5,000. It is obvious that for the purpose of determining the meaning of the agreement, the value that is material is the value estimated by the parties in their agreement, not the value estimated by the court three years later.

[4] (2.) Even if the evidence had showed that when the parties made their agreement, they understood that plaintiff would receive property worth $32,850 and defendant would receive property worth $31,375, it would not support the conclusion that the payments were subject to modifica-

case, to the extent the monthly payments are designed to discharge the obligation of support and maintenance, they will ordinarily have some of the indicia of alimony."

tion. The agreement was for a "permanent and lasting division" of all their rights in separate as well as community property. As stated in Dexter v. Dexter, supra, 42 Cal.2d at page 43, 265 P.2d at page 877, "[A]t the time a property settlement is made, the parties may be uncertain as to which of their property is community rather than separate, and they will ordinarily not know how the court in the divorce action will find the facts or how it would, in the absence of an acceptable agreement, exercise its discretion in dividing the property and awarding alimony. The amicable adjustment of these doubtful questions with respect to the property and support and maintenance rights of the parties may alone supply sufficient consideration to support their entire agreement. [Citation.] Thus in the present case, the parties recited that they desired to settle their property and support and maintenance rights 'by friendly agreement, instead of resorting to court for said purpose.' Moreover, since plaintiff secured her divorce on the ground of extreme cruelty, had the parties not settled their rights by agreement, the court could in its discretion have awarded plaintiff all of the community property and less alimony than she received under her agreement. In such case, however, the alimony would be subject to reduction in the event of changed circumstances. Plaintiff was entitled to agree instead to an equal division of the community property in exchange for support and maintenance payments that could not be reduced. Accordingly, the fact that the community property was divided equally has no bearing on the validity of the provision of the agreement whereby both parties waived all rights to support and maintenance other than as provided therein. [Citations.]" In the present case the very fact that the finding of the respective values was based on conflicting evidence indicates that the parties were in doubt as to the value of their property and that they meant what they said when they provided that both the division of their property and the monthly payments were "for and in consideration of the permanent and lasting division and settlement of all their property rights of every kind and nature. * * *" Moreover, in the absence of the agreement the court could have awarded plaintiff all of the community property and less alimony, and just as in the Dexter case, she was entitled to agree instead to a substantially equal division of the community property in exchange for support and maintenance payments that could not be reduced.

When as in this case the parties have clearly expressed their "purpose of fixing and adjusting their personal and property rights," have provided that the provision for alimony is "for and in consideration of the permanent and lasting division and settlement of all their property rights of every kind and nature," and the wife has waived "all right to future maintenance and support * * *, except as herein otherwise expressly provided," the conclusion is inescapable that they have made the provisions for support and maintenance an integral and inseparable part of their property settlement agreement. With such conclusive evidence of integration, the provisions for support and maintenance or alimony would be subject to modification only if the parties expressly so provided. See Flynn v. Flynn, supra, 42 Cal.2d 55, 61, 265 P.2d 865, and cases cited. The court may not, however, "insert what has been omitted", Code Civ.Proc. § 1858, and thereby abrogate the clearly expressed agreement of the parties.

[5] Plaintiff contends that the trial court erred in failing to find defendant in contempt of court and in conditionally suspending the issuance of a writ of execution. There was evidence that defendant had been twice married after his divorce from plaintiff, that he had no assets other than the income from his medical practice upon which an execution could be levied, and that he had suffered a partial stroke necessitating loss of time from his practice. On the basis of this evidence and evidence of defendant's income and expenditures the trial court was justified in finding that defendant, "while in arrears, is not in contempt of Court," and that "the financial obligations of said defendant have been of such a nature so as to have prevented the payment of the sum of $500.00 each and every month."

With respect to the question of execution, both parties rely on Lohman v. Lohman, 29

Cal.2d 144, 173 P.2d 657, and Di Corpo v. Di Corpo, 33 Cal.2d 195, 200 P.2d 529, dealing with the right to execution on an installment judgment under the provisions of section 681 of the Code of Civil Procedure. It was stated in the Lohman case that "Although issuance of execution upon a judgment requiring monthly payments may be denied upon equitable grounds, proof that the installments have accrued within five years[6] establishes a prima facie right to execution and the burden is cast upon the judgment debtor to establish facts justifying an order denying the writ", 29 Cal.2d at page 150, 173 P.2d at page 660, and in the Di Corpo case that "Thus, upon proof by plaintiff that installments have accrued within five years, the burden was upon defendant to establish facts justifying an order recalling the writ." 33 Cal.2d at page 201, 200 P.2d at page 532. We have concluded, however, that it is unnecessary to determine whether defendant has met the burden referred to in these cases.

[6, 7] Prior to 1951, section 139 of the Civil Code provided that "Where a divorce is granted for an offense of the husband, the Court may compel him to provide for the maintenance of the children of the marriage, and to make such suitable allowance to the wife for her support, during her life, or for a shorter period, as the Court may deem just, having regard to the circumstances of the parties respectively * * *." An order for support payments under this section was enforceable by execution pursuant to section 1007 of the Code of Civil Procedure, which provides, "Whenever an order for the payment of a sum of money is made by a Court, pursuant to the provisions of this Code, it may be enforced by execution in the same manner as if it were a judgment." In 1951, however, section 139 was amended, and in addition to other changes not relevant to this proceeding, a provision was added that orders thereunder "may be enforced by the court by execution or by such order or orders as in its discretion [the trial court] may from time to time deem necessary." Under this provision the trial court now has discretion to determine in each case whether execution is an appropriate remedy for enforcing its order. In the present case the court found on sufficient evidence that to permit the issuance and enforcement of a writ of execution would discredit defendant professionally and impair his ability to make the monthly payments and discharge the arrearages. Accordingly, it did not abuse its discretion in conditioning the issuance of execution on defendant's noncompliance with its order to discharge the arrearages in installments.

To the extent that the judgment modifies the provisions of the property settlement agreement and the interlocutory and final decree based thereon it is reversed. In all other respects the judgment is affirmed. Each side shall bear its own costs on this appeal.

GIBSON, C. J., and SPENCE and McCOMB, JJ., concur.

CARTER, Justice.

I concur in the conclusion reached in the majority opinion. I do not, however, agree with the reasoning leading thereto.

I said in my dissent in Dexter v. Dexter, 42 Cal.2d 36, 46, 265 P.2d 873, 879, that this court "* * * had an opportunity to clarify the law so that stability might be given to property settlement agreements and agreements for support and maintenance. Not only do the majority holdings in these three cases [Fox v. Fox, 42 Cal.2d 49, 265 P.2d 881; Dexter v. Dexter, 42 Cal.2d 36, 265 P.2d 873; Flynn v. Flynn, 42 Cal.2d 55, 265 P.2d 865] not settle the law, but they add untold confusion." I said in my dissent in the Flynn case, 42 Cal.2d 55, 62, 67, 265 P.2d 865, 871, that the holding of the majority there was an effective trap designed to catch both wary and unwary attorneys who were honestly and conscientiously trying to protect their clients' interests, and that it was "absolutely impossible for attorneys to know whether this court will, years later, determine that there was an incorporation [of the agreement in the judgment of divorce], or *order* one whether

6. Code of Civil Procedure section 681 was amended in 1955 to provide for a 10-year instead of a 5-year period.

or not it was intended at the time of the interlocutory decree."

The main, and most vicious, error in this and in the Fox, Dexter and Flynn cases is the holding that the agreement of the parties may now be scrutinized to determine what the parties intended when the agreement was executed—whether they intended monthly payments as an integral part of a property settlement agreement or whether they really intended such periodic payments to be alimony and therefore subject to modification later by that court or by another court. Even one later determination as to the intent of the parties is not sufficient under the holdings in these cases—if an appellate court so desires it may decide that the parties intended the payments to be one or the other, and so on ad infinitum.

In the case under consideration, we have the majority reversing the judgment of the trial court insofar as it modified the provisions of the " 'property settlement agreement.' " The trial court had concluded that the monthly payments provided for were alimony and therefore subject to modification. The majority here concludes that the monthly payments were an integral part of the property settlement agreement and therefore *not* subject to modification. The following statement from the majority opinion leads the way to endless litigation between these parties and others in the same situation: "In the absence of conflicting extrinsic evidence as to the meaning of the agreement, the trial court's interpretation of it is not binding on this court. Fox v. Fox, 42 Cal.2d 49, 52, 265 P.2d 881; Estate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825." The error in permitting this point to be litigated and re-litigated when the parties obviously intended a final and complete determination of their property rights leads to this result: The trial court here concluded that the monthly payments were alimony; the District Court of Appeal concluded that the payments were an integrated part of a property settlement agreement and this court is now also so holding. By its holding, the case is now set at large and there must be a retrial of the matter. On the new trial, other evidence may be forthcoming which will have a bearing on what the parties intended when they entered into the agreement. If new evidence is introduced which shows that the parties thought they were providing for alimony or support and maintenance payments for the wife, the trial court may again decide that such payments were alimony and subject to modification; the District Court of Appeal might affirm the holding of the trial court, and it is highly probable that this court might again conclude that such payments were an integrated part of a property settlement agreement and again set the case at large for a new trial. This one issue has already been passed upon by the courts of this state four times—once when the divorce was granted; again by the trial court when the wife applied for an order of execution; next by the District Court of Appeal; and next, but far from last, by this court. This interminable and expensive litigation all stems from the holding of a majority of this court that the question of what the parties intended when they entered into their agreement is one of fact which may be relitigated at some future time.

I have been advised by trial judges from all over the state that they find the rules set forth in the Fox, Dexter and Flynn cases extremely difficult, if not impossible, to apply in the various situations presented to them in actions for divorce. So long as this condition exists, this court will have the added burden of endeavoring to correct the honest errors made by trial courts in this type of case. This situation could be very easily remedied if this court would formulate definite understandable rules to guide lawyers and the judges of the numerous superior courts of this state.

This court has not seen fit to correct its previous errors but, on the contrary, added to the general confusion with its holding in the case under consideration. It is at once apparent from a glance at the signatures on the opinions in all of these cases that trial judges and attorneys are not the only ones who are confused as to the holdings in the Fox, Dexter and Flynn cases. Here, we have Mr. Justice SHENK, who signed Mr. Justice Traynor's opinions in the Fox, Dexter and Flynn cases, dissenting from his opinion herein. In passing, it

should be mentioned that, in my opinion, Mr. Justice SHENK in his dissent correctly applies the rules set forth in the Fox and Flynn cases that the trial court could take extrinsic evidence in aid of its interpretation of the agreement and that its conclusion based thereon was supported by the evidence and should not be disturbed on appeal.[1]

Civil Code sections 158, 159 and 175 all authorize contracts between husband and wife. Under the statutory law it would be a very simple matter for this court to lay down understandable and workable rules of law applicable to agreements for property settlement, alimony, and support and maintenance in divorce and separate maintenance cases. Such rules would permit lawyers properly to advise their clients, would permit husbands and wives seeking divorce who are honestly and intelligently endeavoring to make a division of their property, and arrangements for support and maintenance, to do so without fear that such arrangements would be later changed by a trial, or an appellate court. There appears to me to be no sound reason why contracts between such parties should not, in the absence of fraud or overreaching, be given the same stability and dignity accorded to contracts entered into between persons not so related.

The rule of law I should like to see in effect in California in this type of case is very simple and easy of application. Where the parties have entered into an agreement for a division of their property, or where one has agreed to give, and the other to receive, periodic payments in lieu of a division of their property, or in conjunction with a division of their property, or for support and maintenance, or alimony, the agreement so entered into if approved by the court as fair, just and equitable and not the result of any fraud or overreaching, should be the sum total of the parties' rights and liabilities and should not be subject to modification unless the parties have expressly provided for a later modification, or unless a subsequent modifying agreement is executed by them.

In a divorce action, when the parties have entered into an agreement involving their property rights, the court should inquire into the facts surrounding the execution thereof to ascertain whether there has been any fraud or overreaching. The court should also inquire into the terms and provisions of the agreement to determine whether it is fair, just and equitable. When the court approves the contract as fair, just and equitable and determines that there has been no fraud or overreaching, the matter should be forever concluded and the parties bound by the terms of their agreement.

Stated simply, the foregoing proposed rules mean only this: That the parties have entered into an agreement which the court has approved as fair and equitable and not the result of fraud or overreaching; that such agreement should be accorded the same finality and dignity as contracts entered into between strangers.

If the above rules were in effect in California, the problem of incorporation would also be a very simple one. In my opinion there is no incorporation of an agreement in a divorce decree unless that agreement has been copied therein in *haec verba*, or its substance is stated therein, or unless a copy of the agreement is attached physically to the decree of divorce and referred to as being a part thereof. When there has been an effective incorporation of the agreement in the judgment, the agreement is merged therein and the effect is to make the remedy one upon the judgment rather than by separate action on the agreement itself. Incorporation should have absolutely no effect so far as the parties' agreement is concerned. The agreement is a contract and its terms should govern. If the decree orders compliance with the terms of the agreement which has been incorporated in the judgment, the only result should be in the form of remedy available to the party seeking to enforce the judgment. Plummer

1. In the Dexter case it should be remembered that the majority, while holding that the trial court could determine the character of the monthly payments involved, affirmed the trial court's action in sustaining defendant's objection to the introduction of evidence on that issue.

v. Superior Court, 20 Cal.2d 158, 124 P.2d 5.

It is at once apparent that if the above rules had been applied in the instant case, we would not have the chaos and confusion here present. Here it is evident that the parties intended a *final* settlement of their property rights at the time the agreement was executed. The holding of the majority here destroys the effectiveness of the agreement solemnly entered into by the parties and leaves their property and rights in a state of uncertainty and confusion.

I would therefore reverse the judgment and order.

SHENK, Justice (dissenting).

I am unable to agree with that portion of the opinion which holds that the alimony payments to the wife were integrated in the property settlement agreement and were therefore not subject to modification as provided in section 139 of the Civil Code.

A property settlement agreement should be construed as any other agreement. Here the parties were dealing at arm's length and were represented by counsel in the preparation of the agreement. They are presumed to mean what they said in that instrument and the words they have used are to be taken in their ordinary and legal meaning. Here both meanings are the same. The problem in each case is to ascertain the intention of the parties by the language they have used. The parties set about to settle a "permanent and lasting" division of their "property rights" whether "separate or community." Permanent alimony payments do not fall within either category and as a general rule must be dealt with subject to the power of the court to modify them in accordance with the provisions of section 139 of the Civil Code. Where in the agreement there is a clear intention to waive them or to integrate and settle them as part and parcel of all marital and property rights, the right of the parties to so contract is recognized. Here, as properly found by the court, there was no such intention. The parties repeatedly and with obvious design used the word "alimony" in their agreement. That word ordinarily means an allowance made to the wife by her husband for her support after a dissolution of their marriage by divorce. It is used frequently in our statutes as incorporated in our official codes. For example, it is specifically employed in sections 137, 140 and 142 of the Civil Code. In our decisional law it has been used repeatedly in its ordinary sense. It must be assumed that it was used in its ordinary sense throughout this proceeding. It was first used by the parties in their agreement, which provides that the defendant shall pay to the plaintiff $500 per month as "alimony" for her "support and maintenance" and provides that these payments shall continue "until the wife dies or remarries." Then in her complaint for divorce the wife asked for an award of "alimony" in this same sum. She prayed that the property settlement agreement be approved and made a part of the decree and that the court order the defendant to pay her $500 per month for her care, maintenance and support "as therein agreed." The interlocutory decree approved the property settlement agreement and incorporated it by reference in the judgment and ordered that the defendant pay to the plaintiff $500 per month for her "care, maintenance and support * * * as agreed in said property settlement agreement * * * until the plaintiff dies or remarries * * *." The word "support" as used in section 139 of the Civil Code of course means alimony. The final decree of divorce specifically states that "wherein said interlocutory decree makes any provision for alimony * * * [it] is hereby made binding on the parties affected thereby as if herein set forth in full." Those decrees have long since become final.

The use by the parties and by the court of the descriptive and meaningful term and phrases "alimony", "care, maintenance and support" and "until the plaintiff dies or remarries" should not be disregarded and should be determinative in support of the findings and conclusions of the trial court in the present proceeding.

But this court now says, as a matter of law, that the parties did not mean what they said when they used the word "alimony" in their agreement, and that the trial court did not mean what it said in its di-

vorce decrees, and that the findings and conclusions in the present proceeding are without support in the record. If the agreement was without ambiguity, as both parties contend, the trial court had the power in the first instance to declare from its language alone the intention of the parties, and its determination should not be set aside unless it is unreasonable. A construction of the agreement on that theory alone is reasonable. However, each party contends that the agreement is unambiguous in his or her favor, and this is one test of ambiguity. The fact that the parties themselves each ascribe different meanings to the words used indicates the existence of an ambiguity. Chastain v. Belmont, 43 Cal. 2d 45, 51, 271 P.2d 498; California Employment Stabilization Comm. v. Walters, 64 Cal.App.2d 554, 559, 149 P.2d 17.

Notwithstanding her contention that the agreement is unambiguous in her favor the plaintiff at the hearing of the present proceeding requested the court to take extrinsic evidence to ascertain the intention of the contracting parties as to the alimony payments. In so doing she was met by the construction of the agreement in the prior divorce proceedings to the unmistakable effect that alimony was not integrated in the agreement. However in compliance with her request the trial court took extrinsic evidence. This it had the right to do in aid of the interpretation of the agreement when ambiguity is present or questionable. Tuttle v. Tuttle, 38 Cal.2d 419, 421, 240 P. 2d 587; Flynn v. Flynn, 42 Cal.2d 55, 60, 265 P.2d 865; Fox v. Fox, 42 Cal.2d 49, 52, 265 P.2d 881.

Having before it the terms of the agreement, the divorce decrees and the extrinsic evidence the trial court found and concluded that alimony as such was not intended to be integrated in the agreement and was not affected by the provision therein waiving "all right to future maintenance and support * * * except as herein otherwise provided." The exception could have reference only to the alimony which is "otherwise provided." In my opinion the record fully supports the findings and the conclusion of the trial court that the alimony payments were modifiable.

I would affirm the judgment.

SCHAUER, Justice (dissenting).

Husband and wife are as free as other competent persons to contract with each other. (Civ.Code, §§ 158, 159.) There is no reason why they cannot enter into a property settlement agreement which includes a provision for alimony, as such, which shall be subject, within agreed limits, to control by the court. For example, the parties could agree to a maximum limit or to a minimum limit or to both maximum and minimum limits, or they could include a cost-of-living sliding scale, the exact amount of contributions in each case to be fixed by the court if the parties failed to agree. They could also provide for security to guarantee maximum payments or they could agree that the court might order complete termination of alimony upon the showing of the occurrence of some casualty.

A contract made by competent parties, and valid under the law of contracts, does not for some mysterious reason become subject to alteration in or disregard of its terms merely because the contracting parties are or were husband and wife. But when the contract by its terms provides for the payment of alimony the ordinary meaning of the word suggests that the amount of alimony shall remain subject to control of the court unless that primary meaning is expressly negated or limited by the contract. Changing the amount of alimony payments obviously is not an alteration of the contract where the contract provides for "alimony" and does not prohibit such changes.

Here, I cannot hold that as a matter of law the contract is not subject to the interpretation given it by the trial court. That contract was not in truth made a part of the decree of divorce. The majority opinion states that "The decree approved and *incorporated by reference* the provisions of the agreement and expressly ordered defendant to pay $500 per month 'as agreed in said property settlement agreement.'" (Italics added.) But, as I have heretofore pointed out (Flynn v. Flynn (1954), 42 Cal. 2d 55, 61–63, 265 P.2d 865), the simple fact is that an agreement cannot be made a part of a judgment unless it is in truth incorporated in the judgment so that when the

judgment is copied in the judgment book the whole of the judgment, necessarily including the agreement which is a part of it, is set forth word for word.

" 'In no case is a judgment effectual for any purpose until entered.' (Code Civ. Proc. § 664.) To enter a judgment means to copy it in the 'judgment book' so that it becomes a permanent and public record (see Code Civ.Proc. § 668), so that he who reads may know its content. Any portion of a judgment not entered in the judgment book would be ineffectual for any purpose. If the clerk by error omitted to enter any part of a judgment which had been filed, the error of the ministerial officer could be corrected; but if he has performed his duty and the judgment as entered is truly the judgment as rendered, and that judgment has become final, then neither this court nor any other court or person has power to add words to the language of that judgment." (Flynn v. Flynn, supra.)

Inasmuch as the agreement was not incorporated in the decree, the trial court's determination in the light of the entire record that the order for payment of $500 monthly was in the nature of an award of alimony, should be upheld.

I would affirm the judgment.



46 Cal.2d 540

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

James MERKOURIS, Defendant and Appellant.

Cr. 5745.

Supreme Court of California.
In Bank.
May 25, 1956.

As Modified on Denial of Rehearing
June 20, 1956.

Defendant was convicted of first degree murder. The Superior Court, Los Angeles County, Charles W. Fricke, J., rendered judgment imposing the death penalty, and defendant appealed automatically. The Supreme Court, Carter, J., held that trial court abused its discretion in failing to try issue of defendant's sanity at commencement of trial and permitting defendant, over his counsel's implied objection, to withdraw his plea of not guilty by reason of insanity after return of verdict, in view of doubt created in court's mind as to defendant's sanity by court-appointed psychiatrist's uncontradicted affidavit that defendant was medically and legally insane at times of his examination by affiant and commission of alleged crime.

Judgment reversed.

Spence, J., Gibson, C. J., and Shenk, J., dissented.

1. Criminal Law ⇐625

Ordinarily, question whether a doubt has arisen as to defendant's sanity, so as to require trial court to order determination of such question by court or jury trial, is for trial judge to determine. West's Ann. Pen.Code, § 1368.

2. Criminal Law ⇐1148

The trial judge's conclusion as to whether a doubt has arisen as to defendant's sanity, so as to require order for determination of such question by court or jury trial, may properly be disturbed on appeal only where such a doubt appears as matter of law or trial judge's discretion in determining question of its existence has been abused. West's Ann.Pen.Code, § 1368.

3. Mental Health ⇐432

An accused whose sanity is in question should be deemed sane for purpose of being tried, if he is capable of understanding nature and object of proceedings against him and can conduct his defense in rational manner, though his mind may be deranged or unsound on some other subject. West's Ann.Pen.Code, §§ 1367, 1368.

4. Criminal Law ⇐625

Superior court judge's statement that he thought court would be compelled to accept defendant's plea of not guilty of murder because of insanity after reading psychiatrist's affidavit, presented before commencement of trial, that defendant was

medically and legally insane at time of trial, as well as when alleged crime was committed, and being told that defendant did not want such a plea entered, and court's appointment at same time of three other psychiatrists to examine defendant, showed, as matter of law, that there was a doubt in court's mind as to defendant's sanity within statute requiring court in such case to order determination of that question by court or jury trial. West's Ann.Pen.Code, § 1368.

5. Criminal Law ⇐625, 1166(1)

When a doubt of defendant's sanity at time of trial for offense charged appears on face of record as matter of law, trial judge's failure to order determination of such question by court or jury trial is abuse of discretion resulting in miscarriage of justice, so as to require reversal of conviction. West's Ann.Pen.Code, § 1368.

6. Criminal Law ⇐625

Conflict between three court-appointed psychiatrists' reports that defendant was sane at time of murder trial, as well as when alleged crime was committed, and another independent psychiatrist's affidavit that defendant was medically and legally insane when examined by affiant and when crime was committed, was sufficient to make question of his sanity one of fact, which should have been tried by court or jury before proceeding to murder trial. West's Ann.Pen.Code, §§ 1367, 1368.

7. Criminal Law ⇐625

In murder prosecution, Superior Court abused its discretion in failing to try issue of defendant's insanity at commencement of trial, after reading psychiatrist's affidavit that defendant was medically and legally insane when examined by affiant and at time of commission of alleged crime, and in permitting defendant, over his counsel's implied objection, to withdraw his plea of not guilty by reason of insanity after jury returned verdict of conviction, though defense counsel did not offer such affidavit at commencement of trial so as to obtain trial on such issue before murder trial, as court must order inquisition on its own motion, if doubt arises as to defendant's sanity at any time. West's Ann.Pen.Code, § 1368.

8. Criminal Law ⇐625

Defendant's failure to plead his insanity at commencement of trial is not controlling on question of trial court's duty to order sanity inquisition, and such duty is not conditioned on a motion by defendant in reliance on code provision for trial of question of defendant's sanity. West's Ann. Pen.Code, § 1368.

9. Criminal Law ⇐625, 1166(1)

Where facts show as matter of law that a doubt as to defendant's sanity must or should have arisen at commencement of trial, trial judge's failure to decide that such a doubt had arisen and then order submission of question of defendant's sanity to jury constitutes omission to exercise a jurisdictional duty, with resulting prejudice to defendant in his substantial rights. West's Ann.Pen.Code, § 1368.

10. Attorney and Client ⇐62, 88

An attorney of record has exclusive right to appear in court for his client and to control court proceedings, so that neither client nor another attorney can be recognized by court in conduct or disposition of case.

11. Criminal Law ⇐286

Where defense counsel desired to proceed with murder trial on defendant's plea of not guilty by reason of insanity and a doubt existed as to defendant's sanity, trial court abused its discretion in permitting defendant personally to withdraw such plea after jury returned verdict of conviction. West's Ann.Pen.Code, § 1368.

12. Criminal Law ⇐365(1), 371(4, 12), 372(4), 673(5)

In prosecution for murder of defendant's former wife, evidence as to death of her second husband, allegedly killed by defendant in same manner and at approximately same time, showed more than merely defendant's criminal disposition and was properly admitted as part of res gestae or as helping to disclose his motive, intent or common plan or scheme, where jury was properly instructed concerning limited purpose for which evidence was received.

13. Criminal Law ⇐633(1)

A trial judge owes duty to preserve order of court and see that all persons, in-

cluding defendant, indulge in no act or conduct calculated to obstruct administration of justice.

14. Criminal Law ⇐637

A trial court has right to use reasonable restraint of defendant in order to conduct trial in orderly and dignified manner.

15. Criminal Law ⇐637

Where defendant interrupted examination of state's witness in murder trial by stating that judge was conducting trial in prejudicial manner, calling him a "stupid old fool," and stating that he had not learned anything and had a bungling police department and unscrupulous prosecutor, judge was not guilty of prejudicial misconduct in stating that he would order defendant gagged, if he caused any further disturbance.

16. Homicide ⇐158(1, 4)

In murder prosecution, defendant's threats against deceased before homicide are admissible in evidence to show malice, but defendant's threats against another person are admissible only under circumstances showing some connection with injury inflicted on deceased.

17. Homicide ⇐156(2), 158(4)

In prosecution for murder of defendant's former wife, police inspector's testimony as to contents of destroyed letters, written by defendant to deceased before homicide, accusing her of being a sexual degenerate, and to deceased's second husband, allegedly killed by defendant at approximately same time, telling him not to worry about his wife's sexual degeneracy because he would not be around long, was properly admitted, as letter to former wife was malicious and that to second husband a threat because of his marriage.

18. Criminal Law ⇐398(2)

In murder prosecution, secondary evidence of contents of letters written by defendant before homicide to decedent and her husband, allegedly killed by defendant at approximately same time, through testimony of police inspector, who first testified as to his destruction of letters, was properly admitted. West's Ann.Code Civ.Proc. § 1855.

19. Criminal Law ⇐398(2)

In prosecution for murder of defendant's former wife, defendant's argument concerning remoteness in time of letters written by him to decedent and her second husband, allegedly killed by defendant at approximately same time, and such spouses' deaths, went to weight of secondary evidence of contents of letters rather than admissibility thereof.

20. Criminal Law ⇐1036(1)

In murder prosecution, defendant, making no objection to admission in evidence of a recording of conversation with him by police officer in state to which he went to extradite defendant after his arrest therein, and copy of such recording, made by officer on another type of machine after returning to California, could not complain of playing to jury of such copy on his appeal from conviction.

21. Criminal Law ⇐398(1)
Witnesses ⇐257

In murder prosecution, admission in evidence of notes, used by police officer to refresh his memory while testifying for state, and written transcription of tape recording of his conversation with defendant, was not error, where writings were marked for identification and court informed all attorneys that they might see and use them. West's Ann.Code Civ.Proc. § 2047.

22. Homicide ⇐22(1)

To constitute "lying in wait" within statute declaring murder perpetrated by lying in wait first degree murder, elements of waiting, watching and concealment must be present. West's Ann.Pen.Code, § 189.

See publication Words and Phrases, for other judicial constructions and definitions of "Lying in Wait".

23. Homicide ⇐308(3)

In prosecution for murder of defendant's former wife, evidence that defendant waited in his automobile, parked near decedent's shop, and watched it at certain times on eleven days ending two days before day of homicide, did not justify "lying in wait" instruction given jury by trial court, in absence of evidence that defendant made any attempt to conceal himself or to keep presence near shop secret, as killing was not

accomplished through defendant's watchful waiting in automobile and did not follow on heels of such waiting. West's Ann.Pen. Code, § 189.

24. Homicide ⇐340(2)

In murder prosecution, trial court's giving to jury of "lying in wait" instruction, not justified by evidence, was prejudicial error warranting reversal of conviction of first degree murder, where question of premeditation was not further involved. West's Ann.Pen.Code, § 189.

25. Criminal Law ⇐784(1)

In murder prosecution, trial court erred in refusing defendant's requested instruction that if evidence was susceptible of two reasonable constructions or interpretations, one of which pointed to defendant's guilt and the other to his innocence, jury must adopt interpretation admitting of innocence, where state's evidence was entirely circumstantial and warranted reasonable inferences of either guilt or innocence.

26. Criminal Law ⇐561(1)

The prosecution must prove defendant's guilt of crime charged beyond reasonable doubt, so that he is entitled to acquittal, if evidence is equally balanced.

27. Criminal Law ⇐784(1)

In murder prosecution, trial court erred in refusing defendant's offered instruction that if evidence was susceptible of two reasonable constructions or interpretations, one of which pointed to defendant's guilt and the other to his innocence, juror must adopt interpretation admitting of innocence, on grounds that instruction virtually said that defendant is entitled to verdict of acquittal when evidence is equally balanced and was in conflict with reasonable doubt instruction; offered instruction being correct statement of applicable law.

Morris Lavine and P. Basil Lambros, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

CARTER, Justice.

Defendant, James Merkouris, was charged by information[1] with the murder of Despine Forbes, his former wife. He pleaded not guilty, and not guilty by reason of insanity.[2] The jury returned a verdict of first degree murder, without recommendation, based entirely upon circumstantial evidence. Defendant's motion for a new trial was denied and judgment was thereafter pronounced and the death penalty imposed. The appeal is automatic. Pen.Code, § 1239(b).

Defendant and Despine were married in Michigan in 1944. They moved to Los Angeles where they separated in February, 1945. Defendant divorced Despine in Michigan in May, 1945. Despine was married to Robert Forbes in September, 1946, in Los Angeles. Robert, a former police officer, and Despine went into the ceramics business at 5956 West Boulevard in Los Angeles.

In the summer of 1948, Inspector Wood of the United States Post Office, received a telephone call from a man who identified himself as Robert Forbes. Inspector Wood testified that the person identifying himself as Robert Forbes made a complaint involving a violation of postal regulations as a result of which he went to the ceramics shop and interviewed Robert Forbes. Forbes directed Inspector Wood to go to the home of Despine's mother where he picked up three letters in envelopes. The envelopes were postmarked at Los Angeles and two of them were addressed to Mr. Forbes and one to Mrs. Forbes; the letters were signed "Jim Merkouris" or "Jim Merkery." The letters accused Mrs. Forbes of being a sexual degenerate and told Mr. Forbes not to worry about it because he would not be around long. As a result of

1. Defendant was charged in another information with the murder of Robert Forbes, husband of Despine. The district attorney elected to go to trial only on the information charging the murder of Despine.

2. Defendant, after the verdict was returned, requested permission to withdraw this plea.

Both of these points are now urged as reasons why this court should reverse the judgment and will be hereinafter discussed.

the action taken, defendant was indicted in Michigan for sending obscene matter through the mails, pleaded guilty, was fined $150 and placed on probation for two years. After the statute of limitations had run in 1951, Inspector Wood destroyed the letters. Inspector Wood testified from his recollection of the matter.

Another officer testified that Forbes had told him he was trying to get a permit to carry a gun because Despine's "ex-husband" had been telephoning them and writing letters and that he was afraid of the man.

In 1953, defendant and one Jerry Pappos ran a restaurant in Detroit, Michigan for about three weeks. During that time, Mr. Pappos went to the restaurant one morning and found a box with two guns in the bottom of the cigarette case. One of the guns had a cylinder on it similar to that on a Colt .38, but they were bigger. When he asked defendant about the guns, defendant said they belonged to a friend of his. Mr. Pappos told the defendant to get rid of them and defendant said "soon I get the guy I get them out." The guns disappeared shortly thereafter. When the business was broken up, Mr. Pappos bought defendant's interest by buying defendant a car in his, Pappos', name, and making the payments thereon. The car was a black 1953 Pontiac hard-top.

The record shows that defendant, using the name "Jerry Pappas" registered at a hotel in Los Angeles on September 3, 1954; that he was driving a black 1953 Pontiac with Michigan license plates. Defendant checked out of the hotel on September 8, 1954.

Customarily, Robert Forbes took Despine to the ceramics shop and then took their daughter to the home of Despine's mother where she was cared for during the day. Almost every day, Robert would park his car on West Fifty-Ninth Place, go down the alley and into the back of the ceramics shop. On the morning of September 20th, a witness testified that he saw Robert open a window of the ceramics shop at about 9:10 or 9:15; at from 9:15 to 9:20 on the same morning, Robert took the daughter to Despine's mother's home where he was given a bowl of mush to take to Despine. Sometime between 9:00 and 10:00 the morning of the 20th, Robert was seen to park his car on Fifty-Ninth Place and go toward the back of it as if to go down the alley.

Mr. and Mrs. Miner operated a service station at 5924 West Boulevard in Los Angeles and lived in a house on an adjoining lot. The service station was open from 6:30 a. m. until 7:00 p. m. every day except Sunday. On September 7, 1954, the Miners noticed a muddy Pontiac parked in the vicinity of a telephone pole on West Boulevard facing south in the direction of Fifty-Ninth Place between nine and ten in the morning; a man was sitting behind the wheel in the car. On the same day, at about 4:00 or 4:30 p. m., the Miners noticed the same car parked in the same place with the same man behind the wheel. Mr. Miner was able to read the word "Michigan" on the license plate. On each of the days from September 7th through the 18th, with the exception of Sunday, the 12th, the Miners saw the same car, with what appeared to be the same man, parked either by the telephone pole on West Boulevard or on Fifty-Ninth Place by the stop sign, headed east toward West Boulevard. The man's head, when he was parked on West Boulevard, appeared to the Miners to be facing south on West Boulevard and at times he appeared to be looking at the service station. When the man was parked on Fifty-Ninth Place west of West Boulevard, he appeared to Mrs. Miner to be looking in the direction of the service station or straight ahead. On September 14, 1954, Mr. Miner became suspicious and called the car to the attention of a sergeant of the Police Department. The sergeant, who was in sport clothes, off duty, and a customer of the Miners, drove around behind the suspect car and ascertained that the license plate read AA 6930 Michigan. He wrote the number on the back of an envelope and gave it to the Miners. The sergeant could not positively identify the defendant as the man he had seen in the car. At one time, Mrs. Miner saw the man out of the car walking north toward a flower shop on the corner of Fifty-Ninth

Place. Mrs. Miner identified the defendant as the man in the car. The Miners were both familiar with the ceramics shop owned by the Forbes and knew both Despine and Robert.

About 9:15 a. m., September 20, 1954, Mr. Miner saw the same Pontiac, with the same man in it, going west on Fifty-Ninth Place. After making the boulevard stop on West Boulevard, the car turned south and passed from his sight; within five minutes thereafter he saw the man who had been driving the Pontiac walking around the apartment house and then east on Fifty-Ninth Place toward the alley. The man turned his head and he and Mr. Miner stared at each other; the man turned to his right at the alley and disappeared into the alley. The man was identified by Mr. Miner as the defendant.

About 9:15 a. m., September 20, 1954, Mrs. Simons was hanging up clothes in an areaway between the ceramics shop and an apartment house when she saw a strange man enter the areaway from West Boulevard and go into the first entryway (Simons' entry) in the building; she saw him lean out of the entryway and look toward her; when she started toward him he ran out of the west entrance the way he had come. Mrs. Simons identified defendant from a picture of him and said that she recognized the lower part of his face since the man she had seen in the areaway had his hat pulled down over his eyes. Sometime during the morning, she heard four thumping, thudding sounds coming from within the ceramics shop; the sounds were different from those she had previously heard coming from the shop.

Around 9:45 a. m., September 20, 1954, Paul Yonadi left his apartment at 3550 West Fifty-Ninth Place and backed his car out of the garage which was across the areaway from the rear of the ceramics shop into the alley. He got out of the car to close the garage door. At this time, he saw a man, whom he identified as the defendant, come out of the wooden gate at the rear of the ceramics shop. Mr. Yonadi and the man looked at each other; the man then walked southward down the alley without turning around.

At 11:25 a. m., September 20, 1954, a sheriff's patrol officer noted in his daily log that he had seen a 1952 Pontiac coach with a Michigan License plate AA-69-30 standing without a driver, or occupant, about 250 yards from the beach area at Point Dume which is about 12 miles from Santa Monica. The officer searched the car but found no registration or identification. He looked for someone having a possible connection with the car but found no one. The driving time between the ceramics shop and Point Dume was approximately 49 minutes.

Between 11:15 and 11:30 a. m., September 20, 1954, a salesman who made regular calls at the ceramics shop with bread, found the front door of the shop open. He rang several times but no one answered. He opened the door leading from the display room to the room in back thereof and saw the body of Mr. Forbes lying on the floor. The police were called, and when they arrived to investigate they found the body of Mrs. Forbes in a room adjoining that in which Mr. Forbes' body was found. Both Mr. and Mrs. Forbes had been killed by shots fired at either extremely close range or by holding the gun in contact with the head. A woman's purse was hanging on a clothes rack; it contained some cash, checks, and a money order. A telephone in the room was off the hook.

Sergeant Forbes of the Los Angeles Police Department was a brother of the deceased Forbes. He remembered that Despine's former husband had been from Michigan and obtained pictures of him from Despine's mother. These pictures were shown to the Miners and to Mrs. Simons, and Mr. Yonadi who all identified the defendant as the man they had seen that day.

Forty-four latent finger print impressions were obtained from the ceramics shop, nineteen of which were identifiable; none of them corresponded to defendant's prints. A "Cat's Paw" rubber heel print was discovered by the rear gate to the alley. The evidence showed that the heel of defendant's shoe could have made the print.

The evidence is confusing as to the type, or types, of gun used. Of the eight pieces of metal recovered from the ceramics shop,

five appeared to be slugs or spent bullets; three appeared to be portions of bullets, one of lead and the other two of a brass or copper material. The ballistics expert was of the opinion that the eight slugs and fragments found in the ceramics shop as well as the one recovered from the body of Despine had all been fired from a .45 caliber Smith and Wesson gun. The expert witness was also of the opinion that the bullet recovered from the body of Robert was a .32 caliber bullet. The land area around Point Dume where the Pontiac car had been found parked on the morning of September 20th was carefully searched and experienced skin divers searched in the water and rocks but failed to recover any firearm, or guns.

On Wednesday, September 22, 1954, a farmer living in Penrose, Colorado, was driving east from his farm to Pueblo, Colorado on Highway 50 at about 4:00 p. m. Highway 50 goes west from Pueblo, through Salt Lake City to San Francisco. About nine and a half miles west of Pueblo he saw a wrecked car off the right-hand side of the highway. The wrecked car was a black 1953 Pontiac. A dusty, dirty man with his left arm covered with drying blood was there and was later identified as the defendant. The farmer, at defendant's request, took defendant, his briefcase, a suitcase and a small kit into Pueblo. The defendant asked to be let out at the bus depot to clean up before going to report the accident; defendant told the farmer that he was from Texas and had been on his way to Salt Lake when he had a flat tire; that he had turned to go back to Pueblo to have the tire fixed. An officer patrolling the road later the same day found the wrecked car; in it he found a dictionary, a book entitled "Investigator's Handbook" with certain underlined passages, and a third book. The car was impounded in Pueblo; no report was ever made of the accident. The record shows that it was possible for defendant to have been at Point Dume at the time noted and close to Pueblo on September 22nd.

Defendant was arrested in Hot Springs, Arkansas, on September 25, 1954. The officer sent to extradite him said defendant said he had not been in Los Angeles for some seven or eight years. Defendant testified that he had arrived in Los Angeles on September 3, 1954; that he left after five or six days to go to Texas; that he arrived in Galveston, Texas, a day or so before September 19th; that he saw his father in Galveston; that on the 19th of September, he left Galveston for Houston which he left on the 20th; that he arrived in Dallas on the 20th; that he left Dallas on the 20th after eating and getting gas for the Pontiac; that he went to Oklahoma City, leaving there on the 21st for Amarillo, Texas on his way to Colorado; that he left Amarillo between midnight and three in the morning on the 22nd headed for Colorado on the way to Salt Lake City; that he passed through Pueblo and headed west; that he had a flat tire about ten miles outside Pueblo; that on the way back to Pueblo, he lost control of the car which overturned; that a farmer drove him into Pueblo where by telephone he notified the police of the accident. He testified that from the bus depot in Pueblo, he took a bus to Oklahoma City where he bought a ticket to Hot Springs, Arkansas where he was arrested. Defendant denied telling the officer he had not been in Los Angeles for seven or eight years; and said that the guns [3] had been temporarily left by a customer and appeared to be .22 caliber target pistols.

Defendant's Sanity at Time of Trial:

Defendant contends that the court erred in proceeding to trial when, on the first day of trial, February 7, 1955, there was presented to the court the uncontradicted affidavit of John Vernon Miller, M. D. (a duly licensed psychiatrist) in which it was concluded that "the subject is medically and legally insane at the time of [my] examination and at the time of commitment of the alleged act." The report, which is lengthy, shows that defendant is an epileptic, subject to both grand and petit mal seizures; that in 1941 his release from confinement in an army jail had been recommended because it was felt he was "mentally incompetent."

3. Heretofore mentioned in Mr. Pappos' testimony.

Section 1367 of the Penal Code provides: "A person cannot be tried, adjudged to punishment, or punished for a public offense, while he is insane."

Section 1368 of the Penal Code provides: "If at any time during the pendency of an action and prior to judgment a doubt arises as to the sanity of the defendant, the court must order the question as to his sanity to be determined by a trial by the court without a jury, or with a jury, if a trial by jury is demanded * * *."

The People argue that Dr. Miller's affidavit was handed to the court "regarding the plea of not guilty by reason of insanity" ; that such a plea was thereupon entered and three doctors appointed by the court to examine the defendant; that at no time did defendant's counsel suggest that defendant was insane at the time of trial so as to bring into play the provisions of sections 1367 and 1368 of the Penal Code. It is argued by the People that defendant's counsel did not intimate, by affidavit or otherwise, that defendant was uncooperative or that they were unable to obtain assistance or information from him in preparing his defense. Dr. Miller's affidavit shows, however, that "he [defendant] felt his attorneys 'were railroading me in' and 'trying to get my money'" ; that "He [defendant] has been quite uncooperative with his attorneys and demanding; refusing to take advice, feeling that they should believe he is innocent, they should get angry at the people he is angry at, and that he is supreme in his knowledge."

The reports of the three court-appointed doctors were received by the court approximately a week after the commencement of the trial. Two of these reports show that the doctors were of the opinion that defendant was sane at the time of trial as well as at the time the crime was committed; the third report was to the same effect, although stating that defendant showed some "paranoid ideation."

[1–3] In People v. Perry, 14 Cal.2d 387, 399, 94 P.2d 559, 565, 124 A.L.R. 1123, we said: "Ordinarily, the question whether a 'doubt' has arisen as to the sanity of the defendant is for the determination of the judge of the trial court. People v. Keyes, 178 Cal. 794, 802, 175 P. 6; People v. Hettick, 126 Cal. 425, 428, 58 P. 918; People v. Fountain, 170 Cal. 460, 467, 150 P. 341; People v. West, 25 Cal.App. 369, 143 P. 793. And it is only where, as a matter of law, a 'doubt' may be said to appear, or where there has been an abuse of the discretion that is vested in the trial judge, in the determination of the question, that the conclusion of the latter properly may be disturbed on appeal therefrom. People v. Gilberg, 197 Cal. 306, 317, 240 P. 1000; People v. Moriarity, 61 Cal.App. 223, 214 P. 485; People v. Rosner, 78 Cal. App. 497, 248 P. 683; People v. Kirby, 15 Cal.App. 264, 114 P. 794; People v. Little, 68 Cal.App. 674, 230 P. 178; People v. Hettick, 126 Cal. 425, 58 P. 918." People v. Aparicio, 38 Cal.2d 565, 241 P.2d 221. It was also said in the Perry case, supra, that if the person whose sanity is in question is capable of understanding the nature and object of the proceedings against him and can conduct his defense in a rational manner, he should be deemed sane for the purpose of being tried, though on some other subject his mind may be deranged or unsound.

The report of one of the court-appointed doctors shows that defendant resented the examinations; that he stated that he resented the plea of not guilty by reason of insanity; that he at all times claimed he was innocent of the crime with which he was charged; that he refused to answer numerous seemingly unrelated questions on the ground that his refusal was on "advice of counsel."

Closely related to this problem is that which occurred after the jury had returned a verdict of first degree murder without recommendation:

"The Court: * * * I understand there is a matter to be taken up out of the presence of the jury. Let the record show the district attorney, defense counsel and the defendant are present. Is there anything you gentlemen want to take up before we proceed?

"Mr. Solomon: I was going to make this statement, if the Court please, that the defense is prepared to go ahead with this plea of not guilty by reason of insanity.

I understand, though, Mr. Merkouris feels differently about it.

"The Defendant: Yes, that is right.

"The Court: Well, Mr. Merkouris, I think I should say this to you, that I know that in the early part of the case, before we ever started the trial, the plea of not guilty by reason of insanity was put in for you by your counsel. I think he did that as a measure of protection.

"The Defendant: It was put in, though—

"The Court: Let me finish, just a minute, please.

"I think he did that as a matter of protection, because if occasion would arise, that plea would have to be entered before the Court started its trial. I will say if I had been in his place I would have done exactly the same thing, and I've been practicing law a few years myself. He's been practicing law a great many years. We had also the advantage of your other two attorneys.

"We have now got to the point where the next step in the trial would be the trial of that question of not guilty by reason of insanity. Now, you have indicated that you don't want that trial.

"The Defendant: I don't want what?

"The Court: You don't want to be tried on this question of insanity.

"The Defendant: Yes, that is correct.

"The Court: Do you want to withdraw your plea of not guilty?

"The Defendant: The plea was entered over my objection.

"The Court: I understand.

"The Defendant: As I explained to these men, it carried an implication of guilty, and that was one of the main reasons why these people convicted me. Well, that's beside the point now. I understand that; in any event I want the plea withdrawn right now, because as far as I can see it's useless.

"The Court: I want you to thoroughly understand the effect of this situation. I'm not going to talk about your case, I'm going to talk about cases in which both pleas are entered. If a defendant is tried for an offense and found guilty, and also has the plea of not guilty by reason of insanity, we next try in regular order the question as to that plea of insanity, is the man legally insane or is he legally sane?

"The Defendant: I understand that.

"The Court: If the jury found him legally sane, then the other verdict of guilty stands; if he is legally insane that operates as an acquittal. Now, that is an opportunity you have under the plea of not guilty by reason of insanity.

"The Defendant: Well, no, to me that still carries an implication of guilty, and I see no reason why I should give such an implication. As I said before, I did not commit these crimes and I don't care for that implication to go into the record. If those people want to convict me of crimes I did not commit, that's their business, I understand that.

"The Court: You understand also—

"The Defendant: I understand what you mean.

"The Court: Your lawyers advised you to stand on your plea and to go trial.

"The Defendant: You're looking at it from a lawyer's viewpoint, but the jury is not.

"The Court: Well, of course, we can't view it also from the defendant's viewpoint, he's sitting in a different seat looking at it.

"The Defendant: I want it withdrawn.

"The Court: You definitely do not want to try this question of insanity.

"The Defendant: No.

"The Court: You want to withdraw the plea? You understand if you do withdraw it, you stand convicted of first degree murder with the death penalty?

"The Defendant: I understand.

"The Court: The only possibility you've got is the chance something will be accomplished?

"The Defendant: Yes, I understand.

"The Court: Let the record show the plea of not guilty by reason of insanity has been withdrawn."

It is contended by the defense that the trial court committed prejudicial error in

permitting defendant himself to withdraw the plea of not guilty by reason of insanity when he was represented by counsel and when the defendant's sanity was the very issue involved.

[4, 5] Prior to commencement of the trial itself, the court had before it an affidavit of a qualified psychiatrist in which it was averred, without any equivocation, that the defendant was medically and legally insane at the time of trial, as well as at the time the alleged act was committed. The Penal Code provides, § 1368, that "If at any time during the pendency of an action * * * a doubt arises as to the sanity of the defendant, the court must order the question as to his sanity to be determined by a trial by the court without a jury, or with a jury, if a trial by jury is demanded * * *." It appears that a doubt as to the defendant's sanity did arise in the mind of the trial court after he had read the report of Dr. Miller who was on the court list of psychiatrists. The record shows that the court, after reading the affidavit, and after being told that the defendant did not want a plea of not guilty by reason of insanity entered, said: "I think, under these circumstances, the Court would be *compelled* to accept a plea of not guilty by reason of insanity." (Emphasis added.) At the same time, the court appointed three other psychiatrists to examine the defendant. It appears as a matter of law that there was, at that time, a doubt in the mind of the court as to defendant's sanity. People v. Ah Ying, 42 Cal. 18, 21. We said in People v. Aparicio, 38 Cal.2d 565, 568, 241 P.2d 221, 223, that "when a doubt of the defendant's sanity at the time of the trial as contemplated by the statute appears on the face of the record as a matter of law, an abuse of discretion is shown and the failure to order a determination of the question of sanity results in a miscarriage of justice and a reversal is required. People v. Vester, 135 Cal.App. 223, 26 P.2d 685; People v. West, supra, 25 Cal.App. 369, 143 P. 793."

[6] Taking the evidence concerning defendant's sanity as reflected in the record, we see that three court-appointed psychiatrists considered him sane at the time of trial as well as sane at the time the crime was committed; we see that one independent psychiatrist considered him both legally and medically insane at both times. This conflict in the medical evidence was sufficient to make the question one of fact which should have been tried. The colloquy between the court and the defendant relative to a withdrawal of the plea of not guilty by reason of insanity shows that the defendant did not understand the gravity of his predicament. People v. Jensen, 43 Cal.2d 572, 576, 275 P.2d 25; People v. Gomez, 41 Cal.2d 150, 158, 258 P.2d 825; People v. Aparicio, 38 Cal.2d 565, 567, 241 P.2d 221. He did not want, so he said, for the jury to have before it the "implication of guilt." It should be remembered that this desire of defendant's was expressed *after* the jury had found him guilty of murder in the first degree without recommendation.

[7–9] It is our conclusion that the trial court abused its discretion in not trying the issue of defendant's sanity at the commencement of the trial and in permitting the defendant, over the implied objection of his counsel, to withdraw his plea of not guilty by reason of insanity. The People's argument that defense counsel did not offer Dr. Miller's affidavit at the commencement of the trial so as to obtain a trial on that issue prior to the commencement of the trial is immaterial. The section specifically provides that if a doubt arises as to the defendant's sanity, the court "must order the question" to be tried. It is the duty of the court to order an inquisition, upon its own motion, if at any time a doubt arises as to a defendant's present sanity. We said in People v. Aparicio, 38 Cal.2d 565, 568, 241 P.2d 221, 223, that "The failure of the defendant * * * to plead that he was then insane within the meaning of the section is not controlling. The duty imposed upon the trial judge by the statute is not conditioned on a motion in reliance on the code provision." People v. Ah Ying, 42 Cal. 18, 21; People v. Vester, 135 Cal.App. 223, 237, 26 P.2d 685; People v. Sloper, 198 Cal. 601, 606, 246 P. 802. In People v. Vester, 135 Cal.App. 223, 228, 26 P.2d 685, 687, it was said:

"If, then, as a matter of law it appear that the facts were such that necessarily a 'doubt' must or should have arisen (and not simply that as a privilege, or as a favor, such a conclusion might, or might not, have been accorded to defendant, dependent upon the discretion of the trial judge), it becomes clear that in the failure by the trial judge to decide that a 'doubt' had arisen as to the sanity of defendant, and thereupon to order that 'the question as to his sanity * * * be submitted to a jury,' an omission by the trial court to exercise what may be termed a jurisdictional duty resulted, with the inevitable consequence that defendant was prejudiced in his substantial rights in the premises."

[10, 11] Defendant was represented by counsel and "It is settled that the attorney of record has the exclusive right to appear in court for his client and to control the court proceedings, *so that neither the party himself* (Anglo California Trust Co. v. Kelly, 95 Cal.App. 390, 272 P. 1080; Boca, etc., R. Co. v. Superior Court, 150 Cal. 147, 88 P. 715; Id., 150 Cal. 153, 88 P. 718; Electric Utilities Co. v. Smallpage, 137 Cal. App. 640, 642, 643, 31 P.2d 412; Toy v. Haskell, 128 Cal. 558, 61 P. 89, 79 Am.St. Rep. 70; Crescent Canal Co. v. Montgomery, 124 Cal. 134, 56 P. 797; Wylie v. Sierra Gold Co., 120 Cal. 485, 52 P. 809; Mott v. Foster, 45 Cal. 72; Board of Commissioners [of Funded Debt of City of San José] v. Younger, 29 Cal. 147, 87 Am. Dec. 164), nor another attorney (Johnston v. City of San Fernando, 35 Cal.App.2d 244, 247, 95 P.2d 147; Drummond v. West, 212 Cal. 766, 769, 300 P. 823; McMahon v. Thomas, 114 Cal. 588, 46 P. 732; Prescott v. Salthouse, 53 Cal. 221; Hobbs v. Duff, 43 Cal. 485; 3 Cal.Jur. 637), can be recognized by the court in the conduct or disposition of the case. Board of Commissioners [of Funded Debt of City of San José] v. Younger, supra; Crescent Canal Co. v. Montgomery, supra." Emphasis added; Wells Fargo & Co. v. City, etc., of San Francisco, 25 Cal.2d 37, 42, 43, 152 P.2d 625, 628; Zurich General Accident & Liability Ins. Co., Ltd. v. Kinsler, 12 Cal. 2d 98, 105, 106, 81 P.2d 913. Considering the fact that defense counsel desired to proceed with the trial on the plea of not guilty by reason of insanity and the further fact that a doubt existed as to defendant's sanity, it appears that the trial court clearly abused its discretion in permitting defendant personally to withdraw his plea of not guilty by reason of insanity.

Information:

[12] Defendant contends that the trial court committed prejudicial misconduct in permitting the admission of evidence relative to the death of Robert Forbes when the district attorney had elected to proceed solely on the information charging him with the murder of Despine Forbes. It is contended that the admission of this evidence was so prejudicial as to deprive him of due process of law within the meaning of both the federal and California Constitutions.

It appears that here the evidence complained of showed more than merely criminal disposition and was properly admitted as part of the res gestae, or because it helped to disclose motive, intent, or a common plan or scheme. The victims met their deaths in the same manner and, from all that appears, at approximately the same time. The jury was properly instructed concerning the limited purpose for which such evidence was received.

Alleged Prejudicial Misconduct Of Trial Court:

[13–15] It is contended that the trial court was guilty of prejudicial misconduct in informing defendant that if he made another outburst, he would be gagged.

After the autopsy surgeon had testified concerning his examination of the body of Robert Forbes, the following occurred:

"Q. All right, now, you go ahead and illustrate what you have just testified about concerning that first wound.

"The Court: (To defense counsel) Not quite so loud, gentlemen, I can hear what you say up here.

"The Defendant: Wait! I would like to make a remark at this time.

"The Court: (To the defendant) You sit down.

"The Defendant: I'm being tried on one count. You are highly prejudicial, in my opinion.

"The Court: I don't care anything about your opinion.

"The Defendant: You are conducting this trial in a partial manner, in a prejudicial manner. You are trying me here for one count. You are showing pictures of two people who were killed.

"The Court: I'm running this trial.

"The Defendant: You are running this trial in a very prejudicial manner.

"The Court: You may proceed, Mr. Leavy.

"The Defendant: You stupid old fool!

"The Witness: Wound Number 1—

"Mr. Leavy: Doctor, I don't mean to interrupt you when you point out this—

"The Defendant: You may have written a few books on law, but you haven't learned anything. You not only have a bungling police department—

"The Court: That's enough. I want to inform counsel—

"The Defendant: —but an unscrupulous prosecutor.

"The Court: According to People versus Harris, I have a right to order this man to be gagged so that he can't make any noise, and I shall do so if we have any further disturbance along this line."

In People v. Harris, 45 Cal.App. 547, 552–553, 188 P. 65, 67, a similar occurrence took place and the court threatened in the presence of the jury to gag the defendant. It was there said: "It was the right of the defendant to be present at his trial, and this right, notwithstanding his obstreperous conduct, was accorded him. It is the duty of a judge in the administration of justice to preserve the order of the court and see to it that all persons whomsoever, including the defendant himself, indulge in no act or conduct calculated to obstruct the administration of justice." In People v. Loomis, 27 Cal.App.2d 236, 239, 80 P.2d 1012, 1014, the defendant, because of his loud and tumultuous conduct during the trial, was strapped to a chair and gagged. It was there held that "There can be no doubt as to the right of the court to use reasonable restraint in order to conduct the trial in an orderly and dignified manner." In view of the defendant's conduct, no prejudicial misconduct on the part of the trial court appears.

Hearsay Evidence:

[16, 17] It is first contended that the court erred in admitting evidence concerning the letters written by defendant to the two victims. It will be recalled that the letters themselves had been destroyed by Inspector Wood and that he was permitted to testify concerning his recollection of their contents. It will also be recalled that the letter to Robert Forbes told him not to worry about his wife's alleged sexual degeneracy because he would not be around long. It is argued by defendant that the threat, if any, was against Robert, and not Despine with whose murder he is charged. In this connection it is also argued that the evidence concerning the letters is so remote as to be immaterial and irrelevant. In answer to the first argument, in People v. Wilt, 173 Cal. 477, 482–483, 160 P. 561, 563, it was said (quoting from People v. Bezy, 67 Cal. 223, 7 P. 643): "'While threats against the deceased are admissible in evidence to show malice, threats against another person are only admitted under circumstances *which show some connection with the injury inflicted on the deceased.*' (The italics are ours.) Where a sufficient connection is shown such threats are clearly admissible." The evidence here showed that both persons had been killed in the same manner and, presumably, at approximately the same time. The letter to Despine which accused her of being a sexual degenerate could certainly be considered a malicious letter and the one to Robert a threat because of his marriage to Despine. People v. Hong Ah Duck, 61 Cal. 387, 390; People v. Chaves, 122 Cal. 134, 143, 54 P. 596; People v. De Moss, 4 Cal.2d 469, 474, 50 P.2d 1031.

[18] The court did not err in admitting secondary evidence of the contents of the letters inasmuch as proof of the destruction thereof was first made by Inspector Wood who later testified as to the contents of the letters. Section 1855 of the Code of Civil

Procedure provides that "There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases:

"One—When the original has been lost or destroyed; in which case proof of the loss or destruction must first be made. * * *" The same section also provides that when a writing has been lost or destroyed, either a copy thereof or oral evidence as to the contents may be admitted. People v. Guasti, 110 Cal.App.2d 456, 462, 463, 243 P.2d 59; Deacon v. Bryans, 88 Cal.App. 322, 324, 263 P. 371.

[19] Defendant's argument concerning the remoteness in point of time of the letters and the deaths of the Forbes goes to the weight of the evidence rather than its admissibility. People v. De Moss, 4 Cal.2d 469, 474, 50 P.2d 1031; People v. Brown, 76 Cal. 573, 574, 18 P. 678.

[20] It is next contended that the trial court erred in admitting in evidence copies of certain recordings. The police officer who went to Arkansas after defendant made, while there, certain recordings of his first conversation with defendant. When the officer returned to Los Angeles, he made a copy thereof on another type of machine. At the trial, defense counsel did not object to the use of the copy which was played because its sound facilities were better. In addition, the original recording was also played.

Evidence was admitted to show the copy was a true and correct one and defendant was advised by the trial court prior to the playing of the copy of the recording that it was secondary evidence. Both the original recording and the copy thereof were admitted in evidence without objection, and the original, as well as the copy, was played to the jury. Under the circumstances here present, defendant cannot now complain that a copy of the original recording was played to the jury. People v. Porter, 105 Cal.App.2d 324, 331, 233 P.2d 102; People v. Wignall, 125 Cal.App. 465, 474, 13 P.2d 995; People v. Sellas, 114 Cal.App. 367, 378, 300 P. 150.

[21] Defendant also complains that certain notes and a written transcription of the tape recording used by the officer were erroneously admitted in evidence over objection. The record shows that the notes were used pursuant to section 2047 of the Code of Civil Procedure.[4] The record shows that the questioned writings were marked for identification; that the court informed all attorneys they might see and use them, to which defense counsel replied, "Thank you very much."

Instruction on Lying in Wait:

[22, 23] Defendant contends that the court committed prejudicial error in giving the jury an instruction on lying in wait. Section 189 of the Penal Code provides that all murder perpetrated by lying in wait is murder of the first degree.

The evidence on which this instruction was based has been heretofore set forth. It will be recalled that defendant was identified as the man who had been seen sitting in a car, also identified as his, between nine and ten in the mornings and four and four-thirty in the afternoons of September 7th through the 18th (with the exception of Sunday, the 12th), and that the car was so parked that its occupant could see the ceramics shop where the crime later occurred. It will also be recalled that although defendant was seen in the vicinity of the ceramics shop on the morning in question, he was not seen parked on the street as before.

This court has said that in order to constitute lying in wait the elements of waiting, watching and concealment must be present, People v. Sutic, 41 Cal.2d 483, 492, 261 P.2d

4. "A witness is allowed to refresh his memory respecting a fact, by anything written by himself, or under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. But in such case the writing must be produced, and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon it, and may read it to the jury. So, also, a witness may testify from such a writing, though he retain no recollection of the particular facts, but such evidence must be received with caution."

241; People v. Byrd, 42 Cal.2d 200, 209, 266 P.2d 505; People v. Tuthill, 31 Cal.2d 92, 101, 187 P.2d 16. We have here the elements of waiting and watching, but the record is devoid of any evidence tending to show that the defendant made any attempt to conceal himself or to keep his presence in the vicinity of the shop a secret. In the Sutic case, it was held that " 'concealment in ambush' " was not necessary and that the evidence there fully justified the jury's finding "that the homicide was the result of defendant's intent to kill and was accomplished by his 'lying in wait' until the opportune time to strike * * *." 41 Cal.2d 483, 492, 493, 261 P.2d 241, 246. In the Tuthill case, it was held that the lying in wait was the " 'means' through which defendant accomplished his purpose." 31 Cal. 2d 92, 101, 187 P.2d 16, 21. In the Byrd case, the evidence showed that defendant waited outside his wife's house armed with a gun and that the murder occurred that night, 42 Cal.2d 200, 209, 266 P.2d 505. In these three cases the killings occurred shortly after the "lying in wait", and lying in wait was the "means" through which each defendant accomplished the homicide. In the present case, the killings occurred on the morning of the 20th; the last time defendant had been seen parked in his car in the vicinity was on the 18th; he was not seen watching or waiting on the morning of the 20th, although he was seen driving his car in that vicinity at that time. The facts in the case under consideration do not appear to us to justify a lying in wait instruction. The killings were not accomplished through defendant's watchful waiting in his car; there was no attempt at either concealment or secrecy; and the killings did not follow on the heels of the watchful waiting.

[24] If, as we have concluded, the evidence is not sufficient to justify the lying in wait instruction, there can be no doubt that the defendant was seriously prejudiced thereby since if the killing was committed by lying in wait, it was murder of the first degree by force of the statute, Pen.Code, § 189, and the question of premeditation was not further involved, People v. Byrd, 42 Cal.2d 200, 209, 266 P.2d 505; People v. Tuthill, 31 Cal.2d 92, 99, 187 P.2d 16.

Two Reasonable Theories Instruction:

[25] It is next contended that the trial court erred in refusing to instruct the jury concerning its duty if the evidence was susceptible of two reasonable theories.

Defendant offered this instruction: "If the evidence in this case is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendant's innocence, and reject that which points to his guilt.

"You will notice that this rule applies only when both of the two possible opposing conclusions appear to you to be reasonable. If, on the other hand, one of the possible conclusions should appear to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and to reject the unreasonable, bearing in mind, however, that even if the reasonable deduction points to defendant's guilt, the entire proof must carry the convincing force required by law to support a verdict of guilty beyond a reasonable doubt."

The court instructed the jury as follows: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal, but the effect of this presumption is only to place upon the State the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that conviction that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge."

"Two classes of evidence are recognized and admitted in courts of justice, upon either or both of which, juries lawfully may

base their findings, whether favorable to the People or to the defendant, provided, however, that to support a verdict of guilt, the evidence, whether of one kind or the other, or a combination of both, must carry the convincing quality required by law, as stated in my instructions.

"One type of evidence is known as direct and the other as circumstantial. The law makes no distinction between the two classes as to the degree of proof required for conviction or as to their effectiveness in defendant's favor, but respects each for such convincing force as it may carry and accepts each as a reasonable method of proof.

"Direct evidence of a person's conduct at any time in question consists of the testimony of every witness who, with any of his own physical senses, perceived such conduct or any part thereof, and which testimony describes or relates what thus was perceived. All other evidence admitted in the trial is circumstantial in relation to such conduct, and, in so far as it shows any act, statement or other conduct, or any circumstance or fact tending to prove, by reasonable inference the innocence or guilt of the defendant, it may be considered by you in arriving at a verdict."

"I instruct you further that you are not permitted, on circumstantial evidence alone, to find the defendant guilty of the crime charged against him unless the proved circumstances not only are consistent with the hypothesis that the defendant is guilty of the crime, but are irreconcilable with any other rational conclusion." (Emphasis added.)

In People v. Bender, 27 Cal.2d 164, 175, 177, 163 P.2d 8, 15, (relied upon by defendant) we said in holding that the trial court should give an instruction of its own motion embodying the principle " 'that, to justify a conviction, the facts or circumstances must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion.' " 8 Cal.Jur. 371, § 405. We also said there that the jury had been told that " 'If the evidence in this case is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law to adopt that interpretation which will admit of the defendant's innocence, and reject that which points to his guilt.' *This instruction is eminently proper as far as it goes. To it should have been added a direct statement of the precise principle under discussion.*" (Emphasis added.) It will be noted that in the case under consideration, the "precise principle" was given to the jury, but the instruction which *was* given in the Bender case was here omitted. In the Bender case, we held that under the facts there presented, the failure to instruct fully was not ground for reversal.

The evidence here is entirely circumstantial. No murder weapon (or weapons) was ever found; no fingerprints matching those of defendant were found in the ceramics shop. The most incriminating evidence against defendant is that he was identified as the man coming out of the back gate of the ceramics shop. Defendant's theory was that he was not guilty; that he was not in Los Angeles on the 20th, although he admitted having been there on the 3rd through the 8th or 9th of September when he left for Texas. From the resumé of the evidence heretofore set forth, it appears that at the time the case was submitted to the jury reasonable inferences of either guilt or innocence could have been drawn therefrom. The jury could have disbelieved the identification testimony of Mr. Yonadi who said it was the defendant he saw coming out of the back gate; it could have disbelieved the testimony of Mrs. Simons who said that the defendant was the man she had seen in the areaway because she recognized "the lower part of his face" from a colored picture. Under the circumstances here presented, that part of defendant's instruction bearing upon two reasonable interpretations, or constructions, of the evidence should have been given.

[26, 27] Defendant's offered instruction was refused because the trial court felt that it was not good law in that it "virtually says that when the evidence is equally balanced the defendant is entitled to a verdict of acquittal" and because it was in con-

flict with the reasonable doubt instruction. In a criminal case the prosecution must prove the defendant guilty beyond a reasonable doubt. Therefore, if the evidence is equally balanced, the defendant is entitled to an acquittal. Further, there is in the proposed instruction nothing inconsistent with the instruction on reasonable doubt. The offered instruction was a correct statement of the applicable law and should have been given.

The judgment and the order denying the motion for a new trial are reversed.

TRAYNOR, SCHAUER and McCOMB, JJ., concur.

SPENCE, Justice.

I dissent.

The majority opinion bases the reversal upon the conclusion that the trial court committed prejudicial error in the following respects: (1) In failing to try the question of defendant's sanity at the commencement of the trial; (2) In permitting defendant to withdraw his plea of not guilty by reason of insanity following the trial on the plea of not guilty; (3) In giving an instruction on the subject of lying in wait; and (4) In failing to give a certain requested instruction relating to circumstantial evidence. In my opinion, a review of the record, including the evidence, shows that defendant was accorded a fair trial, free from any prejudicial error; that defendant was properly convicted of a deliberate and premeditated murder perpetrated by means of lying in wait; and that no ground for reversal has been shown as there has been no "miscarriage of justice." Const. Art. VI, § 4½.

It may be conceded at the outset that defendant was an unusual type of person, whose history and actions may be said to have evidenced some deviation from the normal. The same may be said, however, concerning a large percentage of persons who commit serious crimes; but this does not indicate that such persons have not the requisite capacity to be subject to trial and conviction for the offenses which they commit. It is only certain types of incapacities, within the broad meaning of the word "insane," which deprive a person of sufficient capacity to stand trial upon criminal charges, People v. Perry, 14 Cal.2d 387, 399, 94 P.2d 559, 124 A.L.R. 1123; People v. Kirby, 15 Cal.App. 264, 268, 114 P. 794, or which deprive him of sufficient capacity to be held criminally responsible for his acts. People v. Kimball, 5 Cal.2d 608, 610, 55 P.2d 483. It is for this reason that mere opinion evidence that a person is "insane" or of "unsound mind," which often means no more than that there is some deviation from the normal in some respect, has been held in civil cases to be insufficient to show lack of capacity of the individual for a particular purpose. In re Estate of Lingenfelter, 38 Cal.2d 571, 580, 241 P.2d 990; In re Estate of Arnold, 16 Cal.2d 573, 585–587, 107 P.2d 25. Furthermore, it is well established in criminal cases that if a person "is capable of understanding the nature and object of the proceedings against him and can conduct his defense in a rational manner, he should be deemed sane for the purpose of being tried, though on some other subjects his mind may be deranged or unsound." People v. Perry, supra, 14 Cal.2d 387, 399, 94 P.2d 559, 565, and authorities cited. This general subject was discussed at length in In re Buchanan, 129 Cal. 330, 61 P. 1120, 50 L.R.A. 378, and the rule applicable here was recently reiterated by this court in People v. Aparicio, 38 Cal.2d 565, where it was said at page 568, 241 P.2d 221, at page 223: "Even the testimony of experts as to insanity in a general sense is not sufficient to create a doubt insofar as that testimony does not relate to the defendant's ability to conduct his own defense. People v. Darling, 107 Cal.App.2d 635, 237 P.2d 691; see also, People v. Huntoon, 41 Cal.App. 392, 182 P. 776."

In the present case, a reading of the record, including defendant's testimony and his other statements made during the course of the trial, leaves no doubt that defendant appeared to be an intelligent and rational person, although perhaps not possessed of the best judgment. In addition, the considered opinions of the three court-appointed experts who examined him during the course of the trial showed that de-

fendant was sane both at the time he committed the offense and at the time of trial. Defendant obviously was keenly aware of the nature of the charge and of the proceedings, and had quite definite ideas concerning the manner in which he wanted the case tried. It appears that from the outset he resisted any suggestion of entering a plea of not guilty by reason of insanity. He was represented by able counsel, who no doubt realized that the evidence would clearly indicate that defendant had killed the victims, and that it might be advisable under the circumstances to interpose the additional plea of not guilty by reason of insanity. In this connection, counsel obtained the affidavit of Dr. Miller and presented it to the court, but without any suggestion that anyone was of the opinion that defendant then lacked the capacity to stand trial upon the charge against him. On the contrary, the affidavit was presented by counsel solely "regarding the plea of not guilty by reason of insanity." The court thereupon accepted that plea and appointed, as was its duty, three experts to examine defendant with respect thereto. Pen.Code, § 1027.

The majority opinion concludes that "the trial court abused its discretion in not trying the issue of defendant's sanity at the commencement of the trial." I cannot agree with this conclusion. The trial court had ample opportunity to observe defendant's previous conduct during the preliminary proceedings leading up to the time of the filing of Dr. Miller's affidavit on February 7, 1955, the first day of the trial. We cannot assume that such previous conduct manifested any degree of intelligence and rationality less than that manifested by defendant throughout the trial. Neither defendant nor his counsel suggested at any time that defendant lacked the capacity to stand trial; nor did Dr. Miller's affidavit, containing his bald conclusion that defendant was "insane," include any statement of opinion that defendant was not "capable of understanding the nature and object of the proceedings against him and [conducting] his defense in a rational manner." People v. Perry, supra, 14 Cal. 2d 387, 399, 94 P.2d 559, 565. Under these circumstances, it cannot be said as a matter of law that a "doubt" should have arisen in the trial court's mind concerning defendant's capacity to stand trial; nor can it be said that the trial court abused its discretion in failing to order a trial of that question. People v. Jensen, 43 Cal.2d 572, 576, 275 P.2d 25; People v. Gomez, 41 Cal. 2d 150, 158–159, 258 P.2d 825.

With respect to the withdrawal of the plea of not guilty by reason of insanity, the majority opinion concludes that the trial court abused its discretion "in permitting the defendant, over the implied objection of his counsel, to withdraw his plea of not guilty by reason of insanity." There was admittedly no express objection of counsel, and I find nothing in the record which may be said to constitute an "implied objection" of counsel. Following the verdict on the plea of not guilty, counsel was still keenly aware of defendant's objection to the defense of insanity. Counsel was nevertheless placed in a difficult position. The trial court had accepted the plea of not guilty by reason of insanity, and counsel apparently felt under a duty to express his willingness to try the issue thus presented despite counsel's knowledge of defendant's manifested intelligence and rationality throughout the proceedings, of defendant's insistence upon his sanity, and of the unanimous opinions of the court-appointed experts that defendant was sane at all times. All of these facts clearly indicated that defendant would be found sane upon any trial of the issue. Counsel therefore merely stated: "I was going to make this statement, if the Court please, that the defense is prepared to go ahead with this plea of not guilty by reason of insanity. I understand, though, Mr. Merkouris feels differently about it." Then followed an extended discussion between court and defendant, which included defendant's repeated insistence that he definitely did not want a trial on the insanity issue and ended with the court's statement: "Let the record show the plea of not guilty by reason of insanity has been withdrawn." Counsel did not enter into this discussion or advance any objection thereto or to the final

declaration of the court concerning withdrawal of the plea. The record therefore indicates final acquiescence by counsel in, rather than any "implied objection" to, defendant's withdrawal of the plea of not guilty by reason of insanity. The situation is quite similar to that presented in People v. Perry, supra, 14 Cal.2d 387, 94 P.2d 559, where "defendant, in person," withdrew the plea although his counsel had previously stated,"I am willing to proceed with this insanity plea." 14 Cal.2d at page 396, 94 P.2d at page 563. I am therefore of the opinion that there was neither error nor an abuse of discretion on the part of the trial court in permitting the withdrawal of the plea, and manifestly there was no prejudice.

With respect to the instructions, the majority opinion concludes that the trial court committed prejudicial error in giving any instruction on the subject of lying in wait, as "the evidence is not sufficient to justify the lying in wait instruction." I cannot join in this conclusion, as I do not believe it can be reconciled with the decisions of this court in People v. Byrd, 42 Cal.2d 200, 266 P.2d 505; People v. Sutic, 41 Cal.2d 483, 261 P.2d 241; and People v. Tuthill, 31 Cal.2d 92, 187 P.2d 16.

From the evidence set forth in the majority opinion, the jury could properly infer that defendant had long entertained the deliberate and premeditated intention of killing his victims; that he had obtained guns for that particular purpose; that he had travelled from Detroit to Los Angeles in a Pontiac automobile and registered under an assumed name to conceal his identity; that he had waited in, and watched from, his automobile in the vicinity of his victims' place of business for long hours during many days preceding, as well as on the day of the killing, seeking the opportunity to take his victims by surprise and to accomplish his purpose at a time when his intended victims were together and no other person was present in their place of business; and that he finally accomplished his purpose on September 20, 1954, by means of such lying in wait.

The majority opinion states: "We have here the elements of waiting and watching but the record is devoid of any evidence tending to show that the defendant made any attempt to conceal himself or to keep his presence in the vicinity of the shop a secret." In my opinion, there was ample evidence to show that all the necessary elements of lying in wait were present. The "concealment" which is mentioned in connection with lying in wait has never been held to mean complete concealment from everyone. Such complete concealment is ordinarily impossible. All that is required, or should be required, is evidence showing an attempt on the part of the murderer to conceal his presence from his intended victim while watching and waiting for the opportune time to carry out his purpose. Thus, evidence of watching and waiting in an automobile on a public street or road for the purpose of perpetrating murder has been held sufficient to justify the giving of an instruction on lying in wait, People v. Byrd, supra, 42 Cal.2d 200, 266 P.2d 505; People v. Sutic, 41 Cal.2d 483, 261 P.2d 241, and it is immaterial in any case that the intended victim may have become actually aware of the presence of the murderer either immediately before or some time before the killing occurred. People v. Sutic, supra; People v. Tuthill, supra, 31 Cal.2d 92, 187 P.2d 16. It appears sufficient if the watching and waiting are accompanied by any attempted concealment from the victim as "part of defendant's plan to take his victim later by surprise." People v. Sutic, supra, 41 Cal.2d 483, 492, 261 P.2d 241, 246.

This court has not heretofore adopted the view expressed in the dissenting opinion in People v. Byrd, supra, 42 Cal.2d 200, 217–218, 266 P.2d 505, that despite the existence of ample evidence to show watching, waiting and attempted concealment from the intended victim until the opportune time to perpetrate the murder, an instruction on lying in wait is improper if it appears that the victim became "aware of defendant's presence" prior to the murder and "there is no evidence that the shots were fired from a position of concealment." 42 Cal.2d at page 218, 266 P.2d at page 515.

I do not believe that such view should be adopted now, for it would have the effect of declaring improper an instruction on lying in wait in many cases, such as the present one, which I believe are typical cases of murder "perpetrated by means of * * lying in wait" within the meaning of section 189 of the Penal Code. In other words, if the evidence is otherwise sufficient, I believe that an instruction on lying in wait should be held proper despite the fact that the victim may have ultimately become aware of the presence of the murderer and despite the fact that the murder may have been finally committed in full view of the victim. People v. Byrd, supra, 42 Cal.2d 200, 266 P.2d 505; People v. Tuthill, supra, 31 Cal.2d 92, 187 P.2d 16.

The majority opinion states, however: "In the present case, the killings occurred on the morning of the 20th; the last time defendant had been seen parked in his car in the vicinity was on the 18th; he was not seen watching or waiting on the morning of the 20th although he was seen driving his car in that vicinity at that time. The facts in the case under consideration do not appear to us to justify a lying in wait instruction." I cannot follow this reasoning. There was evidence that defendant had been watching and waiting in his parked car near the scene of the murder on the mornings and afternoons of at least eleven separate days in September prior to September 20, the last day being September 18. There was also evidence that defendant was driving his car and later walking in the vicinity on the morning of the murder on September 20. The jury could properly infer that at all such times, including the day of the murder, defendant was attempting to conceal himself from his intended victims in order to take them by surprise, and was watching and waiting for the opportune moment to perpetrate the murder. I find no authority to indicate that one who watches and waits for the opportune moment to commit murder while moving in an automobile or on foot in the vicinity of a particular place may not be held to be "lying in wait" within the meaning of section 189 of the Penal Code, and no good reason appears for so holding. I am therefore of the opinion that there was abundant evidence to justify the giving of the instruction on lying in wait; and that the conclusion of the majority that the evidence was insufficient for that purpose not only finds no support in the authorities cited in the majority opinion but is directly contrary to said authorities.

The reversal by the majority is further predicated upon the failure of the trial court to give a particular instruction on circumstantial evidence, as requested by defendant. In refusing to give the requested instruction, the endorsement of the trial court thereon read in part as follows: "Covered by Caljic 24 and 27 on circumstantial evidence." In my opinion, the principles involved in the requested instruction were adequately covered by the instructions given, including the instruction that "you are not permitted, on circumstantial evidence alone, to find the defendant guilty of the crime charged against him unless the proved circumstances not only are consistent with the hypothesis that the defendant is guilty of the crime, but are irreconcilable with any other rational conclusion." It is conceded by the majority that this "precise principle" was given to the jury here and, in my opinion, there was no error, and certainly no prejudice, in failing to elaborate on the subject of circumstantial evidence further than the trial court did in the instructions given.

For the reasons stated, I would affirm the judgment and the order denying a new trial.

GIBSON, C. J., and SHENK, J., concur.

Rehearing denied: GIBSON, C. J., and SHENK and SPENCE, JJ., dissenting.

142 Cal.App.2d 92

Beatrice SILVER, Plaintiff and Appellant,

v.

Sylvan SCHWARTZ and Robert Elliot, individually and as co-partners, doing business under the firm name and style of Gasumat and Gasumat No. 2, et al., Defendants,

Sylvan Schwartz, individually, and Sylvan Schwartz and Robert Elliot, as co-partners doing business under the firm name and style of Gasumat and Gasumat No. 2, Respondents.

Civ. 16641.

District Court of Appeal, First District, Division 1, California.

June 6, 1956.

Action to recover sum allegedly loaned by plaintiff to partnership. The defense was that payment had been made by plaintiff to purchase half interest in partnership for her son, and that other partner was to get his half interest in return for his services and "know-how". The Superior Court, City & County of San Francisco, Thomas M. Foley, J., rendered judgment adverse to plaintiff, and she appealed. The District Court of Appeal, Agee, J. pro tem., held, inter alia, that it had not been error to exclude evidence as to whether other partner had treated one-half of moneys advanced by plaintiff as income on his personal income tax return, since it had not been shown that circumstances were such as to make moneys taxable to him as income.

Affirmed.

1. Judgment ⇐215

Where plaintiff's counsel informed court that plaintiff would probably be his last witness, and following plaintiff's testimony counsel and court engaged in discussion of case, and there was nothing to apprise court that plaintiff had anything further to offer in way of evidence, it could not be said that court was required to ask "Is the matter submitted?" before announcing judgment for defendants, even though it might be customary to do so.

2. Trial ⇐66

Granting or denying of request to reopen case for purpose of taking additional evidence lies within sound discretion of court.

3. Trial ⇐66

Letter from plaintiff's counsel to trial judge, wherein counsel stated that he had not filed objections to defendants' proposed findings because action had never been submitted, did not constitute a motion to reopen and did not require trial court to make any ruling.

4. New Trial ⇐157

In absence of request for opportunity for oral argument of new trial motion, it was not error to pass upon motion without hearing argument.

5. Appeal and Error ⇐706(3)

Counter-affidavit filed within time allowed but subsequent to time when ruling on new trial motion was made was not before reviewing court, and that court would have to treat plaintiff's affidavit in support of a new trial motion as being uncontroverted. West's Ann.Code Civ.Proc. § 659a.

6. Appeal and Error ⇐1033(10)

Trial court's action, in ruling upon plaintiff's new trial motion before time allowed to defendants to file counter-affidavits had expired, was not a matter of which plaintiff could successfully complain. West's Ann.Code Civ.Proc. § 659a.

7. Appeal and Error ⇐977(5)
New Trial ⇐6

Motion for new trial is directed to sound discretion of trial court and its refusal to grant such motion will not be reversed upon appeal in absence of clear showing that trial court abused its discretion.

8. Evidence ⇐215(1)

In action to recover sum allegedly loaned by plaintiff to partnership, wherein defense was that payment had been made by plaintiff to purchase half interest in partnership for her son, and that other partner was to get his half interest in return for his services and "know-how", it was not error to exclude evidence as to whether other partner had treated one-half of moneys advanced by plaintiff as income on his personal income tax return, where it was not shown that circumstances were

such as to make moneys taxable to him as income.

9. Evidence ⇐265(3)

In action to recover sum allegedly loaned by plaintiff to partnership, wherein defense was that payment had been made by plaintiff for her son, and that other partner was to get his half interest in return for his services and "know-how", written acknowledgment, of indebtedness by partnership to plaintiff, executed by plaintiff's son four days after action was filed was not conclusive, and trial court was, at most, required to weigh such acknowledgment of indebtedness against all opposing evidence and could take into consideration that it has been executed by plaintiff's son, that her attorneys had prepared the document, and that plaintiff's son's participation in transaction had been almost entirely through plaintiff, acting under power of attorney. West's Ann.Corp.Code, § 15011.

Sullivan, Roche, Johnson & Farraher, San Francisco, for appellant.

Rhein, Dienstag & Levin, Edward Levin, Jay Jackson, Jr., San Francisco, for respondents.

AGEE, Justice pro tem.

The plaintiff, Beatrice Silver, brought this action against her brother-in-law, Sylvan Schwartz, and her son, Robert Elliot, individually and as copartners, for the sum of $25,500, plus interest, which sum she claims was loaned by her to the partnership. Elliot allowed judgment to go against him by default and he is not a party to this appeal. The trial court, sitting without a jury, rendered judgment in favor of Schwartz and the partnership, and plaintiff has appealed therefrom.

Schwartz proposed to Mrs. Silver that she put up the money necessary to obtain a long term lease on a certain corner lot in Colma, California, and construct a gasoline service station thereon. They agreed that Elliot would become an equal partner with Schwartz in the venture. Schwartz was to arrange for and oversee the construction work and start the business going. Then Elliot was to quit his job in Los Angeles and become the active manager of the station, with a drawing account of $350 or $400 per month. As it turned out, Elliot never did work at the station.

Schwartz secured a fifteen year lease on the corner property. Between November 4, 1949, and April 16, 1950, Mrs. Silver put up a total of $25,500. Schwartz supervised the construction work and, after completion, operated the station himself until October 1951. Then, on behalf of the partnership, he leased the station for seven years at a guaranteed minimum rental of $1,400 per month.

This action was tried in June, 1954. By that time, each of the partners had received from the profits of the business a total sum of approximately $18,700. Rentals accruing since the litigation began had been collected by the attorneys and were being held by them. The record does not disclose the amount of this undistributed income. The payments to Elliot actually had been received by Mrs. Silver, who held his power of attorney. However, Mrs. Silver has never received any money for herself, despite the testimony of herself and Elliot that the agreement was that the $25,500 was to be paid back to her out of the profits of the business. Neither she nor Elliot offered any explanation of why none of the profits actually distributed to the partners, which totaled over $37,400, had never been paid to her. In her capacity as attorney-in-fact for Elliot, she received his monthly payments and thus had actual knowledge at all times of what the profits were.

The only issue before the trial court was whether Mrs. Silver's money was a loan to the partnership, as she contended, or payment for a half interest in the business for her son, as Schwartz contended. Schwartz testified that his agreement with Mrs. Silver was that he was to get his half interest in return for his services and "know-how." In reply to a question as to what consideration was furnished by him, he stated: "My know-how in the business, my efforts of securing one of the finest, most valuable land leases in the gasoline business, which has been acknowledged by

different leaders in the gasoline industry, plus the construction of the station, taking it from the ground up, employing help to get it up to a terrifically high gallonage, where it was the second highest gallonage unit of the Texeco Oil Company in Northern California, and then executing a lease for a term of seven years with a seven-year option at a guaranteed rental of $1400 a month. That was the consideration. * * * That was the consideration for my getting the undivided one-half interest in the partnership business and the assets, plus two years of hard labor." On November 30, 1949, before Mrs. Silver had put up any money, except an original advance of $250, both she and Schwartz signed a written agreement, the first sentence of which states: "I hereby acknowledge that one-half (½) of the assets of the partnership business standing to my credit in the partnership business operated under the name Gas-O-Mat No. 2 have been contributed by Mrs. Beatrice Silver in consideration of my services in organizing said business." The trial court adopted findings in substantially the same language.

[1] Appellant, Beatrice Silver, states: "The principal ground for appeal is the claim that appellant was prevented from having a fair trial by reason of an abrupt termination of the trial by the court before all the evidence was in and before the case was submitted for decision." The record shows that, after appellant rested, respondents moved for a nonsuit, which was denied. Respondents then called Schwartz as their only witness and, at the conclusion of his testimony, respondents rested. Appellant's attorney then said:

> "Your Honor, it is two minutes to 4:00. Mrs. Silver is here. [She had not been called previously.] Does your Honor wish to go ahead?
>
> "The Court: Yes. Will she be your last witness?
>
> "Mr. Kolb [Appellant's attorney]: She will be the last witness, most likely.
>
> "The Court: All right."

Appellant then took the witness stand and testified. When she had concluded, her counsel and the court engaged in a discussion of the case which covers four pages of the transcript. The concluding remark made by appellant's counsel is as follows: "The only conclusion that can be drawn on this matter is that it was a loan to the partnership and must be repaid by the partnership." The court thereupon announced judgment for the defendants. Nothing further transpired or was said by anyone. There was no protest, no request to reopen, no offer of additional proof. In short, there was nothing to apprise the court that appellant had anything further to offer in the way of evidence. Under such circumstances, it cannot be said that the court was required to ask, "Is the matter submitted?" even though it is customary to do so.

[2, 3] The trial was held on June 23, 1954. A letter from appellant's counsel to the trial judge, dated August 13, 1954, was made a part of the record on appeal by stipulation. It states that appellant's counsel had not filed objections to respondents' proposed findings because the action had "never been submitted." However, the trial court could hardly have been more explicit when it said to appellant's counsel, at the very end of the trial: "I will deny your motion and give judgment for the defendant." The findings and judgment were signed on August 17, 1954. Assuming, without so holding, that the letter was an informal request to reopen the case for the purpose of taking additional evidence, the granting or denying of such request is within the sound discretion of the court. 24 Cal.Jur., p. 768. By its signing of the findings and judgment on August 17, 1954, which was presumably after receipt of said letter, the court by implication denied such request. Moreover, a letter such as this does not constitute a motion to reopen and does not require the trial court to make any ruling thereon.

[4] Appellant's next contention is that "the court erred in denying plaintiff's motion for a new trial without permitting said motion to be heard on its merits." The notice of intention to move for a new trial was filed on August 27, 1954. On September 17, 1954, appellant's affidavit in support of the motion was filed and the following

minute order made: "In this action, the motion for a new trial was *submitted,* on affidavit, *without argument.*" (Emphasis added.) On September 24, 1954, the motion was denied and the following minute order made: "In this action, heretofore submitted, the Court ordered the motion for a new trial denied." Appellant did not request an opportunity for oral argument and the law does not require it. Collins v. Nelson, 41 Cal.App.2d 107, 113, 106 P.2d 39.

[5, 6] Appellant's real criticism of the trial court's action in ruling upon the motion seems to be that it did so before the time allowed to respondents to file counter-affidavits had expired. Respondents were allowed up to and including September 27, 1954, to do so, Code Civ.Proc. § 659a, and, in fact, such a counter-affidavit was executed on that date. However, this was not before the court on September 24, 1954, when the ruling was made, and hence could not have been considered by it. The same limited record is before us. Broads v. Mead, 159 Cal. 765, 768, 116 P. 46. In reviewing the trial court's denial of the motion, we must treat appellant's affidavit in support of her motion as being uncontroverted.

Appellant's affidavit states that the "abrupt termination" of the trial, heretofore discussed, prevented her from calling as a witness the accountant for the partnership, who would have testified that, as of November 30, 1949, one-half of the assets of the partnership business standing to the credit of Schwartz was the sum of $125 only. The testimony already in the record established this without dispute. Appellant had put up $250 on November 4, 1949, and this was all until after the signing of the agreement on November 30, 1949. The second advance was for $9,750 and was made on December 5, 1949. Appellant's counsel had already made the point during the trial that the "one-half (½) of the assets" referred to in the agreement of November 30, 1949, referred only to the original payment of $250 and not to the ultimate total. The accountant's proposed testimony would not have contradicted the record in this respect. The trial court interpreted the clause as referring to *all* of the *contributions* agreed to be made by appellant. The accountant would not, of course, be allowed to give his legal conclusion as to the meaning of such clause. Appellant's affidavit alleges that the accountant also would testify that Schwartz did not treat his one-half of the moneys advanced by her as income to himself. Appellant argues that such moneys could only be (1) a gift, (2) a loan, or (3) income. Schwartz testified, in effect, that his one-half interest was not a gift. Therefore, appellant continues, if it was not treated by Schwartz as income, it must of necessity be a loan. This contention was brought up by appellant during the trial and will be hereinafter discussed.

Appellant's affidavit next states that she wanted to introduce into evidence the deposition of Schwartz, taken in this action before the trial for the purpose of getting into evidence an admission by him that the moneys advanced were not gifts. It is crystal clear from the testimony given by Schwartz at the trial that he does not contend that there was any gift to him. The admission would be merely cumulative and most certainly not contradictory.

Lastly, appellant's affidavit states that she was desirous of, but was prevented from, moving to amend her answer by alleging that the instrument of November 30, 1949, did not correctly set forth the understanding of the parties. Appellant was allowed to testify fully concerning the execution of the agreement and the surrounding circumstances. After she had finished with her testimony on direct examination, appellant's counsel then said: "Now, your Honor, we will go into rebuttal testimony, based on Defendants' Exhibit A." Then appellant testified at length that she did not understand the agreement, that she was rushed into signing it, that she trusted Schwartz and that she did not have any independent advice. The record shows that appellant's counsel, at the conclusion of appellant's testimony, did move to amend the answer "on the ground that the same is not a true agreement between the parties and does not express the intentions of the parties." The trial court said: "I have given you an opportunity to do that [attack the agreement] here in the trial."

The motion was denied and there is no showing that the court abused its discretion in so ruling.

[7] It is elementary that a motion for a new trial is directed to the sound discretion of the trial court, and a refusal to grant such a motion will not be reversed upon appeal in the absence of a clear showing that the trial court has abused its discretion. 20 Cal.Jur., "New Trial," § 13.

[8] Appellant next complains of the exclusion of evidence as to whether Schwartz treated one-half of the moneys advanced by appellant as income to him on his personal income tax return. Schwartz was not required to so report said moneys *until* the circumstances were such as to make them taxable as income. When an individual receives an interest in partnership capital as compensation for services, the value of such interest is taxed as follows: "Such amount is taxable to the partner at such time as there are no substantial restrictions or conditions on his right to withdraw or otherwise dispose of such amount, or when in fact he does obtain such amount (either through a distribution or by sale or exchange of his partnership interest), whichever event first occurs." Regulations of the Internal Revenue Service, § 1.721–1; 2 Federal Tax Guide (P–H) 23, 493. Hence, until the proper foundation is laid to show any of the foregoing conditions, it is immaterial whether Schwartz reported the moneys as income. Such foundation not having been established, or proof offered to establish the same, the objection was properly sustained.

[9] Appellant's last point concerns a written acknowledgment of indebtedness by the partnership to the appellant which was executed by Elliot four days after this action was filed. It was admitted in evidence. Appellant contends that it is *binding* upon the partnership, citing section 15011 of the Corporations Code, and "*compels* a judgment for plaintiff." This is not the law. Section 15011 provides: "An admission or representation made by any partner concerning partnership affairs within the scope of his authority as conferred by this act is *evidence* against the partnership." (Emphasis added.) Each of the cases cited by appellant concerns the *admissibility* of a partner's admission. None of said cases holds that such an admission is *conclusive*. The trial court was, at most, required to weigh this "acknowledgment of indebtedness" against all opposing evidence, and it could take into consideration that Elliot is appellant's son, that her attorneys prepared the document and presented it to him in Los Angeles for signature, and that Elliot's participation in the entire transaction was almost entirely through appellant, acting under a power of attorney.

For the foregoing reasons, the judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



Louis DAMIANI, Plaintiff and Appellant,

v.

Harry ALBERT, Hayden F. Jones, Harry W. Case, individually and as members of the Los Angeles County Civil Service Commission, Los Angeles County Civil Service Commission and Eugene Biscailuz, individually and as Sheriff of the County of Los Angeles, Defendants and Respondents.*

Civ. 21558.

District Court of Appeal, Second District, Division 1, California.

June 7, 1956.

Rehearing Granted July 5, 1956.

Mandamus proceedings instituted by petitioner who had been discharged, from position of deputy sheriff of Los Angeles County, after hearing before County Civil Service Commission on charges of violating Manual of Policy and Ethics of Sheriff's Department by (1) failing to go through channels with complaint that member of sheriff's emergency reserve was unfit and unqualified to serve, and (2) knowingly filing a false report against a superior officer. The Superior Court, Los An-

* Opinion vacated 301 P.2d 36.

geles County, Bayard Rhone, J., denied a writ, and the petitioner appealed. The District Court of Appeal, Doran, J., held that in light of record, denial of writ had been proper.

Affirmed.

1. Mandamus ⇐172, 187(9)

In mandamus proceeding, Superior Court determines whether findings of Civil Service Commission were supported by substantial evidence, and District Court of Appeal considers whether decision of Superior Court is supported by substantial evidence; but it is not function of appellate court to weigh evidence before Superior Court, nor of Superior Court to weigh evidence before Civil Service Commission, and neither court may exercise independent judgment on evidence.

2. Evidence ⇐32, 47

Court may not take judicial notice of county ordinances, rules and regulations of sheriff's office or Civil Service Commission.

3. Mandamus ⇐187(9)

On appeal from denial of writ of mandate, presumption would be that findings and conclusions supported judgment, and it would also be assumed that findings and conclusions of Civil Service Commission were supported by evidence.

4. Mandamus ⇐187(10)

In light of record, appellate court would affirm denial of writ of mandate to petitioner who had been discharged, from position of deputy sheriff of Los Angeles County, after hearing before County Civil Service Commission on charges of violating Manual of Policy and Ethics of Sheriff's Department by (1) failing to go through channels with complaint that member of sheriff's emergency reserve was unfit and unqualified to serve, and (2) knowingly filing a false report against a superior officer.

Herbert W. Simmons, Jr., Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, Andrew O. Porter, Deputy County Counsel, Los Angeles, for respondents.

DORAN, Justice.

This is an appeal from the judgment.

As recited in respondents' brief, "The Appellant, Louis Damiani, was a Deputy Sheriff of Los Angeles County who was discharged for cause on November 18, 1954. He requested a hearing before the County Civil Service Commission, one of the Respondents herein. A formal hearing was held on December 22 and 23, 1954 and the Commission sustained the discharge. Damiani petitioned the Superior Court for a Writ of Mandate, which was denied, and the appeal is from such denial.

"Appellant was charged with filing a report he knew to be false, stating that his superior officer, Sergeant Mallette, was intoxicated when serving as a uniformed officer at a junior high school dance, October 15, 1954. It was also charged that he violated rules of the Sheriff's Office requiring official communications to be sent through the chain of command and that he had been suspended twice for disciplinary reasons."

As pointed out by appellant, "The petitioner was charged with violating Section 1205 of the Manual of Policy and Ethics of the Sheriff's Department of the County of Los Angeles in that allegedly on or about October 30, 1954, without going through channels petitioner communicated in writing directly with Captain Mullison of the Sheriff's Emergency Reserve that a member of the Emergency Reserve, Deputy Weberg, was unfit and unqualified to serve as a member of this Department." Also that, "Petitioner was charged with violation of Sections 1407, 1431, 1444 and 1502 of the Manual of Policy and Ethics, in that he allegedly, on or about October 25, 1954, reported in writing that one Sergeant Byron A. Mallette was intoxicated while off duty but working on an approved outside assignment as a uniformed officer."

[1, 2] Although appellant's contentions are not without merit they are highly technical. As respondent points out, "It is not the function of the appellate court to weigh the evidence before the Superior Court, nor may the Superior Court weigh the evidence before the Civil Service Commission.

Neither court may exercise an independent judgment on the evidence. Technically the District Court of Appeal considers whether the decision of the Superior Court is supported by substantial evidence, and the Superior Court determines whether the findings of the Civil Service Commission were supported by substantial evidence. (Moran v. State Board of Medical Examiners, 32 Cal.2d 301 [196 P.2d 20].)" Incidentally, the findings and conclusions of the trial judge are not included as part of the record on appeal. And, of course, the court may not take judicial notice of county ordinances, rules and regulations of the Sheriff's Office or the Civil Service Commission.

[3, 4] The presumption applies that the findings and conclusions support the judgment. It also must be assumed that the findings and conclusions of the Civil Service Commission are supported by the evidence. In the light of the record, the judgment must be and is affirmed.

WHITE, P. J., and FOURT, J., concur.



142 Cal.App.2d 109

Helen MILLER, Plaintiff and Appellant,

v.

SCHLITZ BREWING COMPANY, a corporation, and Associated Brewers Distributing Company, a corporation, Defendants and Respondents.

Civ. 21621.

District Court of Appeal, Second District, Division 1, California.

June 7, 1956.

Action for injuries sustained by employee who allegedly cut her finger on broken bottle while opening case of defendants' beer. The Superior Court of Los Angeles County, Fred Miller, J., entered judgment of nonsuit, and plaintiff appealed. The District Court of Appeal, Doran, J., held that if employee of restaurant, to whom distributor had delivered three sealed cases of beer, cut her finger on broken bottle when opening one of cases which had remained undisturbed since delivery, she would not have cause of action against either distributor or brewer upon claim of negligence predicated on theory of res ipsa loquitur, since probability that bottle was broken while in possession of either defendant distributor or defendant brewer was not warranted.

Judgment affirmed.

Negligence ⇐121(3)

If employee of restaurant, to whom distributor had delivered three sealed cases of beer, cut her finger on broken bottle when opening one of cases which had remained undisturbed since delivery, she would not have cause of action against either distributor or brewer upon claim of negligence predicated on theory of res ipsa loquitur, since probability that bottle was broken while in possession of distributor or brewer was not warranted.

Silverberg & Fahrney, Long Beach, for appellant.

Moss, Lyon & Dunn, Henry F. Walker, Los Angeles, for respondent Schlitz Brewing Co.

Joseph A. Kean, Los Angeles, for respondent Associated Brewers Distributing Co.

DORAN, Justice.

As recited in appellant's brief, "This is an action brought by Helen Miller against Schlitz Brewing Company, a corporation, and Associated Brewers Distributing Company, a corporation, to recover for personal injuries.

"Helen Miller sought relief in the amount of twenty-six thousand six hundred sixty dollars ($26,660.00) as compensation for her medical bills, wages lost and damage to her person. In her complaint she charged the co-defendants with negligence in packing a case of beer so that plaintiff was injured when, in the course of her em-

ployment, she opened the case and cut her finger on a broken bottle contained therein.

"Each defendant denied the allegations of negligence, issues were formed, and the case was set for trial.

"At the trial, the plaintiff introduced into evidence the testimony of two witnesses whch tended to prove the following facts: That plaintiff was employed by the Blue Pacific Cafe in the City of Long Beach, and that on April 21, 1954, a delivery of beer was made by the 'Schlitz man' to the cafe, which plaintiff received and paid for. She was the only one present in the cafe at the time, and obtained a receipt from defendant Associated Brewers Distributing Company.

"Five days later, on April 26, 1954, while plaintiff was moving beer bottles from the case into the cooler, she picked up the bottle which caused her injury. The bottle was in the case, and was broken, so that the top part of the bottle came off in her hand, and the bottom part remained in the case. One witness was present at the time, and testified to the fact that plaintiff was injured by the broken bottle.

"Plaintiff testified that the case which contained the broken bottle was made of paper pasteboard, and that it was in the same place as it had been when delivered. It was the top case in a stack of three cases. The case was sealed when delivered, and remained sealed until plaintiff opened it to remove the bottles at the time of the accident. She didn't move the case at that time, but merely opened it.

"At the conclusion of plaintiff's evidence, the defendants each moved the Court to grant a nonsuit, and each motion was granted, and a nonsuit entered against the plaintiff.

"The only question involved in this case is whether the Trial Court acted properly in granting the motions for judgments of nonsuit."

Appellant relies on the doctrine of res ipsa loquitur and argues that, "There can be no doubt that the plaintiff proved sufficient facts to give rise to an inference of negligence under the doctrine of *res ipsa loquitur,* since, when the evidence is taken in the light most favorable to the plaintiff it is seen that it is more probable than not that the instrument under defendants' control was the cause of the accident. The plaintiff showed all she needed to in order for the inference to arise; it was shown that a sealed carton, delivered by one of the defendants from its exclusive control; contained a broken bottle, and that the plaintiff was more probably than not injured by the bottle, and that the injury probably would not have happened unless there was some negligence and that the defendants, or one of them, was probably the negligent party, and that the plaintiff did not interfere with the instrument after delivery by the defendants, or one of them.

"Wherefore, we respectfully submit that the Trial Court erred in granting the motions for a judgment of nonsuit, because a *prima facie* case was made by the plaintiff."

Respondent Schlitz Brewing Company argues, on the other hand, that, "There is no showing that respondent Brewing Company packed the bottle or bottles in the carton or case or that respondent Brewing Company had anything to do with the packing thereof—much less that said respondent was negligent in respect thereto.

"While there is evidence that plaintiff paid the man who delivered the beer and that she secured from him a receipt by defendant Associated Brewers Distributing Company, there is no showing that respondent Brewing Company delivered the beer to plaintiff's place of employment or had anything to do with the delivery thereof.

"There is no showing of the care or lack of care of the bottles during transportation thereof to plaintiff's place of employment or that respondent Brewing Company was responsible for such transportation or had anything to do therewith.

"There is no showing as to whether the carton was or was not in a damaged or marked or stained condition at any time.

"There is no showing that the bottle was in the possession of respondent Brewing Company or that if it ever was the bottle then was or could have been broken.

"There is no showing that if and while the bottle was in the possession of respondent Brewing Company the bottle was defective and that such defect was or should have been discovered by said respondent Brewing Company through reasonable inspection. Indeed, there is no showing as to what would constitute reasonable inspection or what would or should be discovered thereby.", and in general that there was no act of negligence nor is there any evidence of liability so far as the above mentioned respondent is concerned. It is also contended that the evidence is insufficient to invoke the application of the doctrine of res ipsa loquitur.

Respondent Associated Brewers Distributing Company points out that, "The only allegation of negligence in the plaintiff's complaint was the specific allegation that the defendants negligently and carelessly packed said case of Schlitz Beer.

"As quoted in the case, [In re] Estate of Luckenbach, 205 Cal. 292, at [page] 301 [270 P. 961, at page 965]:

"'"Adopting, as we must, the rules of construction that apply to cases of nonsuit, by indulging every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence, and giving to contestant the benefit of every piece of evidence which tends to sustain his averments, as fully stated in Berger v. Lane, 190 Cal. 443 (213 P. 45), and cases cited, it is clear that he has completely failed to make out a *prima facie* case. * * * The inferences and presumptions spoken of * * * must fall within the realm of rationality. There is nothing in contestant's case which amounts to more than mere conjecture, surmise, or suspicion. To justify the submission of any question of fact to a court or jury there must be proof of a *substantial character* that the fact is as alleged."'

"In re Estate of Bryson, 191 Cal. 521 (217 P. 525). (Emphasis included.)

* * * * * *

"In viewing the evidence in the light most favorable to the appellant, there is no evidence and no reasonable inference can be drawn from the evidence that the Associated Brewers Distributing Company at any time packed or had anything to do with the packing of the case of Schlitz Beer. The plaintiff not only failed to have proof of 'substantial character' but failed to have any evidence to establish the averment of the complaint. Consequently, the plaintiff completely failed to make out a *prima facie* case against the Associated Brewers Distributing Company." It is also argued that, "Elements necessary for the application of the doctrine of res ipsa loquitur were not present."

The doctrine of res ipsa loquitur of course is well known and there are many decisions involving the doctrine. Both appellant and respondents cite from them according to their contended applicability.

It is argued by respondents that, "The reading of the record does not disclose any evidence indicating that the defendant, The Associated Brewers Distributing Company, at any time, had any control over the case of Schlitz Beer or the broken bottle involved in this case.", and that, "Plaintiff has utterly failed to establish the various factors which must be shown as a prerequisite to any application of the doctrine."

At the trial the only question appears to have been, who broke the bottle. It even was suggested that the bottle may have exploded. The trial judge commented in part: "* * * You have a broken bottle in a case, now. Is it any more probable that the people in fixing that up at a plant or that the distributor in carrying it down here, broke that one bottle and never broke any others, than it is that somebody else, some third person, might have broken it? Under the circumstances, I do not think so. * * * I think you must show, and the Court must feel that on the basis of probabilities, that this thing happened up there in the plant where this beer was made or that it happened by the distributor on the way down, and that in all probabilities nobody else, as a matter of probability, could or would have done it. I do not see how you can say that is this kind of case. I do not think that it is your exploding case. People can break bottles by doing many things. It might have (been) dropped in such a place by somebody that

broke it there, that one bottle only, but an exploding bottle, when a person picks a bottle up or puts it in cold water or something and it explodes in his hand, that isn't the same to me as breaking a bottle. It is a different situation. Bottles break by everybody practically. Dropping milk bottles on a cement or brick sidewalk or there are just hundreds of ways, but there are not hundreds of ways in which an exploding bottle would blow up. I do not think they are similar. I disagree.

"I think a non-suit is proper here and I am going to grant it as to both defendants."

From a review of the record and the law it appears definitely that the judgment of the trial court should not be disturbed on appeal. The judgment therefore is affirmed.

WHITE, P. J., and FOURT, J., concur.



142 Cal.App.2d 172

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

James VIENNE, Defendant and Appellant.

Cr. 2664.

District Court of Appeal, Third District, California.

June 8, 1956.

Rehearing Denied June 21, 1956.

Hearing Denied July 5, 1956.

Defendant was convicted in the Superior Court, Sacramento County, Raymond T. Coughlin, J., of robbery in the first degree, and he appealed. The District Court of Appeal, McMurray, J. pro tem., held that the deputy district attorney's closing remarks required reversal of conviction.

Reversed.

1. Criminal Law ⇐741(2)

Identification of defendant as a perpetrator of crime charged is matter for jury.

2. Criminal Law ⇐1137(5)

Defendant could not successfully contend on appeal that it had been improper to permit introduction of evidence of prior identification of accused, where fact of prior identification had been brought out on cross-examination by defendant's own counsel.

3. Criminal Law ⇐719(1), 730(7)

It was prejudicial misconduct for prosecuting attorney to state in closing remarks that defendant's conduct in not making pretrial disclosure of alibi was matter which jury could consider; and notwithstanding prompt admonition that jury should not consider such statements as evidence, prosecuting attorney's subsequent repetition of statement, taken together with unsupported reference to "professional gunmen" would require reversal of robbery conviction.

4. Criminal Law ⇐723(1)

It is natural and necessary that counsel for the People as well as counsel for defendant shall have mind of an advocate; but district attorney, as representative of people, is bound to refrain from making inflammatory statements and is bound by a somewhat higher duty of fairness than is the ordinary practitioner in a court of law.

Alfred J. Hennessy, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., by G. A. Strader, Deputy Atty. Gen., for respondent.

McMURRAY, Justice pro tem.

This is an appeal from a judgment of the Superior Court of the County of Sacramento wherein the appellant was convicted of robbery in the first degree. It is also an appeal from an order denying a new trial.

[1, 2] The appellant was charged with two counts of robbery and was acquitted on one count. The identification of the appellant as the perpetrator of the robbery of

which he was convicted is certainly not the type of testimony which should be taken as a model for identification in criminal trials. However, this question is as to the sufficiency of the evidence and is a matter for the jury. People v. Newland, 15 Cal.2d 678, 104 P.2d 778. The one witness who stated he saw defendant's face testified in a manner which leaves something to be desired, but this court cannot for that reason upset the identification. In People v. Wilson, 76 Cal.App. 688, at page 700, 245 P. 781, identification by the back and shoulders was held to be sufficient identification. The appellant also contends that it was improper to permit the introduction of evidence of prior identification of the accused. This proposition is without merit, since the fact of prior identification was brought out on cross-examination by appellant's counsel.

[3, 4] Appellant further contends on this appeal that the deputy district attorney was guilty of misconduct in certain statements contained in his closing argument. The deputy district attorney who tried the case in his closing remarks stated that the defendant's conduct in not telling the police at the time of his apprehension, or a representative of the district attorney's office at a subsequent questioning, of an alibi to which he testified in the trial was a matter which the jury should consider to determine whether it was the conduct of an innocent man or the conduct of a guilty man. The defendant's counsel immediately cited this as misconduct, and the trial court, with commendable promptness, cautioned the jury that it should not regard such statements as evidence and that they were to be bound only by the evidence introduced before them. Despite the court's attempt to cure the error made by the deputy district attorney in so commenting on the evidence, for there can be little doubt that this was prejudicial misconduct, see People v. Talle, 111 Cal.App.2d 650, at page 676, 245 P.2d 633, the deputy district attorney nevertheless persisted in again making the same statement to the jury, and immediately after the judge's cautionary admonition to the jury, repeated: "I ask you to consider that, ladies and gentlemen, however, as guilty conduct on the part of the defendant." The court again instructed the jury to disregard the matter and the deputy district attorney proceeded with a rather nebulous argument relative to the whereabouts of a special delivery letter which had been testified to by the defendant and again commented on the fact that the defendant had not made any statement as to his whereabouts to anyone until he took the witness stand during the trial. Finally, in his closing remarks, the district attorney stated: "Now if you want to put these professional gunmen away, you and other juries like you are going to have to do it—* * *." There was no evidence which would indicate that the defendant in this case was a professional gunman, and the remark of the deputy was unwarranted.

While it is easy to understand counsel becoming excited in the course of the trial, and while, furthermore, it is natural and necessary that counsel for the people as well as counsel for the defendant shall have the mind of an advocate, still the district attorney, as a representative of the people, is bound to refrain from making inflammatory statements and is bound by a somewhat higher duty of fairness than is the ordinary practitioner in a court of law. People v. Wilkes, 44 Cal.2d 679, 284 P.2d 481. Under the circumstances it is impossible to find that the error here complained of was not prejudicial. Therefore, the judgment and order appealed from are reversed.

VAN DYKE, P. J., and PEEK, J., concur.

Hearing denied; SHENK and SPENCE, JJ., dissenting.

In the Matter of the ESTATE of Harry C. STAUFFER, Deceased.

R. N. PHILPOT and Hilda Kirtlan, Proponents and Appellants,

Gladys Wollenberg, Proponent and Appellant,

v.

Myra Stauffer HENRY, Bernard S. Henry, Juanita Bayley, Robert J. Bayley, Edna Dyer, Alice Stauffer Taylor, Lucille Henry, Stephen R. Bayley and Marjorie Stauffer, Contestants and Respondents.

Civ. 8689.

District Court of Appeal, Third District, California.

May 31, 1956.

Rehearing Denied June 22, 1956.

Hearing Denied July 24, 1956.

Will contest. From a judgment entered in the Superior Court, Sacramento County, Ralph McGee, J., denying probate except as to two items appeals were taken. The District Court of Appeal, Peek, J., held that evidence sustained findings that two persons who were both specific and residuary devisees had procured gifts through undue influence but in view of fact that gifts to two residuary devisees were not so procured, such gifts were valid.

Affirmed in part and reversed in part and remanded with directions.

Schottky, J., dissented in part.

1. Wills ⇐166(2)

In will contest, evidence supported finding that two beneficiaries, one of whom had managed decedent's property during his lifetime, and the other, who was secretary to such person and who had typed will, had used undue influence to procure execution of will.

2. Wills ⇐161

If entire will is result of undue influence probate must be refused, but if only part of it is affected by undue influence, that part may be rejected as void, but remainder, which is outcome of free action of testator, may be sustained if not inconsistent and if it can be separated from part which is invalid. West's Ann. Prob.Code, §§ 101–104, 126.

3. Wills ⇐161

Where two of the beneficiaries under will had not exercised any undue influence in procuring execution of will, their situation was as if testator had died leaving duly executed instrument expressing wishes in their favor unaffected by undue influence or other vitiating circumstances, and gifts to them were valid. West's Ann. Prob.Code, §§ 101–104, 126.

4. Wills ⇐435

It is function of court to construe a will and not to make one. West's Ann. Prob.Code, §§ 101–104, 126.

5. Wills ⇐858(1)

Where there is valid general residuary devise, real property mentioned in lapsed or void devise goes to residuary devisee. West's Ann.Prob.Code, § 126.

6. Wills ⇐161

A separate, distinct, and independent residuary clause will stand even though bequests to some persons named therein are procured by undue influence and even though residuary clause might thereby be increased in value beyond what was contemplated by decedent at time of execution of will. West's Ann.Prob.Code, § 126.

7. Wills ⇐401

Even though a residuary beneficiary did not appeal from adverse judgment in will contest, conclusion reached by District Court of Appeal on appeal by another residuary beneficiary, that such beneficiaries were entitled to part of residue, would redound to his benefit. West's Ann.Prob. Code, § 126.

8. Appeal and Error ⇐1119

Rule that judgment becomes final against nonappealing party even though it is reversed on appeal as to other parties is not applied where portions of judgment adverse to nonappealing party are so interwoven with whole that appeal from part affects other parts, and, in such case, reviewing court can reverse whole judgment if necessary to do justice.

9. Wills ⇐627(1), 863

Where gift is to certain named individuals and the share each is to receive is specifically mentioned, they take individ-

ually as tenants in common and when one dies or is precluded from taking designated share, as to such share, testator dies intestate and it is vested in his heirs at law. West's Ann.Prob.Code, §§ 101–104, 126.

Lewis, Lewis & Lewis, Pierce & Brown, Sacramento, for appellants Philpot and Kirtlan.

A. M. Mull, Jr., Wilke & Fleury, Sacramento, for appellant Wollenberg.

Anthony J. Kennedy, Devlin, Diepenbrock & Wulff, Sacramento, for respondents.

PEEK, Justice.

At the conclusion of a contest instituted by the heirs at law of the decedent, Harry C. Stauffer, the court by its judgment denied probate of the will offered by the proponents, R. N. Philpot and Hilda Kirtlan, except as to two items thereof. Proponents' motion for a new trial was denied, and this appeal followed.

A summary of the pertinent facts as shown by the rather voluminous record indicates that on March 25, 1944, eight years prior to his death and when he was approximately 68 years of age, the decedent, Harry C. Stauffer, executed the will in question. He was one of a large family; however, at the time of his death he was survived by only one sister, Myra S. Henry, aged 87, one of the contestants, and by numerous nieces and nephews, three of whom are also contestants herein. None of these relatives had any contact with Harry for more than 15 years prior to his death, and at the time thereof in January of 1952, none of them attended the funeral or recognized his death in any way. He had been married and divorced, and his one son of that marriage had predeceased him. He was a graduate pharmacist and had at one time operated a pharmacy in Sacramento. From 1916, when he disposed of his pharmacy, until 1929 he lived with a friend in the Fair Oaks district, a suburban Sacramento area, and worked at odd jobs for his friend. In 1921 he suffered a stroke which left him slightly disabled. In 1929 he was employed as a night watchman, but he had no regular work thereafter. In 1934 he returned to his mother's home in Sacramento where he lived with her and his unmarried sister, Ida. This home which was an old style, three-story mansion had been used by the family for a long period of time and was across the street from the real estate office of one of the proponents and appellants herein, R. N. Philpot. From approximately 1931 Philpot, at the request of the mother, handled all of the Stauffer family affairs.

In the middle Thirties, following a request from the mother for advice and assistance in her affairs, Philpot suggested that the home be razed and a store and office building be erected on the site. Through his efforts such a project was ultimately financed and completed in 1938 and 1939. A new home was purchased and Ida and Harry lived there until her death. Shortly after Harry executed the will in question this house was sold, and from then on he lived by himself until his death in 1952. During all of this time, as the trial judge noted in his memorandum opinion, Philpot attended to all business matters pertaining to the property. He prepared the deed by which the mother transferred title of that property to Harry's sister, Lillie; also the deed by which Lillie transferred the same to the sister, Ida; and the deed by which Harry took title from Ida. All of these deeds were kept by Philpot in his office and subsequently he had them recorded. He negotiated loans, employed contractors, secured tenants, prepared leases and all documents necessary to the accomplishing of these purposes.

Although the record contains no evidence as to the value of the property at the time the will was executed, it does appear that largely through Philpot's efforts the value of the property rose from approximately $25,000 in the early 1930s to approximately $120,000 in 1949. All of the funds received from rentals and other sources which belonged to the Stauffer family were placed in a personal bank account maintained by Philpot, and all funds disbursed for the benefit of the Stauffers were paid by Philpot out of this account. The appellant Hilda Kirtlan, who was

Philpot's longtime secretary, personally kept the various accounts involved. Following Ida's death, Philpot continued his management of the Stauffer family affairs. There was evidence that during this entire time Harry drank quite heavily and took no responsibility whatsoever for his estate, allowing Philpot the complete management and control thereof. In addition he had Harry's power of attorney.

At the time of the execution of Harry's will, his estate consisted of the property in question which was rented for a term of years at the rate of $761 per month with some additional funds received as rental for an adjacent parking area; and, prior to the sale of the 34th street residential property, a further sum of $25 per month was received as rent for a small house on the rear of the lot. There were dividends which Harry collected on some stock; and his son had been paying $35 per month to Philpot for his father's support. This stopped upon the death of the son, but in the meantime the rental on the store building had increased to $1,845 per month and the parking lot to $125 per month. Against this were the disbursements necessary for payment on the $45,000 loan against the property and the attendant expenses such as taxes and utilities. During the year prior to the execution of the will Harry received an average of $124 monthly which he obtained in small amounts by calling twice a week at Philpot's office.

On November 10, 1938, Ida gave Philpot a deed to certain grazing land in Glenn County which, according to Philpot, he subsequently sold for $500. In September of 1942 Ida also gave Philpot a promissory note secured by a second deed of trust on the Sacramento property in the sum of $23,000 with interest compounded at the rate of 6 percent per annum. According to Philpot this note and deed of trust were given to him at Ida's suggestion because, as she stated, she had no money and desired to make payment for his services to the family during her lifetime for which he had received no compensation.

By the terms of his will, decedent devised, in Item 2, to Jessie Snyder, certain improved real property (the 34th street property which was sold prior to his death) "For kindnesses shown me during my life * * *." By Item 3 he devised to Philpot and Kirtlan the improved business property, "For services rendered to me and to my family for the past fifteen years, for which no compensation has been paid to them, and for kindnesses shown to me during my lifetime * * *." By Item 4 he gave to Michael David Littlefield, a minor, the sum of $5,000 to be placed in trust with Philpot and to be handled and invested by him until David reached his majority. By Item 5 he gave to certain named relatives the sum of $5 each. By Item 6 it was provided that if there was "sufficient revenue from the estate to warrant" it, $50 should be paid monthly to his sister Myra S. Henry. Lastly by Item 7, he provided that all of the residue of his estate should be "divided share and share alike" among Philpot, Snyder and Gladys Wollenberg, his former daughter-in-law. He also named Philpot as executor without bond.

According to Philpot, the evidence concerning the circumstances surrounding the execution of the will was that several months prior thereto Harry called at Philpot's office saying that he desired to make his will; that he knew about the $23,000 note; and that Philpot told him if he would tell Miss Kirtlan what he wanted, she would type it for him. This was corroborated by Kirtlan who stated he had also talked with her; that thereafter he came to the office with a draft of a will which he had prepared in his own handwriting; that she thereupon typed the will, merely copying from the draft which Harry had given her; and that following the execution of the will Harry took the original draft with him, leaving the executed will with Philpot. The court noted in particular the similarity between Harry's will and that of Ida which Kirtlan had likewise typed and acknowledged in 1938. Excepting the dispositive clauses, the two wills were practically duplicates as the trial court stated, "word for word, phrase for phrase, and clause for clause. Even the spacing and punctuation are identical, including the odd manner of putting the

initials of Philpot ("R". "N".) in quotation marks."

[1] In discussing the question of undue influence, the trial court noted that the evidence clearly established the existence of a confidential relationship between Harry and Philpot which was admitted by all parties, and therefore the activity of Philpot and Kirtlan in the preparation of the will and the undue profits which the will granted to them raised a presumption of undue influence and cast upon the proponents the burden of dispelling the same. To overcome this presumption Philpot and Kirtlan contend that the provisions of the will are not unnatural in that Harry had an abiding dislike for his relatives, and hence it was quite natural for him to reward the only persons who had been helpful to him; that the evidence of undue profit is at best only conjectural since there was no evidence as to the value of the property at the time the will was executed; that while there may have been opportunity for Philpot and Kirtlan to control Harry's testamentary act, that fact standing alone, unless coupled with a showing of activity on their part was insufficient; and that there was no evidence as to Harry's susceptibility to influence or subversion—in fact it was all to the contrary, and the court specifically noted this characteristic. In summation of the above-mentioned evidence, the trial court, in its memorandum opinion, further noted that were it not for the circumstances surrounding the execution of the will, this would be a "close case on the facts", but such circumstances were "so incredible that it destroys the favorable effect of their other testimony."

Although the case made out by the contestants was not a strong one, we are constrained to agree on this point with the conclusion of the trial court. The long control of management of Harry's affairs by Philpot, the participation of proponents in the actual preparation of the will and the gift to them, in effect, of his entire estate for the specific reason that it was for services rendered to himself and his family for which Philpot had received no compensation, when in fact less than two years before Ida had given Philpot a note and trust deed in the sum of $23,000, and the bequest of $50 a month to Myra if there was "sufficient revenue * * * to warrant" it, were sufficient to present a substantial conflict in the evidence as to the true state of his knowledge of his affairs and as to the undue influence, if any, on the part of proponents, and hence to support the conclusion of the trial court thereon. In re Estate of Pellegrini, 138 Cal.App.2d 143, 291 P.2d 558.

Appeal of Gladys Wollenberg

As previously noted, Item 7 of the will gave the residue of the estate to R. N. Philpot, Jessie Snyder and Gladys Wollenberg, share and share alike. The court found that this item could not be separated from the portions of the will affected by the undue influence of Philpot; that to eliminate Philpot therefrom would be to make a will for the decedent which did not express his intent. The court further found that at the time of the execution of the will Harry owned no property which would be disposed of by the residuary clause if the portions of the will affected by the undue influence were admitted to probate.

In discussing the various rules for the interpretation and construction of wills as found in the Probate Code and court opinions, our Supreme Court has held in Re Estate of Lefranc, 38 Cal.2d 289, 295–296, 239 P.2d 617, 621, that:

> "A 'will is to be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, it must have effect as far as possible.' (Prob.Code, § 101.) 'The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative; and of two modes of interpreting a will, that is to be preferred which will prevent a total intestacy.' (Prob.Code, § 102.) (See, also, In re Estate of Phelps (1920), 182 Cal. 752, 190 P. 17; In re Estate of McCurdy (1925), 197 Cal. 276, 282, 240 P. 498.) All 'the parts

of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole; but where several parts are absolutely irreconcilable, the latter must prevail.' (Prob.Code, § 103.) 'A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital of or reference to its contents in another part of the will.' (Prob.Code, § 104.) 'A devise of the residue of the testator's real property, or a bequest of the residue of the testator's personal property, passes all the real or personal property, as the case may be, which he was entitled to devise or bequeath at the time of his death, not otherwise effectually devised or bequeathed by his will.' (Prob.Code, § 126.) 'The making of a will raises a presumption that the testator intended to dispose of all his property. Residuary clauses are generally inserted for the purpose of making that disposition complete, and these clauses are always to receive a broad and liberal interpretation, with a view of preventing intestacy as to any portion of the estate of the testator, and this general rule is in harmony with the declaration of our code that the provisions of a will must be construed, if possible, so as to effect that purpose.' (O'Connor v. Murphy (1905), 147 Cal. 148, 153, 81 P. 406; see, also, In re Estate of Beldon, (1938), 11 Cal.2d 108, 112, 77 P.2d 1052.) The prevailing principle is that the function of the court is to construe a will, not to make one; to ascertain the testator's intention as expressed and, *if lawful,* give it effect." (Emphasis added.)

[2] While it is true that if the entire will is the result of undue influence, probate of the same must be refused, nevertheless, "[i]f only a part of it is affected by undue influence, that part may be rejected as void, but the remainder, which is the outcome of the free action of the testator, ought to be sustained if it is not inconsistent and can be separated from the part which is invalid, and should be admitted to probate." In re Estate of Webster, 43 Cal.App.2d 6, 15, 110 P.2d 81, 86, 111 P.2d 355.

[3] Applying the rules noted in the cited cases to the present one, the only evidence as to participation related to Philpot and Kirtlan. As to the remaining parties named in Item 7, Snyder and Wollenberg, there is absolutely no evidence of any kind relative to any activity by them in procuring the execution of the will. The court specifically found this to be true as regards Snyder. No finding however was made concerning Wollenberg; in fact her name is not even mentioned in the exhaustive memorandum opinion filed by the court. Furthermore, with the exception of his feeling towards Snyder as expressed in his will and toward his former daughter-in-law Wollenberg, as shown by the evidence, the record is devoid of any evidence of any love or affection between the testator and his relatives. In fact it was all to the contrary. Under such facts and circumstances it cannot be said that the presumption of undue influence or any of the specific activities on the part of Philpot so affected the interests of Snyder and Wollenberg that it is impossible to determine to what extent their legacies were tainted with his undue influence. So far as Snyder and Wollenberg are concerned, "* * * their situation is that the [testator] died leaving behind [him] a duly executed instrument, expressing [his] testamentary wishes in their favor unaffected by undue influence, fraud, or other vitiating circumstance. This means nothing more or less than that the will is perfectly valid as to them. The result is that it is only the portions of the will in favor of [Philpot which] * * * should be revoked, * * * the remaining portions continuing as a valid expression of the [testator's] testamentary intention." In re Estate of Carson, 184 Cal. 437, 441, 194 P. 5, 8, 17 A.L.R. 239.

[4] The statutory rules of construction as noted in the Lefranc case and the summation thereof is that the function of the

court is to construe a will—not to make one; to ascertain the testator's intention as expressed, and give it effect, which construction may mean as noted in the Webster and Carson cases, the acceptance of part and rejection of the remainder. But contrary thereto and even to the general thought expressed in the trial court's memorandum opinion, the effect of its conclusion was to defeat any possibility of carrying out, except as to minor bequests, the testator's intention. This is true since the judgment of the trial court excluded both Snyder and Wollenberg, the only two beneficiaries for whom he was shown to have expressed any affection, except Littlefield, and thereby gave substantially all of his estate to the very persons whose participation he emphatically did not want. We cannot agree with such result.

[5] The further contention that the residuary clause must fail because Harry was possessed of no property which would be disposed of by his will, should the portions affected by undue influence have been admitted to probate, is also without merit. By the terms of section 126 of the Probate Code, one who makes residuary disposition of his estate either real or personal, passes all of such property "not otherwise effectually devised or bequeathed by his will." Necessarily, therefore, property not effectually devised, such as in the present case, would pass to the beneficiaries named in the residuary clause. Thus it has been held that in the absence of a contrary intent clearly expressed by the terms of the will, "the accepted rule in this state [is] that, where there is a valid general residuary devise, real property mentioned in a lapsed or void devise goes to the residuary devisee * * *." In re Estate of Russell, 150 Cal. 604, 605, 89 P. 345.

[6] Although we believe the rules above enunciated to be controlling in relation to the questions raised concerning the residuary clause of the will here in dispute, we have been referred to no California case wherein a comparable factual situation was presented or wherein this specific point was at issue. However in Wellman v. Carter, 286 Mass. 237, 190 N.E. 493, 498, it was held that a separate, distinct and independent residuary clause would stand even though bequests to some persons named therein were procured by undue influence, and although the residuary clause might thereby be increased in value beyond what was contemplated by the decedent at the time of the execution of the will, such circumstances were immaterial. This we believe to be the proper rule.

[7, 8] It should further be noted that the conclusion we have reached concerning the construction of the residuary clause will redound to the benefit of Jessie Snyder who did not appeal as well as Gladys Wollenberg who did, under the rule enunciated in the case of Blache v. Blache, 37 Cal.2d 531, at page 538, 233 P.2d 547, at page 551, wherein the court expressly held:

> "It is true that there are cases which hold that a judgment becomes final as against a non-appealing party even though the judgment is reversed on the appeal of other parties. [Citing cases.] But this rule is not applied where portions of a judgment adverse to a non-appealing party are so interwoven with the whole that appeal from a part affects the other parts; in such a situation the appellate court can reverse the entire judgment if it is necessary to do justice."

[9] The conclusion we have reached herein necessarily invokes the further rule that where the gift is to certain named individuals, and the share they each are to receive is specifically mentioned, they take individually as tenants in common. Thus when one of such designated persons dies or, as in the present case, is precluded from taking his designated share, then as to that share the testator died intestate, and such portion is vested in his heirs at law. In re Estate of Murphy, 157 Cal. 63, 106 P. 230; In re Estate of Kelleher, 205 Cal. 757, 272 P. 1060.

By reason of the conclusions herein set forth, the judgment of the trial court as it relates to appellants Philpot and Kirtlan is affirmed. The judgment as it relates to the devisee Snyder and the appellant Wollenberg is reversed, and the cause is remanded to the trial court with instructions

to enter judgment in accordance with the views herein expressed.

McMURRAY, J. pro tem., concurs.

SCHOTTKY, Justice.

I concur in the part of the majority opinion which affirms the judgment as it relates to appellants Philpot and Kirtlan, but am unable to agree with the opinion of the majority that the judgment should be reversed as it relates to appellant Wollenberg and devisee Snyder. I shall therefore set forth my views as to the appeal of Gladys Wollenberg.

Item (7) of the will gave the residue to appellant Philpot, Jessie Snyder and appellant Wollenberg, and the court found that said Item (7) could not be separated from the portions of the will affected by said undue influence without making a will that did not express Harry Stauffer's intent. The court found also that at the time the will was executed Harry S. Stauffer owned no property which would be disposed of by said residuary clause if the portions of the will affected by undue influence (the devise of the 14th and I Street property to appellants Philpot and Kirtlan) were admitted to probate.

Appellant Wollenberg contends that the undue influence of appellants Philpot and Kirtlan does not invalidate the residuary gift as to the two innocent residuary beneficiaries, herself and Jessie Snyder. In her brief she argues that because undue influence invalidated appellant Philpot's portion of the residue, she is entitled to one-half thereof instead of one-third, but upon the oral argument her counsel conceded that she would be entitled only to one-third of the residue.

Appellant Wollenberg points out that there was no evidence or finding that any undue influence or any other wrong was, in any way, indulged in by either Jessie Snyder or Gladys Wollenberg. The evidence establishes that appellant Wollenberg married the son of decedent in 1926. They were divorced some three years later and during the marriage she had occasion to visit with the Sacramento Stauffer family, including her father-in-law, the decedent, two or three times weekly. There was evidence that after the divorce these reciprocal visits were continued. After Ida's death and up to "around 1950" decedent continued to visit Gladys at her home. The decedent was fond or her two sons. Said appellant points out that on the other hand the feeling existing between the Stauffer family and the Henry family was very distant. The last times any of the Henry family had ever seen any of the Stauffers were in 1935 and 1937. Even then they did not see decedent.

The general rule as to partial invalidity is well expressed in 57 American Jurisprudence, section 366, page 266, as follows:

> "While there are authorities which hold that where the execution of a will is shown to be the result of undue influence, the issue is upon the validity of the will as a whole, and testimony which defeats one devise or one legacy defeats all, the general rule is that parts of a will may be held valid notwithstanding other parts are invalid on account of undue influence exercised upon the testator, provided the parts so affected are separable so that the will remains intelligible in itself if the invalid parts are deleted upon probate. In other words, the valid portions of the will may stand and be admitted to probate, although other parts are denied probate, or are set aside, as obtained through undue influence, unless the provisions are so interdependent that the valid cannot be separated from the invalid without defeating the general intent of the testator. * * *
>
> "The general rule as stated above is subject to the limitation that it is not applicable when it will defeat the manifest intent of the testator, interfere with the general scheme of distribution, or work an injustice to other heirs. The doctrine is not applicable where it is impossible to determine to what extent specific legacies have been tainted by the undue influence; in such a situation the whole will must either be refused probate or admitted thereto."

Appellant Wollenberg cites Section 102 of the Probate Code to the effect that an interpretation of a will which will prevent intestacy is preferred, and also quotes from In re Estate of Webster, 43 Cal.App.2d 6, at page 15, 110 P.2d 81 at page 86, as follows:

"The general rule is that if the whole will is the result of the presence of undue influence, probate of the whole will must be refused. If only a part of it is affected by undue influence, that part may be rejected as void, but the remainder, which is the outcome of the free action of the testator, ought to be sustained if it is not inconsistent and can be separated from the part which is invalid, and should be admitted to probate. [Citing cases.]"

Said appellant also cites In re Estate of Carson, 184 Cal. 437, 194 P. 5, 17 A.L.R. 239, as holding that a will induced by false representations of the residuary legatee is valid as to the bequests to others in the absence of any showing that such bequests were affected by the representations.

As set forth in the majority opinion, the court found that the will was not the free and voluntary act of Harry C. Stauffer but was the product of the undue influence of appellants Philpot and Kirtlan except as to a bequest of $5,000 to Michael David Littlefield and a devise of certain real property to Jessie Snyder (which property was sold before Harry C. Stauffer's death, causing said devise to lapse). Appellant Wollenberg argues that "The result of the trial court's decision is to create an intestacy and thus pass the bulk of decedent's estate to the very heirs who were, in effect, disinherited by him and for whom he had no affection or regard." But, as pointed out by respondents, and found by the court, Harry Stauffer owned no property at the time the will was executed which would be disposed of by the residuary clause, and if said clause were permitted to stand as to appellant Wollenberg she would be receiving part of the property which was specifically devised to appellants Philpot and Kirtlan. Furthermore, it is not possible to determine to what extent the undue influence of appellants Philpot and Kirtlan caused the virtual disinheritance of all of the blood relatives of Harry Stauffer other than Myra Henry.

I believe that the trial court's findings that the residuary clause could not be separated from the portions of the will affected by undue influence and that striking the name of appellant Philpot from said residuary clause and permitting the remainder to stand would be to make a will for Harry Stauffer find support in the record. I believe that the instant case comes within the exception to the general rule of partial invalidity, hereinbefore quoted, that "the doctrine is not applicable where it is impossible to determine to what extent specific legacies have been tainted by the undue influence."

I would affirm the judgment in its entirety.



142 Cal.App.2d 123

Claudia WALKER, as Administratrix of the Estate of Mrs. Lillie Maybelle Waller Walker, Deceased, Plaintiff and Appellant,

v.

STATE of California, Goodwin J. Knight, as Governor of the State of California, Edmund G. Brown, as Attorney General of the State of California, State Board of Control of the State of California, John M. Peirce, as Chairman of the State Board of Control of the State of California, Robert Kirkwood and Arthur F. Henning, as Members of the State Board of Control of the State of California, Defendants and Respondents.

Civ. 8698.

District Court of Appeal, Third District, California.

June 7, 1956.

Rehearing Denied July 2, 1956.

Hearing Denied Aug. 1, 1956.

Action against the state and others. From a judgment of the Superior Court, Sacramento County, Malcolm C. Glenn, J., dismissing the action for failure to have summons issued within one year after filing

of the complaint the plaintiff appealed. The District Court of Appeal, Third District, Van Dyke, P. J., held, inter alia, that none of the reasons advanced for failure to have summons issued promptly such as illness and death of plaintiff's predecessor, lack of funds and inability to obtain diligent counsel could serve to prevent dismissal of action since statute is mandatory so that trial court had no discretion in the matter.

Judgment affirmed.

1. Appearance ⇐9(5)

Defendants' motion to dismiss for failure to have summons issued within one year after filing of complaint did not constitute a general appearance within exception in statute requiring summons to be issued within one year after filing of complaint except where appearance has been made by defendant, when summons may be issued within three years, where notice of motion to dismiss expressly stated that it was made for no other purpose, and without submitting themselves to jurisdiction of court. West's Ann.Code Civ.Proc. § 581a.

2. Appearance ⇐10

Where hearing on defendants' motion to quash was continued at request of plaintiff and because defendants' time for pleading to complaint would expire prior to hearing, court of its own motion extended time to plead to complaint, such extension of time did not change the special appearance into a general appearance on part of defendants. West's Ann.Code Civ.Proc. § 581a.

3. Dismissal and Nonsuit ⇐57

That some of defendants allegedly were absent from state during portions of time between filing of complaint and issuance of summons, would not excuse failure to have summons issued during statutory time, since it is the running of time for service, and not the running of time for issuance of summons, which is tolled by defendant's departure from state. West's Ann.Code Civ.Proc. § 581a.

4. Dismissal and Nonsuit ⇐57

That failure to have summons issued within year as required by statute was allegedly due to illness and death of plaintiff's predecessor, lack of funds, and inability to obtain diligent counsel, could not serve to prevent dismissal of action since statute is mandatory and trial court has no discretion in the matter. West's Ann. Code Civ.Proc. § 581a.

Claudia Walker, San Francisco, in pro. per., for appellant.

Edmund G. Brown, Atty. Gen., by William J. Power, Deputy Atty. Gen., for respondents.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment dismissing the action for failure to have summons issued within one year after the filing of the complaint, as required by Section 581a of the Code of Civil Procedure.

On July 26, 1951 appellant's mother commenced this action to recover damages from the state and certain of its officials on the ground that in 1880 the then Judge of the Superior Court of Solano County, acting as the agent of the state, fraudulently conspired to, and did, permit her adoption and thereby deprived her of her vested interest in her deceased mother's estate. Appellant's mother alleged that at the time of the adoption she was only two years old, that no guardian ad litem was appointed to represent her interests and that the required publication of the notice of the proceedings was not made. It was further alleged that the Superior Court Judge, with notice of the vested property rights of appellant's mother, fraudulently permitted her adoption and thereby deprived her of her heritage in violation of her constitutional rights. Appellant's mother sought not only damages for the alleged taking of her property without due process of law but also for personal injuries alleged to have been suffered due to the negligence of her adopting parents. Appellant's mother died July 15, 1952. The summons had not been issued. On October 23, 1953 appellant was appointed the administratrix of her mother's estate and on October 26, 1953 she was substituted as the plaintiff in the present action. She filed an amended complaint wherein she alleged

that, due to circumstances beyond her mother's control, she had been unable to file the statutory $500 undertaking required in an action against the state; and that up to the filing of the amended complaint appellant herself had suffered the same disability. Government Code, § 16047. On October 29, 1953 appellant filed the required statutory bond and had summons issued. Service thereof on respondents was completed on November 2, 1953. On November 5, 1953 respondents filed a notice of motion to dismiss on the ground that the summons was not issued within one year after the filing of the complaint. Section 581a of the Code of Civil Procedure provides:

> "No action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced must be dismissed by the court in which the same shall have been commenced, on its own motion, or on motion of any party interested therein, * * *, unless summons shall have issued within one year, * * *. But all such actions may be prosecuted, if appearance has been made by the defendant or defendants, within said three years in the same manner as if summons had been issued and served; * * *."

Respondent's motion to dismiss was granted on April 23, 1954 and a judgment of dismissal entered. Upon this appeal from such judgment, appellant strenuously argues that the trial court abused its discretion and deprived her of her constitutional rights by dismissing the action. She complains that the trial court did not give proper consideration to the facts that illness, financial difficulties, procrastination of counsel, and other matters prevented an earlier filing of the required statutory bond and caused the delay in issuance of summons. She also maintains that the one-year period in which a summons must be issued was extended by the death of her mother, by some of the respondents' absences from the state during the period, and by the respondents making the motion to dismiss. She also claims the motion constituted a general appearance within the meaning of the exception contained in Section 581a of the Code of Civil Procedure.

[1, 2] Respondents did not make a general appearance. Their notice of motion to dismiss for noncompliance with Section 581a expressly stated that it was made for "no other purpose, and without submitting themselves to the jurisdiction of this court". They did not ask any extension of time to plead. However, the following did occur. We quote from the order of the court: "* * * hearing on said motion to quash was continued at the request of the plaintiff * * * and that defendants' time for pleading to the complaint will expire prior to hearing of said motion, the court of its own motion, and not on the motion of any of the parties * * * hereby extends the time to plead to the complaint * * *" Under these circumstances, extending the time to plead did not change the special appearance into a general appearance upon the part of respondents. Brock v. Fouchy, 76 Cal.App.2d 363, 369–370, 172 P.2d 945.

[3] Assuming, as claimed by appellant, that some of the respondents were absent from the state during portions of the time between the filing of the complaint and the issuance of summons, this would not excuse the failure to have the summons issued during the statutory time therefor provided. It is the running of the time for service, and not the running of the time for issuance of the summons, which is tolled by a defendant's departure from the state. Code Civ.Proc. § 581a.

[4] None of the reasons advanced by appellant for the failure to have summons issued promptly, such as the illness and death of her mother, lack of funds, and inability to obtain diligent counsel, can serve to prevent dismissal of the action. The statute is mandatory. Gonsalves v. Bank of America, 16 Cal.2d 169, 172, 105 P.2d 118; Schultz v. Superior Court, 69 Cal.App.2d 530, 532–533, 159 P.2d 417; Schultz v. Schultz, 70 Cal.App.2d 293, 296–299, 161 P.2d 36. The trial court had no

discretion in the matter. By statutory command it was compelled to dismiss the action.

The judgment is affirmed.

PEEK and SCHOTTKY, JJ., concur.



142 Cal.App.2d 142

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Walter Henry SUGGS, Defendant and Appellant.

Cr. 5451.

District Court of Appeal, Second District, Division 3, California.

June 8, 1956.

Defendant was convicted of five counts of forgery, with three admitted prior felony convictions. The Superior Court of Los Angeles County, Herbert V. Walker, J., denied probation and imposed sentence, and defendant appealed. The District Court of Appeal, Shinn, P. J., held that where defendant admitted prior federal court felony convictions upon advice of court appointed counsel, and such federal judgments were examined in court by counsel but were not offered in evidence, defendant was precluded by such admission from claiming on appeal that federal judgments were for misdemeanor, rather than felony, offenses.

Judgment affirmed.

1. Criminal Law ⇐982

Admissions of defendant of truth of allegations of prior convictions will support judgment that he is a habitual criminal, and necessarily establish truth of facts alleged which are relevant to eligibility for probation.

2. Criminal Law ⇐1137(5)

Where defendant, in forgery prosecution, admitted prior federal court felony convictions upon advice of court-appointed counsel, and such federal judgments were examined in court by counsel but were not offered in evidence, defendant was precluded by admissions from claiming on appeal that federal judgments were for misdemeanor, rather than felony, offenses. West's Ann.Pen.Code, § 1203; 18 U.S.C.A. § 2311.

3. Criminal Law ⇐1137(2)

A defendant in a criminal case cannot complain of error which he has invited.

William Bronsten, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Defendant appeals from a judgment of conviction of forgery, five counts, which judgment recited, inter alia, that defendant admitted three prior felony convictions and that he had served a term of imprisonment for each of these previous offenses, to wit: (1) Forgery of Government check, a 1941 conviction by a Federal court in Missouri; (2) violation of Dyer Act, 18 U.S.C.A. § 2311, a 1944 conviction by a Federal court in Missouri; (3) forgery, a 1949 conviction by the California Superior Court in Yuba County. In the instant matter, defendant was denied probation and was sentenced to State prison for the time prescribed by law, the sentences on Counts II through V to run concurrently with Count I and with each other.

Defendant does not contest the sufficiency of the evidence as to the five counts of forgery, hence it will serve no useful purpose to relate that evidence here. He does, however, contend that the court erred in determining that the two prior convictions in the Federal courts were, in fact, convictions for felony and in holding that he was ineligible for probation. Pen.Code § 1203. He requests that the sentences be set aside, that he be permitted to enter a proper plea as to the two Federal con-

victions, and that another hearing be held to determine his right to probation.

Defendant pleaded not guilty to the forgery counts and denied the priors as alleged in the information. The cause was submitted to the court on the transcript of the preliminary hearing with each side reserving the right to put on additional evidence. After the court had read the preliminary transcript, the deputy district attorney inquired of defendant's then counsel whether he had "seen the priors" and "handed an instrument to Mr. Broady," defendant's attorney. Mr. Broady stated to the court that defendant wished to withdraw his denial of the priors, and, upon inquiry by the court, defendant admitted each of them. Defendant's counsel then orally moved for probation, but informed the court that there was no possibility of probation. Permission to apply for probation was granted, application was made and a report was returned. At the hearing on probation and sentence, the court ordered the probation officer's report to be filed, and denied probation.

The information contained sufficient allegations of the prior convictions and sentences of defendant. Authenticated copies of the judgments were produced by the People and shown to defendant's then counsel and thereafter the former convictions were admitted. The judgments, themselves, are not contained in the record.

Defendant's present counsel, appointed by the court, has presented and offered as a part of the record on appeal authenticated copies of two judgments of the District Court of the United States, Eastern District, Eastern Division for Missouri. The purpose of the offer is to show that due to the sentences imposed the offenses were misdemeanors.

The Attorney General replies that if defendant's request be deemed an application for augmentation of the record it should be denied because additional evidence may not be received on appeal in a criminal case, and for the further reason that defendant is bound by his admissions of the prior convictions of felonies. We need not pass upon the first ground of the objection since we are convinced that the second one must be sustained.

[1, 2] One of the Federal court judgments rendered upon pleas of guilty sentenced defendant to concurrent terms of six months each. The other one sentenced him to a year and a day in an institution of "reformatory type." Since they were not placed in evidence, but only examined by counsel, it must be presumed the court was unadvised as to the sentences they imposed, and relied upon defendant's admissions. Although the court considered the probation report it is fair to assume that defendant was deemed ineligible for probation because of his prior convictions. If the court was mistaken with respect to defendant's eligibility it cannot be charged with error. Defendant is bound by his admissions, made upon advice of his attorney. The court had no duty to examine the judgments, which were not offered in evidence, and no reason for ignoring defendant's admissions. The admissions of a defendant of the truth of allegations of prior convictions will support a judgment that he is an habitual criminal, In re Gilliam, 26 Cal.2d 860, 866, 161 P.2d 793; People v. Stone, 69 Cal.App.2d 533, 159 P.2d 701, and necessarily establish the truth of the facts alleged which are relevant to eligibility for probation. The Attorney General resists the claim that the convictions admitted were only misdemeanors, but we have no occasion to consider this question.

[3] If there was error it was invited by defendant and he may not complain of it. People v. Myers, 1 Cal.App.2d 620, 625, 37 P.2d 191; People v. Pettinger, 94 Cal.App. 297, 271 P. 132; People v. Lucas, 78 Cal.App. 421, 248 P. 691.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

CALIFORNIA REPORTER

298 PACIFIC REPORTER
SECOND SERIES

CALIFORNIA REPORTER

298 PACIFIC REPORTER
SECOND SERIES

WEST KEY NUMBER SYSTEM

46 Cal.2d 644

Alfred J. LUNDBERG, Plaintiff and Respondent,

v.

COUNTY OF ALAMEDA et al., Defendants and Appellants,

The Roman Catholic Welfare Corporation of San Francisco (a Corporation), Intervenor and Appellant.

S. F. 19026.

Supreme Court of California.
In Bank.
June 6, 1956.

Rehearing Denied July 5, 1956.

Resident taxpayer of county brought suit against county and religious organization to challenge the legality of a tax exemption. The Superior Court, Alameda County, A. J. Woolsey and Cecil Mosbacher, JJ., entered judgment in favor of the resident taxpayer, and the religious organization appealed. The Supreme Court, Gibson, C. J., held that provision of the Revenue and Taxation Code granting tax exemption to property used exclusively for school purposes of less than collegiate grade and owned and operated by religious, hospital or charitable funds, foundations or corporations, provided that the property is used for nonprofit purposes and owned by nonprofit organizations, does not contravene the provision of the First Amendment of the Federal Constitution forbidding the enactment of laws respecting the establishment of religion.

Judgment reversed.

Schauer, Shenk, and Carter, JJ., dissented.

1. Taxation ⚿251

Resident taxpayer of county had right to bring suit against county to challenge the legality of a tax exemption. West's Ann.Code Civ.Proc. § 526a.

2. Taxation ⚿57

In California all property must be taxed unless an exemption is authorized by the state Constitution or is granted by the laws of the United States.

3. Taxation ⚿196

Fact that the word "charitable" is only one of three descriptive words used in section of the Constitution providing that the Legislature may exempt from taxation all or any portion of property used exclusively for "religious, hospital or charitable" purposes and owned by community chest, funds, foundations or corporations organized and operated for religious, hospital or charitable purposes, not conducted for profit and no part of net earnings of which inures to the benefit of any private shareholder or individual, does not require that the word "charitable" be narrowly construed against exemption. West's Ann.Const. art. 13, § 1c.

See publication Words and Phrases, for other judicial constructions and definitions of "Charitable".

4. Taxation ⚿196

Provision of the Revenue and Taxation Code granting tax exemption to property used exclusively for school purposes of less than collegiate grade and owned and operated by religious, hospital or charitable funds, foundations or corporations, provided that the property is used for nonprofit purposes and owned by nonprofit organizations, is authorized by section of the Con-

stitution providing that the Legislature may exempt from taxation all or any portion of property used exclusively for "charitable" purposes and owned by community chest, funds, foundations, or corporations organized and operated for religious, hospital or charitable purposes, not conducted for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual. West's Ann.Rev. & Tax.Code, § 214; West's Ann.Const. art. 13, § 1c.

5. Constitutional Law ⇐48

A presumption is in favor of constitutionality of an act of the Legislature, and the invalidity of the act must be clear and unquestionable before the act can be declared unconstitutional.

6. Constitutional Law ⇐20

The Supreme Court cannot adopt its own interpretation of a provision of the Constitution without regard to the legislative construction, and, where more than one reasonable meaning exists, it is the duty of the Supreme Court to accept that chosen by the Legislature.

7. Constitutional Law ⇐84
Taxation ⇐196

Provision of the Revenue and Taxation Code granting tax exemption to property used exclusively for school purposes of less than collegiate grade and owned and operated by religious, hospital or charitable funds, foundations or corporations, provided that property is used for nonprofit purposes and owned by nonprofit organizations, does not violate section of the Constitution providing that the Legislature shall not grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever, since that section was superseded by subsequent adoption of other sections. West's Ann.Rev. & Tax.Code, § 214; West's Ann.Const. art. 4, § 30; art. 13, §§ 1c, 1½.

8. Constitutional Law ⇐84

The principle of separation of church and state is not impaired by granting tax exemptions to religious groups generally, and First Amendment of the Federal Constitution forbidding the enactment of laws respecting establishment of religion was not intended to prohibit such exemptions. U.S. C.A.Const. Amend. 1.

9. Constitutional Law ⇐274
Taxation ⇐196

Provision of the Revenue and Taxation Code granting tax exemption to property used exclusively for school purposes of less than collegiate grade and owned and operated by religious, hospital or charitable funds, foundations or corporations, provided that the property is used for nonprofit purposes and owned by nonprofit organizations, does not contravene the provision of the First Amendment of the Federal Constitution forbidding the enactment of laws respecting the establishment of religion. West's Ann.Rev. & Tax.Code, § 214; U.S. C.A.Const. Amend. 1.

J. F. Coakley, Dist. Atty., R. Robert Hunter, Chief Asst. Dist. Atty., Richard J. Moore and Maury Engel, Deputy Dist. Attys., John W. Collier, City Atty., Robert E. Nisbet, Deputy City Atty., Oakland, Edmund G. Brown, Atty. Gen., and Clarence A. Linn, Chief Asst. Atty. Gen., for defendants and appellants.

Andrew F. Burke, San Francisco, for intervenor and appellant.

Hill, Farrer & Burrill, Anson B. Jackson, Jr., Musick, Peeler & Garrett and James E. Ludlam, Los Angeles, as amici curiae on behalf of defendants and appellants and intervenor and appellant.

Henry C. Clausen, San Francisco, for respondent.

GIBSON, Chief Justice.

[1] Plaintiff, a citizen resident of defendant county and a taxpayer therein, brought this suit to challenge the legality of a tax exemption. Such actions are authorized by section 526a of the Code of

Civil Procedure,[1] cf. Delaney v. Lowery, 25 Cal.2d 561, 154 P.2d 674 and, being in aid of the collection of taxes, are distinguishable from cases in which a party seeking to avoid taxation was denied mandamus on the ground that an action for refund of illegally collected taxes constituted an adequate remedy at law. (See Security-First Nat. Bank v. Board of Supervisors, 35 Cal.2d 323, 217 P.2d 948; Vista Irr. Dist. v. Board of Supervisors, 32 Cal.2d 477, 196 P.2d 926; Sherman v. Quinn, 31 Cal.2d 661, 192 P.2d 17.)

The suit involves the constitutionality of that portion of section 214 of the Revenue and Taxation Code[2] which grants a tax

1. Section 526a of the Code of Civil Procedure provides: "An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein. This section does not affect any right of action in favor of a county, city, town, or city and county, or any public officer; provided, that no injuntion shall be granted restraining the offering for sale, sale, or issuance of any municipal bonds for public improvements or public utilities."

2. Section 214 of the Revenue and Taxation Code provides:

"Property used exclusively for religious, hospital, scientific, or charitable purposes owned and operated by community chests, funds, foundations or corporations organized and operated for religious, hospital, scientific, or charitable purposes is exempt from taxation if:

"(1) The owner is not organized or operated for profit; provided, that in the case of hospitals, such organization shall not be deemed to be organized or operated for profit, if during the immediate preceding fiscal year the excess of operating revenues, exclusive of gifts, endowments and grants-in-aid, over operating expenses shall not have exceeded a sum equivalent to 10 percent of such operating expenses. As used herein, operating expenses shall include depreciation based on cost of replacement and amortization of, and interest on, indebtness;

"(2) No part of the net earnings of the owner inures to the benefit of any private shareholder or individual;

"(3) The property is used for the actual operation of the exempt activity;

"(4) The property is not used or operated by the owner or by any other person so as to benefit any officer, trustee, director, shareholder, member, employee, contributor, or bondholder of the owner or operator, or any other person, through the distribution of profits, payment of excessive charges or compensations or the more advantageous pursuit of their business or profession;

"(5) The property is not used by the owner or members thereof for fraternal or lodge purposes, or for social club purposes except where such use is clearly incidental to a primary religious, hospital, scientific, or charitable purpose;

"(6) The property is irrevocably dedicated to religious, charitable, scientific, or hospital purposes and upon the liquidation, dissolution or abandonment of the owner will not inure to the benefit of any private person except a fund, foundation or corporation organized and operated for religious, hospital, scientific, or charitable purposes;

"(7) The property, if used exclusively for scientific purposes, is used by a foundation or institution which, in addition to complying with the foregoing requirements for the exemption of charitable organizations in general, has been chartered by the Congress of the United States (except that this requirement shall not apply when the scientific purposes are medical research), and whose objects are the encouragement or conduct of scientific investigation, research and disovery for the benefit of the community at large.

"The exemption provided for herein shall be known as the 'welfare exemption.' This exemption shall be in addition to any other exemption now provided by law. This section shall not be construed to enlarge the college exemption. Property used exclusively for school purposes of less than collegiate grade and owned and operated by religious, hospital or charitable funds, foundations or corporations, which property and funds, foundations or corporations meet all of the requirements of this section, shall be deemed to be within the exemption provided for in Section 1c of Article XIII of the Constitution of the State of California and this section."

exemption to property "used exclusively for school purposes of less than collegiate grade and owned and operated by religious, hospital or charitable funds, foundations or corporations," provided that the property is used for nonprofit purposes and owned by nonprofit organizations. The exemption in question was added to section 214 in 1951 and was approved by the people on referendum at the general election of 1952. This appeal was taken from a judgment declaring the exemption invalid.

[2] In California all property must be taxed unless an exemption is authorized by the state Constitution or granted by the laws of the United States. Section 1c of article XIII of the Constitution declares, "In addition to such exemptions as are now provided in this Constitution, the Legislature may exempt from taxation all or any portion of property used exclusively for religious, hospital or charitable purposes and owned by community chests, funds, foundations or corporations organized and operated for religious, hospital or charitable purposes, not conducted for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual." [3]

The validity of the statutory exemption depends, first, upon whether an educational purpose may be regarded as a charitable purpose within the meaning of section 1c of article XIII. The term charity has been defined in a number of California cases as "'a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government.'" In re Estate of Halm, 196 Cal. 778, 781–782, 239 P. 307, 308; In re Estate of Coleman, 167 Cal. 212, 214, 138 P. 992; In re Estate of Sutro, 155 Cal. 727, 736, 102 P. 920; In re Estate of Lennon, 152 Cal. 327, 329–330, 92 P. 870; In re Estate of Merchant, 143 Cal. 537, 543–544, 77 P. 475. This definition was quoted with approval in Scripps, etc., Hospital v. California Employment Comm., 24 Cal.2d 669, 675, 151 P.2d 109, 155 A.L.R. 360, where a nonprofit hospital was held exempt from unemployment insurance taxes as a charitable organization.

An educational purpose has been held to be charitable in character where the status of a trust or bequest was in controversy and the gift was for the benefit of the public and not for private gain. Collier v. Lindley, 203 Cal. 641, 648–650, 266 P. 526; In re Estate of Halm, 196 Cal. 778, 781–782, 239 P. 307; In re Estate of Yule, 57 Cal.App.2d 652, 654, 135 P.2d 386; In re Estate of Bailey, 19 Cal.App.2d 135, 139, 65 P.2d 102; In re Estate of Bartlett, 122 Cal.App. 375, 377, 10 P.2d 126; see Rest., Trusts, § 370; 14 C.J.S., Charities, § 15, p. 444. And in other jursidictions it has been held that nonprofit educational institutions maintained for the benefit of the public qualify as charitable organizations for the purpose of tax exemption. School of Domestic Arts and Science v. Carr, 322 Ill. 562, 153 N.E. 669; Appeal Tax Court v. St. Peter's Academy, 50 Md. 321; Board of Assessors v. Garland School of Home Making, 296 Mass. 378, 6 N.E.2d 374; State v. Johnston, 65 N.J.L. 169, 46 A. 776; Gerke v. Purcell, 25 Ohio St. 229; In re Hill School, 370 Pa. 21, 87 A.2d 259; see In re Cooper's Estate, 229 Iowa 921, 295 N.W. 448; Morgan v. Presbyterian Church of the United States of America, Ky., 101 S.W. 338; In re Grace, 27 Minn. 503, 8 N.W. 761.

The argument made by plaintiff that the word charitable should be narrowly construed in favor of taxability has been rejected by this court in two recent cases

3. Section 1c, as adopted in 1944, read as quoted above. The following was added by amendment in 1954: "As used in this section, 'property used exclusively for religious, hospital or charitable purposes' shall include a building and its equipment in the course of construction on or after the first Monday of March, 1954, together with the land on which it is located as may be required for the use and occupation of the building, to be used exclusively for religious, hospital or charitable purposes."

involving section 1c of article XIII. Y. M. C. A. v. County of Los Angeles, 35 Cal.2d 760, 221 P.2d 47; Fredericka Home For The Aged v. County of San Diego, 35 Cal. 2d 789, 221 P.2d 68. In the Y. M. C. A. case, where it appeared that the Association operated at an over-all loss in conducting its various activities, we held that dormitory facilities provided by it at relatively low rentals were exempt as property used exclusively for religious and charitable purposes, pointing out that the dormitories were designed mainly to give young men access to a place for study, recreation and residence under wholesome influences and that, therefore, they were incidental to and reasonably necessary for the accomplishment of the organization's purposes of promoting good character and Christian ideals. We refused to follow a contrary holding in another jurisdiction, noting that one of the factors leading to that decision was a "concept of charity as confined solely to the relief of the needy and destitute * * * rather than comprehending as well activities which are humanitarian in nature and rendered for the general improvement and betterment of mankind, though the recipients of such benefits may be able to pay at least in part therefor * * *." 35 Cal.2d at page 768, 221 P.2d at page 52.

The broad meaning of the term charitable set forth in the Y. M. C. A. case was applied in the Fredericka Home case where it was held that a home for the aged, operated on a nonprofit basis, was entitled to tax exemption as a charity although entrance fees were charged. Both of these decisions relied upon In re Estate of Henderson, 17 Cal.2d 853, 857, 112 P.2d 605, 607, where it was stated, "A bequest is charitable if: (1) It is made for a charitable purpose; its aims and accomplishments are of religious, educational, political or general social interest to mankind. * * * (2) The ultimate recipients constitute either the community as a whole or an unascertainable and indefinite portion thereof. * * * The charitable nature of an institution is determined on the same basis."

[3] The fact that the term charitable is only one of three descriptive words used in section 1c does not require that it be narrowly construed against the exemption. To the contrary, in Scripps, etc., Hospital v. California Employment Comm., 24 Cal.2d 669, 151 P.2d 109, 112, 155 A.L.R. 360, where an unemployment insurance tax statute exempted organizations formed for purposes such as "religious, charitable, scientific, literary or educational", it was held that a nonprofit hospital was exempt as a charity although the word hospital was not used in the statute. The court stated, "The wide and varied nature of the exemptions thus provided rather clearly indicates a purpose and intention to give the words here in question a broad rather than a strict meaning * * *." 24 Cal.2d at page 676, 151 P.2d at page 113.

[4] It thus appears that the word charitable has been given a broad construction in tax exemption cases as well as others, and it would seem clear that nonprofit schools owned by nonprofit organizations and operated for the benefit of the public come within the term charitable as defined by our decisions. Moreover, both the Legislature and the people have construed the term charitable in section 1c of article XIII as authorizing exemption of such schools.

Section 1c is an enabling provision which empowers the Legislature to grant exemptions within certain general categories. In acting under this section the Legislature must necessarily construe the terms of the provision in order to determine the extent of the authority conferred upon it. The Legislature has consistently treated the term charitable in section 1c as broad enough to include nonprofit schools, first, by specifically excluding them from exemption and, second, by specifically granting them an exemption. The first construction was made in 1945 when the Legislature originally enacted section 214 of the Revenue and Taxation Code, which provided for the exemption of property used exclusively for charitable purposes. The Legislature must have then believed that the word charitable as used in section 1c authorized the exemption of nonprofit schools, and that the unqualified use of that term in section 214 would result in exempting such schools, because it

added at the end of section 214 a proviso that the section should not be construed to include them.[4] If the word charitable was not broad enough to include nonprofit schools, there would have been no necessity for the proviso, and we cannot assume that the Legislature intended to do a useless thing. The next interpretation of section 1c occurred in 1951 when the Legislature amended section 214 to provide for the exemption of nonprofit schools as charitable organizations. The construction thus placed on section 1c by the Legislature was adopted by the people in 1952 when they approved section 214 on referendum.[5]

[5, 6] The presumption is in favor of constitutionality, and the invalidity of an act of the Legislature must be clear and unquestionable before the statute can be declared unconstitutional. We cannot adopt our own interpretation of a provision of the Constitution without regard to the legislative construction, and, where more than one reasonable meaning exists, it is our duty to accept that chosen by the Legislature. Pacific Indemnity Co. v. Industrial Accident Comm., 215 Cal. 461, 464, 11 P.2d 1, 82 A.L.R. 1170; Kaiser v. Hopkins, 6 Cal.2d 537, 540, 58 P.2d 1278; City and County of San Francisco v. Industrial Accident Comm., 183 Cal. 273, 279 et seq., 191 P. 26; People v. Southern Pacific Co., 209 Cal. 578, 593–594, 290 P. 25; see also Woodcock v. Dick, 36 Cal.2d 146, 148, 222 P.2d 667; Reynolds v. State Board of Equalization, 29 Cal.2d 137, 140, 173 P.2d 551, 174 P.2d 4; Delaney v. Lowery, 25 Cal.2d 561, 568–569, 154 P.2d 674. This fundamental principle is particularly applicable where, as here, the statute was enacted pursuant to an enabling provision of the Constitution and there is not only a reasonable legislative construction of that provision but also approval of that construction by the people on referendum.

Plaintiff relies strongly upon the legislative history of section 1c in support of his claim that section 214 is unconstitutional. As originally submitted to the Legislature section 1c read, "The Legislature may exempt from taxation all or any portion of the property owned and used for any of the purposes hereinafter mentioned by community chests, funds, foundations or corporations organized and operated for religious, educational, hospital or charitable purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual." The measure was entirely recast, and in its final form the word educational was omitted, but there is nothing in the record to show why the provision was revised. As we have seen, nonprofit schools owned by nonprofit organizations and operated for the benefit of the public come within the term charitable, and the Legislature may have omitted the word educational on the theory that, under the authorities here and elsewhere, it was unnecessary to use that specific word in order to authorize the exemption of such schools. In the official voters' pamphlet the argument in favor of adoption of section 1c contained the statement, "Competent legal authority advises that schools other than colleges will not be exempted under this amendment because the Legislature expressly eliminated the term 'educational.'" Numerous other arguments were made, however, for and against adoption, and we cannot say which of the various statements was relied on by the voters. It would be purely speculative to hold that those who voted for the amendment intended to exclude nonprofit schools owned by nonprofit organizations and operated for the benefit of the public. The history of section 1c is inconclusive as to

4. As enacted in 1945 section 214 of the Revenue and Taxation Code provided, in part, "This section shall not be construed to enlarge the college exemption or to extend an exemption to property held by or used as an educational institution of less than collegiate grade." Stats.1945, ch. 241, p. 706.

5. Section 214, as submitted to the people, specified that the property therein described "shall be deemed to be within the exemption provided for in Section 1c of Article XIII of the Constitution * * *."

what was intended, and it certainly would not justify a construction of the term charitable contrary to that established by the decisions discussed above, adopted by the Legislature in the 1945 and 1951 sessions, and approved by the people on referendum in 1952. We are satisfied that section 1c authorizes the exemption in question.

[7] It is next argued that the exemption, as applied to schools owned or operated by religious organizations, is contrary to section 30 of article IV of the California Constitution which provides that the Legislature shall not "grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever * * *." This section does not expressly mention tax exemptions, but, even if we assume that it prohibited them, it was superseded by the subsequent adoption of section 1½ of article XIII, which exempts property used exclusively for religious worship, and of section 1c, which, as we have seen, authorizes exemption of nonprofit schools and specifically refers to property owned and operated by religious organizations.

The validity of the exemption is also challenged on the theory that it contravenes that portion of the First Amendment of the federal Constitution which forbids the enactment of laws respecting the establishment of religion. This argument is, of course, pertinent only insofar as the exemption would be available to nonprofit schools operated by religious groups. There are two answers to the contention.

In the first place, it is apparent that the exemption was enacted to promote the general welfare through encouraging the education of the young and not to favor religion, since it is not limited to schools maintained by religious groups but applies also to those operated by other charitable organizations. Under the circumstances, any benefit received by religious denominations is merely incidental to the achievement of a public purpose. An analogous situation was presented in Everson v. Board of Education, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711, where it was held that a statute authorizing the use of public funds to transport pupils could constitutionally be applied to include the furnishing of transportation to parochial schools. The court reasoned that the statute was designed to promote the general welfare, that a parochial school would benefit upon the same terms as would other schools and that the First Amendment does not require that government be hostile to religion in enacting public welfare legislation. 330 U.S. at page 16 et seq., 67 S.Ct. at page 511 et seq. Cf. Bowker v. Baker, 73 Cal.App.2d 653, 663, 167 P.2d 256; Opinion of the Justices, 99 N.H. 519, 113 A.2d 114, 116.

[8, 9] Secondly, even if we regard the exemption as benefiting religious organizations, it does not follow that it violates the First Amendment. The practice of granting tax exemptions benefiting religious sects began in the colonial period. See Paulsen, Preferment of Religious Institutions in Tax and Labor Legislation (1949), 14 Law & Contemp.Prob. 144, 147–148; Torpey, Judicial Doctrines of Religious Rights in America (1948), ch. VI, pp. 171–174; Zollman, Tax Exemptions of American Church Property (1916), 14 Mich.L.Rev. 646, 647–650. Today, at least some tax exemption for religious groups is authorized by statutory or constitutional provisions in every state and the District of Columbia, as well as by federal law. See Note (1949) 49 Columb.L.Rev. 968, 969–982. No case has been found holding that the granting of such exemptions is contrary to state or federal constitutional provisions prohibiting the support or establishment of religion, and, where the matter has been raised, the exemptions have been upheld. Garrett Biblical Institute v. Elmhurst State Bank, 331 Ill. 308, 163 N.E. 1, 5; Trustees of Griswold College v. State of Iowa, 46 Iowa 275, 282. The United States Supreme Court, in discussing the prohibition of laws respecting the establishment of religion, recently stated that the standard of constitutionality is the separation of church and state, and that the problem, like many others in constitutional law, is one of degree. Zorach v. Clauson, 343 U.S. 306, 314, 72 S.Ct. 679, 96 L.Ed.

954. The principle of separation of church and state is not impaired by granting tax exemptions to religious groups generally, and it seems clear that the First Amendment was not intended to prohibit such exemptions. Accordingly, an exemption of property used for educational purposes may validly be applied to school property owned and operated by religious organizations.

The judgment is reversed. Certain other appeals were taken which have been rendered moot by this decision, and they are therefore dismissed.

TRAYNOR, SPENCE and McCOMB, JJ., concur.

SCHAUER, Justice (dissenting).

Since 1914 the provisions of section 1a of article XIII of the California Constitution have exempted from taxation the property of a non-profit *"educational institution of collegiate grade,* * * * used exclusively for the purposes of education." (Italics added.) The quoted language is specific; it leaves no room for speculation or "construction." The majority opinion holds that the language of section 1c of the same article of the Constitution, adopted in 1944, which authorizes the Legislature to exempt from taxation property "used exclusively for *religious, hospital* or *charitable* purposes and owned by" (italics added) certain institutions, likewise authorizes the exemption of *all* the property of such institutions which is used for educational purposes of any character or grade—more specifically, property used for *schools of less than collegiate grade.* This holding is reached despite the fact that the word "educational" is notably absent from the 1944 amendment.

To so construe section 1c of article XIII as to encompass educational purposes, in addition to the "religious, hospital or charitable purposes" which are expressly designated in the section, does violence to the plain meaning of the language used, to the intent of the voters who adopted the section, and to settled principles of statutory construction.

First, the Constitution itself is specific in its property tax exemption provisions. Thus, section 1 of article XIII designates as "exempt from taxation * * * property used for free public libraries and free museums, growing crops, property used exclusively for public schools." Section 1a of article XIII declares that "Any educational institution of collegiate grade * * * not conducted for profit, shall hold exempt from taxation its buildings and equipment, its grounds * * *, its securities and income used exclusively for the purposes of education." Other specific exemptions are listed in article IX. Section 10 of that article declares that "All property now or hereafter held in trust for the founding, maintenance or benefit of the Leland Stanford Junior University * * * may be exempted by special act from State taxation * * * and all other real property so held and used by the university for educational purposes exclusively, may be similarly exempted from county and municipal taxation. * * *" Section 11 provides that "All property now or hereafter belonging to 'The California School of Mechanical Arts,' * * * shall be exempt from taxation." Section 12 makes the same provision as to "All property now or hereafter belonging to the 'California Academy of Sciences.'" Section 13 declares that "All property now or hereafter belonging to the Cogswell Polytechnical College * * * shall be exempt from taxation." Section 15 specifies that "All property as of July 1, 1929, held in trust for the founding, maintenance or benefit of the Henry E. Huntington Library and Art Gallery and the increments thereof and all personal property received in exchange therefor shall be exempt from taxation." In view of these unusually express and specific designations in the Constitution of the property to which the people are willing to grant tax exemption, it appears to me too clear for serious debate among jurists following the law that if by the provisions of section 1c of article XIII it was intended to grant exemption to property devoted to educational purposes, then the language used would have said so, clearly and precisely.

Second, the fact that as originally submitted to the Legislature section 1c referred to property used for "religious, *educational,* hospital or charitable purposes," (italics

added) but that before being submitted to the people for a vote the classification of "educational" was deleted from the measure, is a further indication of the intent that property devoted to such purposes not be included in the authorization for exemption. This view is likewise borne out by the presentation of the measure made in the official voters' pamphlet, wherein the argument in favor of adopting section 1c refers to the amendment as "Fair Play For Charities" and declares, among other things, that "To be exempted, property must be owned and used exclusively for the purposes stated. The amendment does not authorize exemption of investment property or large landholdings. Churches and colleges already are exempt. Competent legal authority advises that *schools other than colleges will not be exempted under this amendment because the Legislature expressly eliminated the term 'educational.'*" (Italics added.) At no point in the arguments concerning the measure, either pro or con, are the above declarations disputed. It thus appears clear that the voters approved the measure in the belief that property used for educational purposes was not included in the authorized exemptions.

Moreover, the fate of other attempted amendments of the Constitution so as to specifically authorize the exemption of property used for private schools of less than collegiate grade expresses more pointedly than can mere words the affirmative intent of the voters of this state that such property continue on the tax rolls. In 1926 a proposed amendment to section 1a of article XIII, submitted as proposition No. 11 on the ballot, to extend the exemption to property used for educational purposes by "any educational institution of secondary grade" was defeated by the vote of the people. Within seven years the issue was again presented, as proposition No. 4 on the 1933 ballot, and again the people refused to amend section 1a so as to extend exemption to the property of "Any private educational institution of less than collegiate grade." It is my firm conviction that this court should not, in the guise of statutory construction, effect an amendment of the Constitution which the voting citizens of California have repeatedly rejected.

Finally, the people of this state, for the purpose of securing the "equality of taxation which results from subjecting all property to the same burden" (Watchtower Bible & Tract Soc. v. County of Los Angeles (1947), 30 Cal.2d 426, 429, 182 P.2d 178), have provided in section 1 of article XIII of the Constitution that "All property in the State except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided." To carry out the objective of equality in taxation, "Constitutional provisions and statutes granting exemption from taxation are strictly construed to the end that such concession will be neither enlarged nor extended beyond the plain meaning of the language employed. [Citations.]" (Cedars of Lebanon Hospital v. County of Los Angeles (1950), 35 Cal.2d 729, 734, 221 P.2d 31, 15 A.L.R.2d 1045; see also Pacific Home v. County of Los Angeles (1953), 41 Cal.2d 844, 849, 264 P.2d 539; Sutter Hospital v. City of Sacramento (1952), 39 Cal. 2d 33, 39, 244 P.2d 390; Watchtower Bible & Tract Soc. v. County of Los Angeles (1947), supra, 30 Cal.2d 426, 428, 182 P.2d 178.) "The provisions of * * * [California's] Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." (Const., art. I, § 22.) The justices of this court, regardless of personal views on social, political, economic or religious subjects, are in duty bound to support the Constitution and laws of this state. "The powers of the government of * * * California shall be divided into three separate departments—the legislative, executive, and judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except as in this Constitution expressly directed or permitted." (Const., art. III, § 1.) Obedient to my concept of judicial duty I must apply the firmly established principles of construction above delineated, give effect to the

plain intent and specific language of the framers of section 1c of article XIII of the Constitution, respect the principle of division of powers of government above quoted, and hold unauthorized the purported exemption of property, however laudatory the objectives, which is sought to be sustained on the sole basis that the property is "used exclusively for school purposes of less than collegiate grade"—a use which is not of a character specified in the constitutional authorization, and which is therefore beyond the power of either the Legislature or this court to write into the Constitution.

The judgment of the superior court, following the law, should be affirmed.

SHENK and CARTER, JJ., concur.

Rehearing denied; SHENK, CARTER and SCHAUER, JJ., dissenting.



142 Cal.App.2d 175

Ruth A. FRAMPTON, Plaintiff and Appellant,

v.

Philip A. STOLOFF, Defendant and Respondent.

Civ. 21466.

District Court of Appeal, Second District, Division 1, California.

June 11, 1956.

Action for personal injuries allegedly sustained by passenger in a standing automobile when it was struck from the rear by defendant's automobile. A jury in the Superior Court, Los Angeles County, A. A. Scott, J., returned a verdict of $250 and, on denial of motion for new trial on ground that damages were inadequate, plaintiff appealed. The District Court of Appeal, White, P. J., held, inter alia, that the verdict was not inadequate as a matter of law though it was less than medical expenses, in view of testimony that a part of hospitalization and treatments was given because of complaints occasioned by pre-existing mental illness.

Affirmed.

1. Appeal and Error ⇐1004(1)

An Appellate Court is authorized to disturb a judgment on ground of inadequacy of damages only where amount of award is supported by no substantial evidence in the record and where verdict is a clear abuse of jury's discretion.

2. Damages ⇐135

Jury's verdict of $250 in action for personal injuries was not inadequate as a matter of law though it was less than the medical expenses, in view of testimony that part of hospitalization and treatments was given because of complaints occasioned by pre-existing mental illness.

3. Appeal and Error ⇐1051(1)

Where objections were made to admission of certain testimony, but record on appeal contained other similar testimony to which objection was not made, admission was not prejudicial.

4. Appeal and Error ⇐169

A judgment will not be reversed on claims raised for the first time on appeal.

5. Appeal and Error ⇐971(1)

Witnesses ⇐267

Although control of examination of witnesses is within discretion of trial court, an abuse of such discretion will justify a reversal.

6. Appeal and Error ⇐1048(6)

Trial ⇐98

Objections, during cross-examination in personal injury case, to questions as "asked and answered" and as "assuming facts not in evidence" should have been overruled, but, under circumstances of case, there was no abuse of discretion and no prejudice by such rulings.

7. Witnesses ⇐286(4)

In personal injury action, wherein plaintiff's witness testified on re-examination that plaintiff would complain periodically that her back bothered her before accident and that such complaints were at a particular period of the month, questions "Explain what that complaint was that she made to you" and "Did your sister at any time indicate to you any explanation of her physical condition?" were improper.

Jack Carl Greenberg, Los Angeles, Philip Silver, Hayward, for appellant.

Wyman & Finell, Eugene L. Wyman, Beverly Hills, for respondent.

WHITE, Presiding Justice.

Plaintiff was a guest in an automobile which was standing still when defendant's automobile struck it in the rear and pushed it forward from 8 to 10 feet, causing considerable damage to the front of defendant's car and slight damage to the rear of the one in which plaintiff was sitting. Plaintiff sought to recover by this action $35,000 damages for injuries to her person.

At the time of the trial, plaintiff was in a mental hospital. Her sister and guardian ad litem appeared for her. Defendant admitted liability and trial was limited to the amount of damages, if any, suffered by plaintiff as the result of said collision. The jury's verdict was $250. Plaintiff moved for a new trial on the ground that the damages awarded her were inadequate. The motion was heard and denied. Plaintiff appeals.

[1] In the instant action, there is evidence which would support a larger award of damages. Since the jury presumably did not believe that portion of the evidence, it need not be considered in detail here. An appellate court is authorized to disturb a judgment on the ground of inadequacy of damages only where the amount of the award is supported by no substantial evidence in the record and the verdict is a clear abuse of the jury's discretion. Gersick v. Shilling, 97 Cal.App.2d 641, 645, 218 P.2d 583; Phillips v. Lyon, 109 Cal.App. 264, 270, 292 P. 711.

[2] Appellant urges that, since the award to appellant is less than her medical expenses, it was inadequate as a matter of law. The undisputed evidence is that plaintiff was taken shortly after the collision on September 22, 1953 to the Valley Receiving Hospital, was there told to go to a private physician; that she then saw and was examined and treated by Dr. Herman Seal on the same day; that he took X-rays for her that day; that the X-rays were negative; that she returned to see Dr. Seal two days later and was then hospitalized for treatment from September 24 to October 9, 1953; that the bill for hospital care given her was $347; that Dr. Seal's bill for services during, before and after hospitalization was $227; and that Dr. Luck's services as orthopedic consultant were worth $115. In this connection, appellant cites and relies upon the three decisions next discussed.

The judgment in Torr v. United Railroads, 187 Cal. 505, 202 P. 671, was reversed on appeal for the reason that the trial court found that plaintiff "then was, and prior thereto had been, earning as said schoolteacher, a salary in the sum of $120 a month; that plaintiff did not lose any amount whatever, by reason of said injuries, which she would have earned * * *". In that case, the evidence was without conflict that because of plaintiff's injuries she had been unable to work at her profession for long periods of time, and had lost salary far in excess of the amount of damages awarded. The facts and circumstances of that case and the instant action differ substantially. In the instant action, there is no evidence that plaintiff had ever worked steadily, and to the contrary it appears from the record that during the year preceding the accident she had suffered a back injury when she fell in a department store where she was working in Pittsburg, and had drawn three to four months compensation therefor; that "she did work off and on" before the accident; that she had worked a couple or three weeks as a housekeeper at her last place of employment; that a day or two before the accident she "had no place to go" and was "staying" at the home of the driver of the automobile in which she was sitting when injured; that she told Dr. Goren "she was a model and a showgirl" and "some kind of housekeeper"; and that she had worked between two and three months on the housekeeping job before the last. A careful reading of the entire record discloses not one iota of evidence as to what, if any, compensation plaintiff had earned in the past or could have been expected to earn in the future.

Price v. McComish, 22 Cal.App.2d 92, 70 P.2d 978, 979, involved a fractured hip ball at the socket which required plaintiff's

hospitalization for two weeks, his remaining in bed in a plaster cast at home for three months with no ability to move except by the contrivance of ropes and pulleys over his bed, the wearing of a steel brace for two months, walking only on crutches for several months, and the use of a cane thereafter. Defendant was held liable for plaintiff's injury and judgment was given for only $200. Without conflict the evidence was that prior to the accident plaintiff "'was able-bodied, and worked with his men on his jobs'"; that since the accident he was unable to carry on his business; and that his actual medical expenses amounted to more than three times the amount of the judgment. In reversing the judgment, it is said, 22 Cal.App.2d at page 95, 70 P.2d at page 980, "It is well-settled law that where it clearly appears from the evidence that a judgment is wholly inadequate in amount, a refusal by the trial court to grant a new trial for that reason furnishes ample ground for a reversal of the judgment."

The facts in the instant action, however, are clearly distinguishable from those in Price v. McComish, supra. In the instant action, plaintiff's medical expenses exceeded the amount of the judgment. However, such expenses were incurred between September 22, 1953, the date of the collision, and May 4, 1954; all X-rays taken were negative; the doctor who was attending her found a swelling the size of a lemon on her lower back on the date of the accident; he treated her with rest, diathermy and drugs; he never really found any muscle spasm and the swelling disappeared in about a week; he continued hospitalization for about ten days more and treatments thereafter for about two months. Plaintiff later went to Dr. Luck who treated her for several months, and, on cross-examination, testified that when he last saw her, her complaints as to her back were about the same as when he first saw her and he "didn't accomplish very much". The record in the instant action also contains the testimony of Dr. Goren, called by respondent, that he examined plaintiff October 13, 1953, about three weeks after the accident, found no indication of any recent back injury, and that he believed her complaints were caused by the recurrence of the mental trouble for which she had been committed and treated with shock therapy some twelve years before the accident and which had caused her to be again committed six weeks before the trial; and that, in his opinion, any hospitalization or treatments to plaintiff's back after the swelling had disappeared were not required because of the collision but were given because of complaints occasioned by her pre-existing mental illness. The jury had the right to accept as true the diagnosis and explanation given by Dr. Goren, and apparently they did so. Accepting this view of the evidence, they could have awarded ⅓ of the hospital bill, or $115, and ⅛ of Dr. Seal's bill, or $30, and none of Dr. Luck's bill, since his services began 2½ months after the collision and, according to substantial evidence, were not required by reason of any condition attributable to the accident in question. If the jury accepted Dr. Goren's testimony as true and his opinions as correct, their award covers the entire medical expense which proximately resulted from the collision and over $100 for general damage.

Price v. McComish, supra, is not authority for reversal of the judgment in the instant action.

In Phillips v. Lyon, 109 Cal.App. 264, 292 P. 711, an award of $3,000 for personal injuries suffered by a fifteen-year-old boy, including the breaking of both bones of his right forearm near the wrist, the fracture of the twelfth vertebra which had caused a lateral curvature of the spine and injury to the periphery process of the vertebra, and a severe contusion on the back of his head, was affirmed. The court, 109 Cal.App. at page 270, 292 P. at page 713, said:

"* * * From the very necessity and uncertainties of the situation a jury is accorded a wide latitude and an elastic discretion in assessing damages as compensation for personal injuries. We know of no equitable or accurate means of measuring the damages under such circumstances except to rely upon the sound judgment of the jurors. Under the facts of this case we are unable to say as a matter of law that the judgment is inadequate or that the award is so grossly insufficient as to lack

support of the evidence and require a reversal on that account."

In appellant's opening brief, she contends that "defense counsel was guilty of prejudicial misconduct * * * by injecting into the case the following evidence:

"(a) That plaintiff had married a 'convicted felon';

"(b) That plaintiff was suffering from schizophrenia after the court had sustained an objection to the introduction into evidence of the Hospital records to prove this fact;

"(c) That plaintiff had a past mental record at the age of 18;

"(d) That plaintiff had an old spine injury."

A portion of the record of the cross-examination of Dr. Luck, a witness called by plaintiff, is relied upon to substantiate instance "(a)" above. It reads as follows:

"Q. Did she inform you that at that particular time when you were examining her that she was also under extreme emotional upset because she had in process a suit for annulment against a Frank Wade, whom she married and whom she found out was a convicted felon, and who also was already married; did she tell you that? A. No. We don't take a very detailed—

"Mr. Silver: If your Honor please, I object to that question on the ground that it is improper for counsel to stigmatize somebody else in the form of a question which assumes that the facts which he stated are true.

"The Court: The objection is overruled.

"Q. by Mr. Wyman: Doctor, will you please answer the question? A. I have no knowledge of that suit, or probably a good many of the details of her social history. We don't take a complete psychiatric history in orthopedics. We relate more of our history to the muscular skeletal system.

"Q. There is no question, though, Doctor, in your own mind as a medical doctor, assuming those facts to be true, that she was in the process of getting an annulment and had a bigamous marriage and filed a criminal complaint, that these things would tend to upset her and make her very nervous, and cause tension; is that not so? A. They upset some people."

The only other objection by plaintiff that in any way bears upon this alleged ground of reversal was made during the examination of Dr. Goren, a witness called by defendant, and is as follows:

"Q. And the three marriages to the bigamists would be bound to affect one emotionally?

"Mr. Silver: I object to it as leading and suggestive.

"Mr. Wyman: I withdraw it.

"Q. Would her past married life have any effect on her emotionally? A. Yes."

[3] Plaintiff's sister, a witness called by plaintiff, had previously testified on direct examination that plaintiff had been in Agnew State Hospital for approximately six weeks; and, on cross-examination without objection from plaintiff, that she was "acquainted with the fact that" at the time of the accident her sister "was undergoing certain emotional disturbances with an annulment from Mr. Frank Wade" and she "knew" her sister had "entered into a bigamous marriage as far as Mr. Wade was concerned" and she "was in process of prosecuting Mr. Frank Wade at that time for bigamy" and "this was all making her very emotionally upset". The record contains other similar testimony to which no objection was made. Consequently, the testimony objected to and now cited as prejudicial error is merely cumulative and its admission could not have been prejudicial.

As to instances (b) and (c) of alleged prejudicial misconduct, we are cited to no objection to evidence that plaintiff was suffering from schizophrenia. On the contrary, the record discloses that the following occurred when defendant offered in evidence "the copies of the hospital records of Agnew State Hospital and the petition committing the lady to the asylum":

"Mr. Silver: I will have to talk to the Court about this first.

"Mr. Wyman: I will withhold it."

Numerous questions relating to plaintiff's mental condition, her history of previous

commitment, the symptoms of schizophrenia, plaintiff's complaints and acts and statements to the several doctors who examined her, were asked and answered without objection.

Regarding instance (d), while several witnesses testified regarding plaintiff's previous spine injury, the record contains not one objection to any question concerning it.

In fact the entire record contains only four objections by plaintiff, only one of which was overruled. The one overruled was the objection "on the ground that it is improper for counsel to stigmatize somebody else" hereinbefore quoted.

Further examination of the record discloses not one motion to strike, no request that the jury be instructed to disregard any of the evidence or any statement of counsel, and no claim made during the trial that counsel for defendant was guilty of any misconduct of any kind.

[4] A judgment will not be reversed on such objections or claims raised for the first time on appeal.

Appellant contends that the trial court committed an abuse of discretion in restricting the plaintiff's cross-examination of Dr. Goren, a witness for defendant. Dr. Goren testified that plaintiff's complaints were schizophrenic; that the emotional condition found when he examined her could not be attributed to "the pain that she was undergoing from the injury she complained of"; that "She had a history of pre-existing mental disease and she was suffering from the same condition. She has never recovered from that"; that the history of pre-existing mental condition was 12 years old "But she had been behaving as a mentally deteriorated person after that"; that "Any woman who marries three married men has some mental deterioration which is not normal"; that she didn't tell him "she knew these men were married when she married them"; that "she found out later they were married" and "in each case she took the steps to annul the marriage"; that he "certainly would expect a woman who has been married before to inquire"; that he doesn't "know if she inquired or not".

[5] As stated by appellant in her opening brief, although the control of the examination of witnesses is within the discretion of the trial court, an abuse of such discretion will justify a reversal.

[6] Appellant's cross-examination of this witness was curtailed by the sustaining of several objections to questions as "asked and answered" and "assuming facts not in evidence", which, in our opinion should have been overruled; but, since her medical witnesses had also testified that her disturbed emotional state and the pains of which she complained could not be entirely explained as the effects of the collision, it would be unrealistic to expect testimony from Dr. Goren contrary to their testimony and his own above outlined. We find no abuse of discretion and no prejudice to the appellant by such rulings.

[7] Appellant further contends that the judgment should be reversed because appellant's re-examination of her sister was restricted. The witness testified that plaintiff "would complain *periodically*" that her back bothered her before this accident and that such complaints were at a *"particular period* of the month". She was asked to "Explain what that complaint was that she made to you". Objection was sustained. She was then asked "Did your sister at any time indicate to you any explanation of her physical condition". Objection to each of these questions was properly sustained.

The judgment is affirmed.

DORAN and FOURT, JJ., concur.

HIGHLAND REALTY COMPANY, a corporation, Plaintiff and Appellant,

v.

CITY OF SAN RAFAEL, Defendant and Respondent.

HIGHLAND REALTY COMPANY, a corporation, Plaintiff and Appellant,

v.

CITY OF SAN ANSELMO, Defendant and Respondent.

S. F. 19184.

Supreme Court of California.
In Bank.
June 8, 1956.

Action to quiet title to land which cities were using as a street. The Superior Court, Marin County, Ben R. Ragain, J., rendered judgment for defendants, and plaintiffs appealed. The Supreme Court, Schauer, J., held that where railroad instituted condemnation proceedings, and, pending proceedings, purchased interest by deed which conveyed a right of way upon, over, and along a strip of land, the deed conveyed only an easement, and not the underlying land.

Judgment reversed.

Opinion, 291 P.2d 564, vacated.

1. Eminent Domain ⇐317(2)

A railroad in a condemnation action can take only an easement, although it may acquire underlying land by purchase. West's Ann.Code Civ.Proc., § 1239, subd. 2.

2. Easements ⇐1

Grant of land as a right of way recognizes nothing but an easement.

3. Easements ⇐1

An easement is real property and may be held in fee simple, and may be created only by a grant, express or implied, or by prescription. West's Ann.Civ.Code, § 806.

4. Easements ⇐1

"Fee simple", within statute providing that a fee-simple title is presumed to be intended to pass unless it appears from grant that a lesser estate was intended, is distinguished from an easement. West's Ann. Civ.Code, § 1105.

See publication Words and Phrases, for other judicial constructions and definitions of "Fee Simple".

5. Railroads ⇐69

Where railroad instituted condemnation proceedings, and, pending proceedings, purchased interest by deed which conveyed a right of way upon, over, and along a strip of land, the deed conveyed only an easement, and not the underlying land. St. 1861, pp. 607–627, §§ 1–60; West's Ann. Code Civ.Proc., § 1239, subd. 2; West's Ann.Civ.Code, §§ 801, subd. 4, 802, subd. 5, 806, 1105.

6. Railroads ⇐69

In construing contracts and deeds for railroad rights of way, such deeds are usually construed as giving a mere right of way, although terms of deed would be otherwise apt to convey a fee.

7. Limitation of Actions ⇐60(10)
Railroads ⇐82(5)

Under statute providing that, upon end of legal existence of railroad company, after change of location of track, or after railroad fails to use land for five years, railroad's interest in right of way for track should revert to persons from whom right of way was acquired, where portion of line was totally abandoned, land reverted after five years from abandonment, and limitations on grantor's action to establish title in land did not run until five years after abandonment. St.1861, p. 618, § 22; West's Ann.Public Util.Code, § 25002; West's Ann.Code Civ.Proc., § 320.

8. Railroads ⇐82(5)

Where railroad, which held right of way, quitclaimed right of way during period in which railroad was losing right of way due to abandonment, rights of railroad's grantees were extinguished upon the expiration of the period in which rights are lost by abandonment. St.1861, p. 618, § 22; West's Ann.Civ.Code, § 811.

9. Railroads ⇐82(1, 5)

Statute providing that, upon a railroad's disuse of a right of way, right of way should revert to railroad's grantors,

does not impose a penalty or forfeiture, and grantors could take advantage of the reversion without exercising their claimed right of re-entry. St.1861, pp. 607–627, §§ 1–60; West's Ann.Public Util.Code, § 25002.

10. Appeal and Error ⇐991

In action against cities to quiet title to lands which cities were using as a street, question whether the public interest had so intervened as to abridge the rights of the owner of the reversion of the land was for trial court, and would not be determined by reviewing court. West's Ann.Code Civ. Proc., § 956a.

11. Limitation of Actions ⇐19(3)

Five-year statute of limitations applied to action to quiet title to land which was used by defendant cities as a street, rather than the three-year statute applicable to actions in trespass, although plaintiff might be awarded only damages. West's Ann. Code Civ.Proc., § 338, subd. 2.

12. Jury ⇐14(1)

In inverse condemnation proceeding, wherein alleged owner sought damages for cities' use of land as a street, cities were entitled to a jury trial, even though owner's action was an equitable one. West's Ann.Code Civ.Proc., § 738; West's Ann. Const. art. 1, § 14.

Thacher, Jones, Casey & Ball, San Francisco, Freitas, Allen, McCarthy & Bettini, S. J. Hugh Allen, San Rafael, for appellant.

Harold Jos. Haley, City Atty., John G. Buresh, City Atty., San Anselmo, for respondents.

SCHAUER, Justice.

In these two consolidated actions plaintiff appeals from a judgment quieting title in defendants, City of San Rafael and City (sometimes in the record called Town) of San Anselmo, to a strip of land claimed by plaintiff which is within the respective corporate limits of one or the other of the defendants and decreeing that plaintiff has no right, title, interest, claim or estate whatsoever in any part of such land. We have concluded that plaintiff's construction of a deed executed by a common predecessor in interest of the parties to this litigation is correct, that essential findings and conclusions of the trial court cannot be sustained, and that the judgment should be reversed.

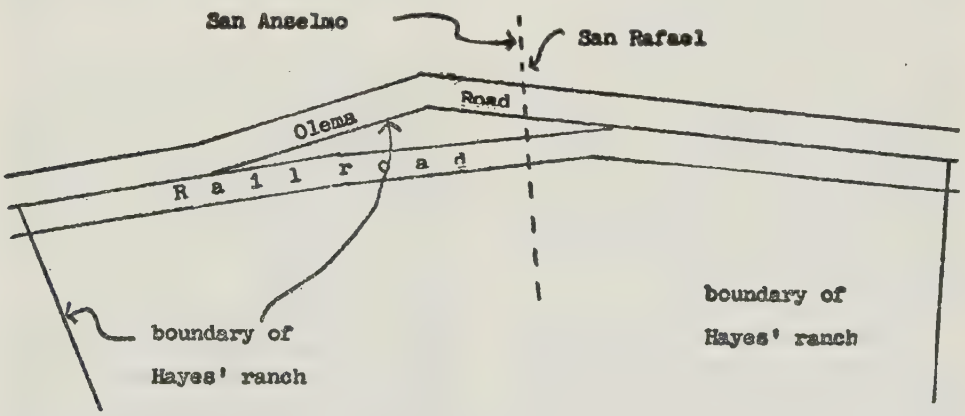
The actions were instituted in May, 1951, by plaintiff's complaints to quiet title to the strip of land, formerly used as a railroad right of way. Each city answered with a general denial, and also pleaded ten affirmative defenses, including claims of ownership in fee simple and by adverse possession under color of title, and of dedication of the land as a public highway. The trial court found that plaintiff had no ownership of any nature in the land, that defendants claimed an interest therein "but that such claim was not adverse to said Plaintiff it being found true that Plaintiff at the time of the commencement of these actions had no estate, right, title to, or interest in said real property," and that "each Defendant is the owner in fee simple absolute of so much of the real property * * as lies within the limits and confines of such Defendant City or Town." As conclusions of law the court declared that each defendant "is the owner in fee simple absolute and entitled to the possession" of such of the land as lies within its limits, that plaintiff has no right or interest therein, and that each defendant was entitled to have title quieted against plaintiff. A decree quieting title was entered accordingly, and this appeal by plaintiff followed.

In 1873, and for some years prior thereto, Patrick Hayes was the owner of a tract of land known as the Hayes Ranch and situated in San Rafael township, Marin County, which township later became, in respective parts, the incorporated City of San Rafael and the incorporated City of San Anselmo. The Hayes Ranch contained some 150 acres, including the strip of land here involved. At that time the North Pacific Coast Railroad Company, hereinafter called the railroad, was a railroad corporation organized under the laws of the State of California (Stats.1861, pp. 607–627). In January or February, 1873, the railroad commenced an action in eminent domain against Hayes and others seeking to con-

demn certain of their property. The strip involved in the present case was brought into the condemnation action by an amended complaint (hereinafter called the complaint), filed June 23, 1873, which alleges "V. That the taking of the lands hereinafter described is necessary to the construction, maintenance, and operation of said Railroad. That said lands are needed for tracks, side-tracks, depot grounds, and the permanent use of said corporation. VI. That the following are descriptions of each piece of land sought to be taken and condemned to the use aforesaid of plaintiff by this action. That all and each of the said pieces of land so sought to be taken are severally located in the County of Marin, in the State of California: * * *

"2d A right of way for the construction and use of said Railroad upon, over, and along a strip of land * * * described as follows: [Here appears a metes and bounds description of the strip of Hayes' land presently involved]."

The following sketch will assist understanding of the issues hereinafter discussed:



An order authorizing the railroad to take possession, issued by the court on July 11, 1873, also describes the property as "A right of way for the construction and use of said Railroad upon over and along a strip of land * * * described as follows."

Hayes filed an answer to the complaint, but thereafter and prior to trial of the action, he conveyed the property to the railroad, by deed dated February 8, 1875, which states that he "doth grant, bargain and sell, convey and confirm unto the [railroad] * * * and to its successors, heirs and assigns forever," the property involved. Such property is described, in the language of the railroad's eminent domain complaint and of the order to take possession, as "all that right of way for the construction and use of said railroad upon, over and along a strip of land * * * described as follows: [Metes and bounds]." The deed recites a consideration of $4,500, and that "this conveyance is subject to mortgage on said land executed contemporaneous herewith by the [railroad to Hayes] * * * for $2000 of the purchase money which mortgage shall be and constitute a lien on said premises prior to all others." The deed further provided that Hayes would have the right to open streets, avenues or crossings "across the right of way and connecting his land with the County Road," (the old San Rafael-Olema road, Fourth Street in San Rafael and Redhill Avenue in San Anselmo). In the next paragraph the deed continues, "Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. To Have and To Hold all and singular the above mentioned and described premises together with the appurtenances unto the [railroad] * * *, its successors heirs and assigns forever." Finally, the

deed declares that "The center line above described [in the metes and bounds description] is a line run along the center of the Railroad Track as at present located and constructed on the land." It thus appears that prior to execution of the deed the railroad had entered Hayes' land pursuant to the order to take possession and had constructed its tracks, as no mention is made of a railroad track in the metes and bounds description which the railroad set forth in its eminent domain complaint.

The $2,000 mortgage mentioned in the deed was executed by the railroad on the same day, and both deed and mortgage were thereafter recorded. The railroad dismissed the eminent domain action so far as Hayes was concerned, and in October, 1875, the mortgage was released of record as having been fully paid.

In March, 1902, the railroad (North Pacific Coast Railroad Company) sold "its entire railroad system," including its interest in the Hayes property here involved, to the North Shore Railroad Company. In January, 1907, the North Shore consolidated with other companies to form the Northwestern Pacific Railroad Company.

Meanwhile, following the death of Patrick Hayes the Hayes Ranch was distributed to his widow, Mary Hayes; and on January 5, 1893, Mary Hayes conveyed the ranch by grant deed to Martin B. Magnesen "subject to *the right of way* of the North Pacific Coast Rail Road Company, conveyed by deed from Patrick Hayes to said Company, dated February 8th, 1875." (Italics added.)

Magnesen began subdividing the ranch, and recorded two subdivision maps of San Rafael Heights. He reserved on these maps an area 15 feet in width abutting for its entire length the southerly side of the strip of land here involved. The remainder of the subdivision was divided into numbered lots.

In January, 1913, Magnesen sold and granted to the Northwestern Pacific Railroad Company, "A *tract of land* ten (10) feet in width adjoining and lying south of that portion of the *right of way* of the Northwestern Pacific Railroad Company, which was conveyed by Patrick Hayes to the North Pacific Coast Railroad Company by deed dated February 8, 1875." (Italics added.) This "tract of land" so conveyed thus constituted the northerly 10 feet of the 15-foot strip reserved on the subdivision maps. In March, 1921, Magnesen conveyed by grant deed what remained of the Hayes Ranch, to Bacigalupi. In the deed from Mary Hayes to Magnesen the northern boundary of the ranch had been described as the Olema Road, while in the deed from Magnesen to Bacigalupi that boundary was described as "the Olema Road (sometimes called Fourth Street) and the right of way of the Northwestern Pacific Railroad Company."

In February, 1923, Bacigalupi conveyed by grant deed to Davis, and in August, 1925, Davis conveyed (with certain lots excepted) to Highland Realty Company, the plaintiff in the present litigation. So far as here material the description in the deed from Bacigalupi to Davis and in that from Davis to plaintiff is the same as that in the deed from Magnesen to Bacigalupi; that is, the northerly boundary is stated to be the Olema Road, sometimes called Fourth Street, and the railroad right of way.

On March 1, 1941, the Northwestern Pacific Railroad Company discontinued suburban service, and on November 9, 1942, was issued a permit authorizing abandonment of the portion of the line which included the right of way here involved. The dismantling of the railroad line on this portion of its right of way was completed on March 31, 1943.

On February 1, 1945, the Northwestern Pacific Railroad Company executed two quitclaim deeds, one to the City of San Rafael and one to the City of San Anselmo (defendants herein), quitclaiming to the respective cities that portion of its former right of way here involved which lay within the corporate limits of the city. By these deeds the railroad also quitclaimed to the respective cities the portion of the 10-foot strip of land south of and adjoining the right of way, which lay within the appropriate city's corporate limits. Fifteen other parcels of land were included in the railroad's deed to San Rafael, and the city

paid a total purchase price of $2,650, which it appropriated by means of a "charter ordinance." The deed from the railroad to San Anselmo recited a consideration of $10.

In 1943 the public began using the strip of land here involved for parking purposes and as a roadway. The use by the public increased continuously, and beginning in the spring of 1946 defendant cities reconstructed the surface of the strip, improving it to better accommodate traffic. From that time on until the summer of 1948 the cities maintained and improved the strip, by then called the "Miracle Mile." In 1948 the cities put on an armor coat pavement and publicly opened "The Miracle Mile" as a one-way street. Thereafter they continued to maintain and improve the street and traffic thereon constantly increased. Mr. Orendorff testified that he had been plaintiff's agent since 1944, with offices in San Anselmo a short distance from the roadway, and that on two occasions after 1946 he protested to the city manager of San Rafael concerning "what privilege they had of going ahead and doing any work, and they were trespassing on this right of way."

The briefs of the parties herein comprise some 370 pages and are replete with contentions, arguments, charges and countercharges. For purposes of this opinion, however, the following appear to be the points which are pertinent to resolution of the present appeal:

The first question is whether by the 1875 deed Patrick Hayes conveyed to the railroad only an easement over the strip of land presently involved, or whether the railroad received title to the underlying land itself. For several reasons, it appears that only an easement passed.

[1] By the condemnation action the railroad had previously filed against Hayes it could have taken only an easement although by purchase it could acquire the underlying land. (Code Civ.Proc., § 1239, subd. 2; People v. Ocean Shore Railroad (1948), 32 Cal.2d 406, 415, 196 P.2d 570, 6 A.L.R.2d 1179; City of Oakland v. Schenck (1925), 197 Cal. 456, 466, 241 P. 545; see also 17 Cal.Jur.2d 758–759; People, By and Through Department of Public Works v. Thompson (1954), 43 Cal.2d 13, 20, 271 P. 2d 507.) As related hereinabove, the deed, which was given only after the railroad had seemingly already constructed its tracks under the court's order of possession, followed the language of the railroad's eminent domain complaint and the order of possession in describing the property as a "right of way for the construction and use of said Railroad upon, over, and along a strip of land * * * described as follows * * *." It thus appears that the deed conveyed exactly that which the railroad sought, and was authorized, to condemn; i. e., an easement, and nothing more. The fact that in his answer in the condemnation proceeding Hayes alleged that the value of the *land* (not merely of an easement) was $4,000 and that severance damages would be $12,000 does not in its context indicate that by the deed, which recites a consideration of $4,500 and provided that Hayes could open crossings over the right of way, he conveyed the land rather than an easement only. His allegation of value referred to the "strip of land sought to be condemned described in said complaint," and must therefore be taken as referring to the right of way easement which the complaint sought to condemn, rather than to the land itself.

[2–6] It is of course true, as defendants point out, that "A fee simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended."[1] (Civ.Code, § 1105; Elliott v. Mc-

1. Although the interest in land which an easement constitutes is real property and may itself be held in fee simple (see Appeal of North Beach & M. R. Co. (1867), 32 Cal. 499, 505–510; Ocean Shore Railroad Co. v. Doelger (1954), 127 Cal.App.2d 392, 398–399, 274 P.2d 23; Irvin v. Petitfils (1941), 44 Cal.App. 2d 496, 500, 112 P.2d 688; Eastman v. Piper (1924), 68 Cal.App. 554, 562, 229 P. 1002; 17 Cal.Jur.2d 90–91) and may be created only by a grant, express or implied, or by prescription (see Civ. Code, § 806; 17 Cal.Jur.2d 99, and au-

Combs (1941), supra, 17 Cal.2d 23, 28, 109 P.2d 329.) In the Elliott case a land company deeded to Rice a parcel of land, "except the south 30 feet thereof reserved for road purposes," and in concluding that the reservation was of only an easement rather than of the land itself the court declared, quoting in part from Parks v. Gates (1921), 186 Cal. 151, 155, 199 P. 40, that "there is a vast difference between a grant for purposes of 'right of way' for a road and a grant of land 'to be used for a road'. The latter grant may be entirely consistent with the conveyance of a fee-simple title, as a road may be maintained as readily on land held in fee as under an easement, but the grant of land as a right of way recognizes nothing but an easement. This rule was applied in Cooper v. Selig, 48 Cal.App. 228, 191 P. 983, where the court construed a deed conveying land to the city of Los Angeles for the purposes of a public road as passing the fee-simple title. Under the same principle of construction, the language in the deed of the land company to Rice conveyed a fee-simple title to him with the reservation of an easement on the part of the grantor. [Citations.]" Applying the same principle to the present case, the grant by Hayes to the railroad of a right of way "upon, over, and along a strip of land" conveyed only an easement, and not the underlying land. (See also San Rafael Ranch Co. v. Ralph Rogers Co. (1908), 154 Cal. 76, 96 P. 1092.) Further, the general rule is that "in construing contracts and deeds for railroad rights of way such deeds are usually construed as giving a mere right of way, although the terms of the deed would be otherwise apt to convey a fee. [Citations.]" (Coon v. Sonoma Magnesite Co. (1920), 182 Cal. 597, 601, 189 P. 271; see People, By and Through Department of Public Works v. Thompson (1954), supra, 43 Cal.2d 13, 21, 271 P.2d 507; Ocean Shore Railroad Co. v. Doelger (1954), 127 Cal.App.2d 392, 399, 274 P.2d 23; Moakley v. Los Angeles Pacific Ry. Co. (1934), 139 Cal.App. 421, 422–425, 34 P.2d 218; see also Tamalpais Land & Water Co. v. Northwestern Pac. R. Co. (1946), 73 Cal.App.2d 917, 923–929, 167 P.2d 825; Thompson on Real Property, Perm. Ed., Vol. 2, pp. 11–12, § 461, and p. 14, § 462; 132 A.L.R. 142–187.) It may also be noted that both subdivision 4 of section 801 and subdivision 5 of section 802 of the Civil Code term "The right of way" as one of the "land burdens, or servitudes upon land."

Defendants argue that Magnesen's conveyance of a fee in a 10-foot strip of land adjoining the railroad right of way, as described above, indicates that he construed the Hayes' deed of 1875 to the railroad as having conveyed land rather than an easement. Magnesen was not, however, a party to the 1875 deed, and moreover, his own conveyance of the 10-foot strip was, as already mentioned herein, of "A *tract of land* ten (10) feet in width adjoining and lying south of * * * the *right of way*" (italics added) of the railroad. The language of his own deed out thus indicates a distinction between the nature and extent of the property interest or right he was conveying and that conveyed by the 1875 deed.

thorities there cited), nevertheless the cases, in construing the presumption declared by the provisions of section 1105 of the Civil Code, have referred to a "fee simple" title as distinguished from an *easement* (Pellissier v. Corker (1894), 103 Cal. 516, 37 P. 465; City of Long Beach v. Marshall (1938), 11 Cal.2d 609, 615–616, 82 P.2d 362; Elliott v. McCombs (1941), 17 Cal.2d 23, 28, 109 P. 2d 329; People By and Through Department of Public Works v. Thompson (1954), supra, 43 Cal.2d 13, 20, 271 P. 2d 507), from a life estate (Burnett v. Piercy (1906), 149 Cal. 178, 190, 86 P. 603; Barnett v. Barnett (1894), 104 Cal. 298, 37 P. 1049; Winchester v. Winchester (1917), 175 Cal. 391, 394, 165 P. 965), and from *title* taken *in trust* (Logan v. Rose (1891), 88 Cal. 263, 267, 26 P. 103). (See also San Pedro, etc., R. R. Co. v. Hamilton (1911), 161 Cal. 610, 616–618, 119 P. 1073, 37 L.R.A.,N.S., 686.) It may be further noted that "A right of way is primarily a privilege to pass over another's land. It does not exist as a natural right, but must be created by a grant or by its equivalent." (County of Alameda v. Ross (1939), 32 Cal.App.2d 135, 143, 89 P.2d 460.)

From what has been said, it follows that title to the land underlying the railroad right of way remained in Hayes and passed through his successors in interest to the present plaintiff. Defendant cities' suggestion that the description in the Magnesen deed to Bacigalupi, the Bacigalupi deed to Davis, and the Davis deed to plaintiff did not embrace the land presently in dispute is without merit. As already recited herein, the northern boundary of the property conveyed by such deed (in all of which deeds the total property was termed "what is generally known as the 'Hayes Ranch,' * * * Containing 150 acres, more or less") is designated as "the Olema Road (sometimes called Fourth Street) and the [railroad] right of way." Without detailing the arguments of the parties, it is apparent that the land here in question was conveyed by the deeds through which plaintiff deraigned its title.

The next question is whether by the 1945 quitclaim deeds from the Northwestern Pacific Railroad Company (successor in interest to Hayes' grantee under the 1875 deed) to the defendant cities, such cities took any interest in the railroad right of way easement.

Section 22 of the Act for the Incorporation of Railroad Companies (Stats.1861, pp. 607, 618–619),[2] under which act Hayes' grantee was organized, provided that a railroad company shall not hold "real estate, or any right, title or interest, therein, acquired, or used solely, or mainly, for * * * tracks * * * [1] beyond the time of the legal existence of said company, [2] nor after the location of said track, or tracks, has been changed therefrom, [3] nor after the said company shall have failed, or ceased, to use the same, for the maintenance of such track, for the space of five years continuously; but in each of such cases, the said real estate, and all the right, title, and interest, therein, shall revert to the person, or persons, and his, or their, assigns, from whom the same was acquired by said company."

[7] It thus appears that the statute set up three contingencies beyond which the railroad could not continue to hold property used for tracks. Defendants urge that contingency [2], change of location of the tracks, occurred in March, 1943, when the tracks were physically removed, and that this quiet title action, seeking reentry and commenced May 28, 1951, was therefore barred by the five-year statute of limitations. (Code Civ.Proc., § 320.) It appears, however, that contingency [3], failure or cessation of use of the property for the maintenance of the tracks for a period of five years, is more properly applicable in the present case, where the tracks were not "changed" from one location to another, but were dismantled and the portion of the line which included the right of way here involved was totally abandoned. Other sections of the 1861 act likewise indicate that a change in location of the tracks meant something other and different from abandonment. Thus in subdivision Seventh of Section 17 a railroad was empowered to "change the line of its road * * *; but no such change shall vary the general route of such road * * *." And in Section 20, after giving railroads certain rights of way over public lands, it is "*provided*, further, that if any road, at any time after its location, shall be discontinued, or abandoned, by said company * * * or the location of any part thereof be so changed as not to cover the lands of the State thus previously occupied, then the lands so abandoned, or left, shall revert to this State. * * *" So construing section 22, and considering the "five years continuously" of failure to use the right of way for tracks to have commenced when the dismantling was completed on March 31, 1943, it follows that this action, brought within another five years, was timely filed.[3]

2. The act was repealed in 1951. (Pub.Util. Code, § 25002; Stats.1951, ch. 764, pp. 2025, 2258.)

3. On appeal, defendants suggest that perhaps contingency [1], termination of legal existence of the railroad company, applies, asserting that the North Pacific Coast Railroad's charter expired in 1922. (See § 2 of the 1861 act.) Although plaintiff does not dispute such assertion, defendants at the trial expressly stated that they were "not relying on that [con-

[8] Since it is provided by section 811 of the Civil Code that "A servitude is extinguished: 1. By the vesting of the right to the servitude and the right to the servient tenement in the same person * * *," it follows further that on reverter of the right of way easement to plaintiff upon the passage of five continuous years following failure of the railroad to use such property for its tracks, the easement was extinguished as well as any right thereto purportedly transferred by the quitclaim deeds from the Northwestern Pacific Railroad Company to the defendant cities.

[9] Against this conclusion defendant cities argue, however, in reliance upon Lemon v. Los Angeles Terminal R. Co. (1940), 38 Cal.App.2d 659, 102 P.2d 387, that the reverter contingencies, even if otherwise applicable here, constitute penalty or forfeiture provisions, based on conditions subsequent, which are not favored by the courts; that to take advantage of such provisions plaintiff must actually exercise its claimed right of reentry; that the first act of plaintiff which could be considered an assertion of a reentry right was the bringing of this action on May 28, 1951; that inasmuch as the 1861 act was repealed effective September 22, 1951 (Pub.Util. Code, § 25002; Stats.1951, ch. 764, pp. 2025, 2058), which was four months after this action was instituted but prior to any judgment, any rights of plaintiff dependent upon enforcement of such asserted forfeiture were thereby extinguished and will not be assisted by the courts. Regardless of whether defendants' argument would be valid if as in the Lemon case the railroad here had held title to the land, rather than only an easement over and across it, no authority has been cited or discovered holding that merger of an easement (i. e., extinguishment of the servitude) into ownership of the land itself, resulting from failure to make use of the easement for the purposes for which the servitude was created, constitutes such a penalty or forfeiture as is discussed in the Lemon case. On the contrary both the Lemon case (at page 663 of 38 Cal.App.2d, 102 P.2d 387) and Hannah v. Southern Pac. R. Co. (1920), 48 Cal.App. 517, 521, 192 P. 304, likewise relied upon by defendants, appear to recognize that the forfeiture and condition subsequent rules do not apply where only an easement was granted. (See also Tamalpais Land & Water Co. v. Northwestern Pac. R. Co. (1946), supra, 73 Cal.App.2d 917, 929, 167 P.2d 825, and authorities there cited.) Defendants' position on this point is consequently likewise without merit.

Defendants also suggest that they have rights of some nature based upon adverse possession. In the first place, however, as noted hereinabove, the trial court expressly found that plaintiff had no ownership of any nature in the land here involved and that defendants claimed an interest therein "but that such claim was not adverse to" plaintiff in view of plaintiff's lack of interest in the property, and that fee title to the land is in defendants. Under such circumstances it is clear that defendants' claims under their affirmative defenses of adverse possession and of dedication of the land as a public highway were not passed upon by the trial court. Further, defendants in their brief state that they "do not claim *title* by adverse possession for we agree that adverse user for the prescriptive period may give rise to an 'implied dedication' in which event an easement is obtained." This appears to be the law. (See Lantz v. City of Los Angeles (1921), 185 Cal. 262, 268, 196 P. 481; People v. Sayig (1951), 101 Cal.App.2d 890, 896, 226 P.2d 702; 15 Cal.Jur.2d 262, § 5; id., 344, § 56.)

[10] Next, defendants assert that in any event, "inasmuch as the property in question was devoted to a public use, the rights of the owner of the reversion, if any, in such a case will be abridged in the public interest and the remedy of ejectment will be denied because the public use has

tingency] at all." Moreover, since under section 17 of the 1861 act a railroad company was given the right to convey property to the same extent as a natural person, plaintiff's position on this point appears to be sound: that the North Pacific Coast could convey its property to another railroad, but that it could not hold it beyond the expiration of its charter if it had not previously so conveyed.

intervened," (see Beals v. City of Los Angeles (1943), 23 Cal.2d 381, 388, 144 P.2d 839; Gurnsey v. Northern California Power Co. (1911), 160 Cal. 699, 711–712, 117 P. 906, 36 L.R.A.,N.S., 185), and plaintiff will be relegated to an action for damages. Plaintiff concedes that defendants' pleadings "show on their face that defendants have entered upon the land, and have in effect taken it by inverse condemnation, for which taking plaintiff must be paid just compensation" if the court finds that defendants' contentions of devotion to a public use should be upheld. Although plaintiff states that it seeks possession of its land by this quiet title action, and argues the evidence does not show such a public need as claimed by defendants, plaintiff nevertheless suggests that this court has the power to make a finding of intervention of public use under the provisions of section 956a of the Code of Civil Procedure. Plaintiff's own evidentiary arguments clearly show, however, that the matter should originally be determined by the trial court. (See Peabody v. City of Vallejo (1935), 2 Cal.2d 351, 378, 40 P.2d 486; Churchill v. Kellstrom (1943), 58 Cal.App. 2d 84, 90, 136 P.2d 602; Peckwith v. Lavezzola (1942), 50 Cal.App.2d 211, 218, 122 P.2d 678.)

[11] Defendants further urge that if plaintiff is awarded only damages, rather than possession of the land, then the matter is governed by the three-year statute of limitations applicable to an action in trespass (Code Civ.Proc., § 338, subd. (2)), rather than by the five-year period applicable to a possessory action, and that therefore any right to damages is barred. Although where the action is brought for the recovery of damages for trespass the three-year statute has been applied (see Williams v. Southern Pacific R. Co. (1907), 150 Cal. 624, 628, 89 P. 599; Robinson v. Southern California Ry. Co. (1900), 129 Cal. 8, 11, 61 P. 947; see also Southern Pac. Co. v. Los Angeles Milling Co. (1918), 177 Cal. 395, 403, 170 P. 829), the correct rule is that under such facts as are disclosed by the present record the defendant cities are in no position to urge the statute of limitations as a bar to the recovery of damages. It was so held in Peabody v. City of Vallejo (1935), supra, 2 Cal.2d 351, 380 [26], 40 P.2d 486, in which the acts of defendant city in appropriating certain waters riparian to plaintiffs' lands were held to entitle plaintiffs to damages even though under the doctrine of intervention of public use the city might be entitled to continue its taking of the water. (See also Bacich v. Board of Control (1943), 23 Cal.2d 343, 346–349, 144 P.2d 818; Martin v. Western States Gas & Electric Co. (1935), 8 Cal. App.2d 226, 230, 47 P.2d 522; Katenkamp v. Union Realty Co. (1940), 36 Cal.App.2d 602, 619, 98 P.2d 239.)

[12] Finally, the parties differ as to whether, in case plaintiff is relegated to damages rather than to possession, such damages are to be assessed by a jury. Plaintiff insists that inasmuch as this proceeding was commenced as an equitable quiet title action any issue as to damages is likewise equitable and to be tried by the court alone, whereas defendants urge a jury trial. Although no case precisely in point has been cited or discovered, the general provision of section 14 of article I of the Constitution that "which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law," would appear to apply to compensation in an inverse condemnation proceeding with the same force as in any other eminent domain matter. (See Code Civ.Proc., § 738; 17 Cal.Jur.2d 596, § 15, and p. 598, § 18, and cases there cited.) In Tyler v. Tehama County (1895), 109 Cal. 618, 624, 42 P. 240, it was declared that an inverse condemnation action is clearly within the constitutional provision prohibiting the taking or damaging of private property for public use without the payment of just compensation therefor, and various other rules usually followed in eminent domain actions have been applied by the cases to inverse condemnation proceedings. (See Heimann v. City of Los Angeles (1947), 30 Cal.2d 746, 753, 185 P.2d 597 [costs]; Collier v. Merced Irr. Dist. (1931), 213 Cal. 554, 572, 2 P.2d 790 [costs]; 18 Cal.Jur.2d 98, §§ 377, 378, and cases there cited.) On this point, defendants' position (that they are entitled

to a jury trial) is correct. (See also Thomson v. Thomson (1936), 7 Cal.2d 671, 682–683, 62 P.2d 358, 117 A.L.R. 1, re trial of equitable and legal issues in the same forum.)

The judgment is reversed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SPENCE and McCOMB, JJ., concur.



142 Cal.App.2d 249

E. J. CECIL, Plaintiff and Appellant,

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a National Banking Association, et al., Defendants and Respondents.

Civ. 5323.

District Court of Appeal, Fourth District, California.

June 14, 1956.

Proceeding on motion to tax costs. The Superior Court, Fresno County, Arthur C. Shepard, J., entered an order disallowing certain items, and the movant appealed. The District Court of Appeal, Mussell, J., held that costs incurred pursuant to arbitration agreement of parties and not in court proceeding to confirm award were properly disallowed.

Affirmed.

1. Arbitration and Award ⇐42

Costs incurred pursuant to arbitration agreement of parties and not in court proceeding to confirm award were properly disallowed. West's Ann.Code Civ.Proc. §§ 1032(c), 1280–1293, 1287–1289.

2. Arbitration and Award ⇐73

In absence of some limiting clause in arbitration agreement, merits of award, either on questions of fact or law, may not be reviewed except as provided in the statute. West's Ann.Code Civ.Proc. §§ 1032(c), 1280–1293, 1287–1289.

Crossland, Crossland & Richardson, William C. Crossland, Fresno, Loeb & Loeb, and Herman F. Selvin, Los Angeles, for appellant.

Stammer, McKnight & Barnum, Fresno, Bronson, Bronson & McKinnon, San Francisco, for respondent Western Frozen Foods Co., Inc.

MUSSELL, Justice.

Plaintiff appeals from an order disallowing certain items in his memorandum of costs filed in the proceedings on his application for an order of court confirming an arbitration award. The orders of the trial court denying a motion to vacate the award of the arbitrators and confirming the award were affirmed on appeal by this court in Cecil v. Bank of America, 297 P.2d 810, and the record on appeal in that case is included herein pursuant to Rule 11(b) of the Rules on Appeal.

On January 10, 1947, plaintiff E. J. Cecil transferred certain farms to defendant Western Frozen Foods Company, Inc. (hereinafter referred to as "Western") with a written agreement and guaranty that Western would realize a certain amount from the operation of the farms within a limited period. The agreement further provided that any dispute which might arise under its terms would be submitted to arbitration, each party to appoint an arbitrator and these two to select a third. The farms failed to produce the guaranteed profits and a demand was made upon Cecil to make good upon his guaranty. On March 2, 1949, Cecil demanded an arbitration as to his liability and appointed Milo Erwin as his arbitrator. Western appointed C. Ray Robinson as its arbitrator and the third arbitrator (Willey) was appointed by the court. Cecil attempted to obtain a court order removing Robinson as arbitrator and on appeal to this court, the order of the court denying Cecil's application was affirmed. Cecil v. Bank of America, 107 Cal.App.2d 38, 236 P.2d 408.

[1] On December 7, 1949, Cecil instituted an action in the Superior Court against the Bank of America National Trust and Savings Association (hereinafter referred to as the "Bank") and Western. On April 14, 1950, Cecil, Western and the Bank entered into a written stipulation that the superior court action be stayed pending arbitration. The stipulation set forth the issues subject to the arbitration, but contained no provision for the payment of the costs and expenses thereof. The arbitration, after extensive hearings, resulted in an award favorable to Cecil. Western and the Bank moved to vacate the award and Cecil petitioned for its confirmation. The trial court confirmed the award on May 10, 1950, and Cecil filed the cost bill which is here involved. In it Cecil claims one-half of the compensation of the court appointed appraiser, Willey, and all of the compensation and expenses of Milo Erwin (the arbitrator appointed by Cecil). Various other disbursements for depositions, service of process and transcription were also claimed but these items were allowed by the trial court and are not here involved. The court disallowed the items claimed as compensation and expenses for Willey and Erwin, and Cecil appeals from the order of disallowance, claiming that the prevailing party in an arbitration confirmation proceeding is entitled to costs as of course; that the trial court therefore, had authority to allow any disbursements necessarily incurred; and that fees and expenses of arbitrators may be among such necessarily incurred items. The costs which were disallowed herein were incurred pursuant to the arbitration agreement of the parties and not in the court proceedings to confirm the award. Under such circumstances, the disputed items were properly disallowed. In Lief v. Brodsky, Sup., 126 N.Y.S.2d 657, it was held that the court had no power to allow costs and disbursements attendant upon a motion to confirm an award where, as here, neither the agreement to arbitrate nor the award referred to any such items. And in In re Weeks, 153 Misc. 211, 273 N.Y.S. 922, it was held that under the Civil Practice Act, the court's power was confined to costs on motion to confirm an award where the arbitrators made no finding respecting costs and that in the absence of direction by the arbitrators, the fee for an arbitrator appointed by the court is to be paid equally by the parties to the arbitration. The right to recover costs in any case is purely statutory and in the absence of statute, there is no such right. (13 Cal.Jur.2d, Costs, Sec. 3.) In 5 Cal. Jur.2d, Arbitration and Award, Sec. 21, it is said that in the absence of an express agreement to pay, it is implied that the party will pay such sums as will fairly and reasonably compensate an arbitrator for services rendered. Our attention has not been directed to any statutory authority to award costs not incurred in court proceedings to confirm an award. Section 1032(c) of the Code of Civil Procedure gives the court discretion to allow or apportion costs, but only in connection with *actions*, and sections 1280–1293 of the Code of Civil Procedure relating to arbitration procedure, confer no power upon the courts to award costs incurred in arbitrations. Section 1287 of the Code of Civil Procedure provides that the court must confirm the award, unless it is modified or corrected as prescribed in sections 1288 and 1289, and the allowance of the disputed items as costs herein would constitute a modification of the award not authorized by these code provisions.

[2] The record shows that the arbitration proceedings were conducted independently of court action and in the absence of some limiting clause in the arbitration agreement, the merits of the award, either on questions of fact or law, may not be reviewed except as provided in the statute. Crofoot v. Blair Holdings Corp., 119 Cal. App.2d 156, 186, 260 P.2d 156. The affidavit in connection with the proceedings on costs indicates that the issue of whether costs should or should not be granted to the prevailing party was submitted to the arbitrators and it must be assumed that they ruled upon it adversely to Cecil.

Appellant relies on the case of Squire's Dept. Store, Inc., v. Dudum, 115 Cal.App. 2d 320, 252 P.2d 418, as authority for the allowance of arbitration costs by a superior

court. However, in that case the costs were allowed in court proceedings and in the instant case the disputed costs were incurred independently of the court action.

The order appealed from is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



142 Cal.App.2d 233

Charles E. KEMMER, Plaintiff and Respondent,

v.

Holly M. KEMMER, Defendant and Appellant.

Civ. 21700.

District Court of Appeal, Second District, Division 2, California.

June 14, 1956.

Proceeding upon motions in father's suit to determine custody of children. The mother's motion sought permission to take the children to Ohio. The father countered with a motion for award of custody to him. The Superior Court, Los Angeles County, LeRoy Dawson, J., granted the father's motion and denied that of the mother. She appealed. The District Court of Appeal, Fox, J., held that the record amply supported the order of the trial court in leaving custody with the father rather than permitting the removal by the newly married mother to Ohio.

Affirmed.

1. Parent and Child ⇐2(2, 4)

In contest between parents concerning their minor child's custody, neither of them is entitled to such custody as matter of right, but under statute each is equally entitled to custody and no showing or finding of unfitness therefor is necessary to enable court to award custody to one or other parent in accordance with what the court, in its sound discretion, deems to be in child's best interest. West's Ann.Civ.Code, § 138(2).

2. Infants ⇐19

The Superior Court has broad discretion in matters pertaining to change of minor children's custody. West's Ann.Civ. Code, § 138(2).

3. Infants ⇐19

In passing on question of changing minor child's custody, child's welfare, not shortcomings of respective parties seeking custody, is determinative. West's Ann.Civ. Code, § 138(2).

4. Infants ⇐19

An application for modification of court's award of minor child's custody is addressed to court's sound legal discretion, which will not be disturbed on appeal unless record clearly shows abuse of discretion. West's Ann.Civ.Code, § 138(2).

5. Infants ⇐19

Generally, to warrant modification of order as to minor child's custody, there must be substantial evidence of change of circumstances after entry of order, but child's welfare may require change of custody order though there is apparently no change of circumstances. West's Ann.Civ.Code, § 138(2).

6. Parent and Child ⇐2(4)

Evidence sustained action of trial judge, in change of custody case, in leaving children with father rather than permitting their removal by newly married mother to Ohio. West's Ann.Civ.Code, § 138(2).

Bayard R. Rountree, Burbank, for appellant.

Walter B. Gieselman, Burbank, for respondent.

FOX, Justice.

This is essentially a change of custody case.

The parties, formerly husband and wife, lived in Erie, Pennsylvania, with their two children. Early in 1953 the husband was granted an uncontested divorce. No order was made relative to the custody of the chil-

dren. They were brought to California in May of that year by the father's mother.

In the summer of 1954, the mother of the children moved to Burbank, California, where she secured employment. The father thereupon filed this suit to determine the custody of the children. At a hearing in September, 1954, the court awarded custody to the mother of the children, requiring the father to make certain payments for their support and restrained each party from removing the children from the state. In the following November the mother lost her job, turned the children over to their father, and returned to her home in Erie, Pennsylvania. In July, 1955, she married a Mr. Inman, whom the plaintiff charged with breaking up the Kemmer home. The Inmans live in Piketon, Ohio, where Mr. Inman is employed as an electrician by the Goodyear Atomic Corporation at a salary of $95 a week. The mother thereupon returned to California and by motion in this suit sought to have vacated the former restraining order prohibiting either parent from removing the children from the state of California, and also sought permission to take the children to Ohio to reside with her and Mr. Inman. Mr. Kemmer countered with a motion to modify the custody order and to award the custody of the children to him. The court denied the motion of the mother and granted that of the father. It is from the ensuing orders that the mother appeals.

At the time of the hearing the boys were, respectively, eight years, and six years and eight months, of age. The court found that since the arrival of the children in California, in May, 1953, they had been in the physical custody of their father all the time except for a period of four months in the summer and fall of 1954, and that he had properly cared for, maintained, and supported them for approximately this two-year period; that they attended the public schools, and, under the father's supervision, the local church. Mr. Kemmer has a job with a railroad company. He works the graveyard shift. This enables him to have time at home with the boys during the day when they are not in school, and in the evenings. Mr. Kemmer's mother, a woman 57 years of age, takes care of the home and looks after the children. Mr. Kemmer lives in a house which has a separate room for the boys. He had lived in this house for a year and a half. At the time of the hearing the boys were preparing to attend the same school they had attended the previous year.

At the time of the hearing, the Inmans had been married less than a month and a half. Mrs. Inman was of the opinion that her husband's earnings of $95 a week were sufficient to take care of their living expenses so that she would not need to be employed and that she could thus devote her full time to her home and children. It is not shown whether this figure represents his gross or "take home" pay. It does appear, however, that Mr. Inman has three children by a former marriage for whose support he is required to pay $25 a week. It does not appear how long he has been engaged in his present line of work or how long he has been in his present employment. Mrs. Inman stated that they had a two-bedroom house for which they paid $65 rent per month. The boys could have one of these bedrooms for themselves. Mr. Inman filed an affidavit expressing his willingness and desire to have the children reside with him and his wife.

The court expressly found that "it is for the best interests of the children in respect to their temporal, mental and moral welfare that they remain with their father," and that it was not for the best interests of the children that they be removed to Ohio to reside with their mother.

[1–5] In a change of custody case, Disney v. Disney, 121 Cal.App.2d 602, at pages 606–607, 263 P.2d 865, at page 869, this court stated the pertinent rules thus: " 'In a contest between parents concerning the custody of their minor child neither is entitled to custody as a matter of right. Under the statute (Civ.Code, § 138(2)) each is equally entitled to custody and no showing or finding of unfitness is necessary to enable the court to award custody to one or the other in accordance with what, in its sound discretion, is deemed the best interest of the child.' Davis v. Davis, 41 Cal.2d 563, 565, 261 P.2d 729, 730. It is also pointed out in this [the same] opinion 41 Cal.2d at page

565, 261 P.2d at page 731, that 'The court has broad discretion in matters pertaining to the change of custody of children.' In passing on such question, 'It is the welfare of the child and not the short comings of the respective parties which is determinative', Young v. Young, 117 Cal.App.2d 735, 738, 256 P.2d 1009; Clarke v. Clarke, 35 Cal.2d 259, 262, 217 P.2d 401, and 'the feelings and desires of the contesting parties are not to be considered except insofar as they affect the best interests of the child.' Taber v. Taber, 209 Cal. 755, 756, 290 P. 36, 37. In Munson v. Munson, 27 Cal.2d 659, 666, 166 P.2d 268, 272, the court states that 'It is settled that "an application for a modification of an award of custody is addressed to the sound legal discretion of the trial court, and its discretion will not be disturbed on appeal unless the record presents a clear case of an abuse of that discretion." '

"It is, of course, the general rule that to warrant the modification of a custodial order there must be substantial evidence of a change of circumstances after the entry of the original decree. Davis v. Davis, supra. However, it is pointed out, in Foster v. Foster, 8 Cal.2d 719, 68 P.2d 719, that 'the change of circumstances' rule is not an absolutely ironclad rule, and that there might be a case in which, despite the fact that there was apparently no change of circumstances, nevertheless, the welfare of the child might require that the previous order of custody be changed. 8 Cal.2d at page 728, 68 P.2d 719."

[6] Applying these principles, it cannot be said, as a matter of law, that the trial court abused its discretion in awarding custody of these two boys to their father. The evidence clearly indicates that for a period of approximately two years the father, in cooperation with his mother, had done "a good job" of taking care of these children. They were apparently getting the necessary attention and supervision, for the trial court found that during this period the father had "properly cared for" them. They had had time and opportunity to become oriented and settled in their new home, in the neighborhood where they lived, and in their school. Against this established setting the trial court had to weigh the uncertainties of the mother's situation. The court may well have felt that her marriage of less than a month and a half was not of sufficient duration to give assurance of its stability. The court may also have had concern about the mother's ability to devote her time exclusively to her home and children in the absence of any indication of the likely permanence of her husband's job, and his obligations to his own children. Then, too, there was uncertainty as to how these children would adjust in the home with a stepfather, and in a different neighborhood and in a new school.

Bearing in mind that the welfare of the children is the guilding principle in custody cases, it is clear that the trial judge exercised a reasonable discretion in leaving the children with the father who had demonstrated, over a substantial period, that he could properly take care of them, rather than permitting their removal by the mother to Ohio where their situation would be fraught with uncertainties. The record amply supports the orders of the trial court.

Appellant relies on Ashwell v. Ashwell, 135 Cal.App.2d 211, 286 P.2d 983. That case is factually so different from the instant proceeding that it is of no assistance.

The orders are affirmed.

MOORE, P. J., and ASHBURN, J., concur.

142 Cal.App.2d 59

The PEOPLE of the State of California, Plaintiff and Appellant,

v.

Adam ACOSTA, Defendant and Respondent.

Cr. 1050.

District Court of Appeal, Fourth District, California.

May 31, 1956.

Prosecution for possession of a narcotic. Defendant moved to set aside the information on the ground that the search warrant which led to defendant's arrest was issued without probable or reasonable cause. The Superior Court, San Diego County, John A. Hewicker, J., entered order granting defendant's motion to set aside the information. The People appealed. The District Court of Appeal, Griffin, J., held that search warrant issued on an affidavit by a police officer attesting that he had information from a known informant and that said informant had seen narcotics in the possession of the defendant at a certain address and that police officer believed that defendant still had the narcotics in his possession was based on sufficient showing.

Order reversed.

1. Searches and Seizures ⇐3(10)

The burden to establish the invalidity of search warrant was on defendant. West's Ann.Const. art. 1, § 19.

2. Searches and Seizures ⇐3(4)

In determining probable cause for issuance of search warrant, court is not called upon to determine whether offense charged was in fact committed, but is concerned only with question of whether affiant had reasonable grounds at time of his affidavit for belief that law was being violated upon the premises to be searched, and if apparent facts set out in the affidavit are such that a reasonably prudent man would be led to believe that there was a commission of the offense charged, there is reasonable cause.

3. Arrest ⇐63(4)

Reasonable cause to justify arrest may consist of information obtained from others, and is not limited to evidence that would be admissible at trial on issue of guilt.

4. Arrest ⇐63(4)

In absence of some pressing emergency, an arrest may not be based solely on information provided by an anonymous informer; but such information is relevant on issue of reasonable cause to justify arrest.

5. Arrest ⇐63(4)

To support finding that there was reasonable cause to justify an arrest, evidence must be presented to court that would justify conclusion that police officer's reliance on information provided by an anonymous informer was reasonable; but in some cases identity of, or past experience with, informer may provide such evidence, and in others it may be supplied by similar information from other sources or by personal observations of police.

6. Searches and Seizures ⇐3(4)

Search warrant affidavit, which contained positive statement that on named date the defendant unlawfully possessed heroin and which alleged that officer knew the name and identity of informant who told officer that on such date the defendant possessed and sold heroin at described premises, was not insufficient as containing only hearsay evidence of informer. West's Ann.Pen.Code, §§ 995, 1524–1526.

7. Indictment and Information ⇐140(1)

Where affidavit made sufficient showing of facts for issuance of search warrant which led to defendant's arrest, on motion to set aside information on ground of lack of reasonable or probable cause for commitment of defendant, only a question of law arose as to sufficiency of showing, and on examination of testimony before committing magistrate on such a motion no findings of fact were proper. West's Ann.Pen.Code, §§ 995, 1524.

8. Arrest ⇐71
Criminal Law ⇐395

Where warrant was issued to search defendant's dwelling for heroin and other paraphernalia, officers were justified in taking marijuana cigarettes as an incident to the arrest, and the introduction of such

evidence at the preliminary examination to support the charge that defendant was found in possession of a "narcotic" was proper. West's Ann.Pen.Code, §§ 995, 1524 et seq., 1529.

9. Arrest ⇐71

Where warrant of seizure authorized the search made, whether arrest was made before or after search and seizure was immaterial.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., James Don Keller, Dist. Atty., and Jack R. Levitt, Deputy Dist. Atty., San Diego, for appellant.

Thomas Whelan, San Diego, for respondent.

GRIFFIN, Justice.

After a preliminary hearing defendant and respondent was charged by information with the crime of having in his possession a narcotic, without describing it. After information filed in the Superior Court, defendant's counsel moved to set it aside under section 995 of the Penal Code and the motion was granted. The People appealed.

The question before the trial court was whether defendant was illegally committed, or committed without reasonable or probable cause. It is defendant's claim that the principal evidence against him at the preliminary examination was obtained in violation of his constitutional guaranty, by unreasonable search and seizure; that the search warrant was issued without a sufficient showing of probable or reasonable cause; and accordingly was invalid, citing such authority as People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905, and subsequent opinions on that subject. See also Willson v. Superior Court, 46 Cal.2d 291, 294 P.2d 36, and sections 1524, 1525 and 1526 of the Penal Code.

The testimony before the committing magistrate, made a part of the evidence before the reviewing court on this motion, shows generally that on the night of July 8, 1955, four police officers went to a two-bedroom residence at 1718 Newton Avenue in San Diego. One officer was armed with a search warrant issued that day. In an affidavit of officer Myrann it is alleged:

> "Personally appeared before me this 8th day of July, 1955, A. N. Myrann, who on oath makes complaint and deposes and says: That on the 7th day of July, 1955, in the County of San Diego, State of California, the crime of Possession of Narcotic was committed, to wit: By Adam Acosta, who then and there did unlawfully have in his possession a quantity of heroin." (It will be noted that this allegation was not made upon information and belief.) It then follows in another paragraph:
>
> "That he has been told by an informant, whose name cannot be revealed without endangering the safety of said informant, that he, the said informant, has seen a quantity of heroin in the possession of Adam Acosta at 1718 Newton Avenue, San Diego, California, and had purchased heroin from said Adam Acosta on July 7, 1955; that said Adam Acosta also on said day had in his possession paraphernalia for the unlawful administration of narcotics intravenously, including a spoon, cotton, hypodermic needle, and syringe. That your affiant believes and therefore alleges that said Adam Acosta still has a quantity of heroin and the above-described paraphernalia in his possession at 1718 Newton Avenue. * * *"

A search warrant was issued upon this showing, commanding the officer to search the person of Acosta and the premises indicated for the following property: "Heroin and spoons, syringes, hypodermic needles and cotton", and "if found, bring them to court". On arrival at the premises officer Schenck knocked at the front door. It was answered by a woman whom he believed to be the mother of Adam Acosta. He showed her his badge and search warrant and asked her if Adam was at home. She did not answer him but stepped back away from the door and Schenck went in. He saw the defendant in the kitchen and searched his person and showed him the

search warrant. He asked him which was his bedroom and defendant pointed to the back bedroom. The officer then told the defendant to sit on the couch and he then asked the defendant's mother which was the defendant's bedroom and she pointed to the front bedroom. The officers went into the front bedroom and commenced to search. Behind the window molding a number of articles were found, including hand-rolled marijuana cigarettes, a dirty piece of cloth wrapped around an eye-dropper, a needle, a spoon, cotton, an eye-dropper bulb in which there was a needle, and a bottle containing marijuana seeds and pieces of paper. Apparently, defendant ran out of the house about this time, left, and subsequently surrendered to the police. The cigarettes were identified by a competent witness as containing marijuana, and the bottle contained marijuana seeds and particles. There was residue of heroin in the spoon and in one piece of paper, and the residue of opium alloy in another piece of paper. Objection was made at the preliminary hearing to the introduction in evidence of the marijuana, because the search warrant did not call for such a search, but only for heroin and the other paraphernalia mentioned. Further objection was made that the affidavit for search warrant was insufficient because it was based on hearsay evidence of what someone told the officer, without naming the person and without having a supporting affidavit of anyone purporting to know the facts, as contemplated by section 1526 of the Penal Code. It was stipulated at such hearing that the judge issued the search warrant, based on the affidavit, and no other witnesses appeared before the judge in regard to its issuance. It appears that the prosecutor demanded that defendant, in connection with his motion to withdraw the evidence, claim ownership of the seized property before he could invoke the doctrine of unlawful search and seizure, citing such authority as United States v. Lee Hee, 2 Cir., 60 F.2d 924, 926; and Lee On v. Long, 37 Cal.2d 499, 234 P.2d 9. The People contend on this appeal: (1) that the warrant was valid and the search proper; (2) that there was sufficient consent to the entry and search of the premises without a warrant; (3) that the search and seizure of the contraband was contemporaneous with the lawful arrest; (4) that there was probable cause for the arrest and search; and (5) that the defendant may not challenge the validity of the search and seizure while disclaiming ownership. This last contention was held untenable in People v. Kitchens, 46 Cal.2d 260, 294 P.2d 17.

[1] Article I, Section 19 of the California Constitution provides that no search warrant shall issue "but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized." The burden to establish the invalidity of the search warrant was on defendant. United States v. Goodwin, D.C., 1 F.2d 36.

[2] In determining probable cause for issuance of a search warrant the court is not called upon to determine whether the offense charged was in fact committed, but is concerned only with the question whether the affiant had reasonable grounds at the time of his affidavit for the belief that the law was being violated upon the premises to be searched. If apparent facts set out in the affidavit were such that a reasonably prudent man would be led to believe that there was a commission of the offense charged, there is reasonable cause. Carney v. United States, 9 Cir., 163 F.2d 784, 786, certiorari denied, 332 U.S. 824, 68 S.Ct. 165, 92 L.Ed. 400.

The courts of this state have defined what constitutes probable cause under various conditions. People v. Kilvington, 104 Cal. 86, 37 P. 799, held that there is probable cause for arrest when there is such a state of facts as would lead a man of ordinary care and prudence to believe, or entertain an honest and strong suspicion, that the person arrested is guilty of the offense charged.

In Cook v. Singer Sewing Machine Co., 138 Cal.App. 418, 422, 32 P.2d 430, it was held that an arrest without a warrant was justified where the suspicion of guilt is founded on relevant facts, circumstances or credible information conveyed to the officer, and that he is not required to have defi-

nitely and finally established the truth of the facts or the certainty of the information upon which he relies. See also Lorenson v. Superior Court, 35 Cal.2d 49, 56, 216 P. 2d 859; Bompensiero v. Superior Court, 44 Cal.2d 178, 281 P.2d 250; People v. Misner, 134 Cal.App.2d 377, 285 P.2d 938; People v. Platt, 124 Cal.App.2d 123, 134, 268 P.2d 529; People v. Hupp, 61 Cal.App.2d 447, 143 P.2d 84; United States v. Li Fat Tong, 2 Cir., 152 F.2d 650, and People v. Boyles, 45 Cal.2d 652, 290 P.2d 535.

It is true there are federal authorities holding that a search warrant may not be issued upon hearsay evidence. United States v. Goodwin, D.C., 1 F.2d 36; United States v. Vatune, D.C., 292 F. 497; United States v. Lai Chew, D.C., 298 F. 652.

[3–5] In People v. Cahan, supra, it was said that the state courts would not necessarily be bound by the federal rules in the right to conduct reasonable searches and seizures or to secure warrants. Willson v. Superior Court, supra [46 Cal.2d 294, 294 P.2d 38], stated the general rule applicable in this state in this respect. It is there said:

> "'Reasonable cause to justify an arrest may consist of information obtained from others and is not limited to evidence that would be admissible at the trial on the issue of guilt.' * * Although information provided by an anonymous informer is relevant on the issue of reasonable cause, in the absence of some pressing emergency * * * an arrest may not be based solely on such information * * * and evidence must be presented to the court that would justify the conclusion that reliance on the information was reasonable. * * * In some cases the identity of, or past experience with, the informer may provide such evidence * * * and in others it may be supplied by similar information from other sources or by the personal observations of the police."

[6, 7] Here, it is argued that the affidavit upon which the search warrant issued contained only hearsay evidence of an informer. The affidavit cannot be so construed. It makes a positive statement of the affiant officer that on July 7th, defendant committed the crime of possession of narcotics and that defendant did then and there unlawfully have in his possession a quantity of heroin. He then further alleges that he was told by an informant, whose name and identity were known to the officer, that defendant was on that day in possession of and had sold heroin at said described premises. Under the Willson case this showing was sufficient. See also People v. Sayles, 140 Cal.App.2d 657, 295 P.2d 579; People v. Maddox, 46 Cal.2d 301, 294 P.2d 6. Accordingly, only a question of law arose as to its sufficiency. People v. Gorg, 45 Cal.2d 776, 780, 291 P.2d 469. On an examination of the testimony before the committing magistrate on such a motion as the one presented to the trial court, no findings of fact by the trial court are proper nor can they be considered.

In Badillo v. Superior Court, 46 Cal.2d 269, 294 P.2d 23, it was held:

> "Where evidence before the magistrate bearing on the issue of illegality of a search or seizure is in conflict or susceptible of conflicting inferences or consists only of the testimony of prosecuting witnesses, the trial court in ruling on a motion to set aside the information will frequently not be in a position to make a final determination as to the admissibility of the evidence, and accordingly the information should not be set aside on the ground that the essential evidence was illegally obtained if there is any substantial evidence or applicable presumption to support a contrary conclusion, since in such cases the ultimate decision on admissibility can be made at the trial on the basis of all evidence bearing on the issue." See also People v. Farrara, 46 Cal.2d 265, 294 P.2d 21.

The search warrant based upon the facts shown was properly issued and there was a sufficient compliance with section 1524 et seq. of the Penal Code. Collins v. Lean, 68 Cal. 284, 9 P. 173.

[8, 9] Accordingly, the only remaining question is whether the officers were justified in taking the marijuana cigarettes

along with the heroin and other paraphernalia indicated and whether they were properly received in evidence in support of the charge that defendant was found in possession of "a narcotic". These articles were all found in the same place and under conditions indicating they were all being used by defendant in the commission of the crime of which he was charged. The taking of the marijuana was an incident to the arrest. People v. Rios, 46 Cal.2d 297, 294 P.2d 39.

It is true that the affidavit indicates that defendant was, on July 7th, in possession of a quantity of heroin which concededly, like marijuana, is a narcotic, the unlawful possession of which constitutes a felony. It is also alleged that the heroin, together with the paraphernalia described, was used for the unlawful administration of *narcotics* intravenously. The defendant was arrested for and charged with possession of a *narcotic,* without distinguishing its derivitive form. The warrant of seizure authorized the search made. People v. Berger, 44 Cal. 2d 459, 282 P.2d 509, relied upon by defendant, is factually dissimilar. Whether the arrest was made before or after the search and seizure was immaterial. People v. Simon, 45 Cal.2d 645, 290 P.2d 531; People v. Martin, 45 Cal.2d 755, 290 P.2d 855.

In In re Dixon, 41 Cal.2d 756, 761–762, 264 P.2d 513, it was held that where police officers lawfully entered petitioner's apartment on his invitation, it was proper for them, as an incident to lawful arrest, to search the premises and seize articles which they believed were being used by him in the commission of the crime for which he was arrested.

In Taylor v. Fine, D.C., 115 F.Supp. 68, 70, footnote 1, it was said: "Incidental to a legal arrest whether with or without a warrant, the officers may conduct a reasonable incidental search" citing cases. And in United States v. Bell, D.C., 48 F.Supp. 986, 995, it is said that:

> "Incidental to an arrest, there may be seizure on the premises of articles, books and papers which are the instruments, fruits, or evidence of the crime or connected with its commission or which supply proof relating to the transaction out of which it arose." And that the officers "had a right without a warrant contemporaneously to search the place in order to find and seize the *things used to carry on the criminal enterprise.*"

See also Carney v. United States, 9 Cir., 163 F.2d 784; United States v. Vatune, D. C., 292 F. 497; United States v. Camarota, D.C., 278 F. 388; United States v. Willis, D.C., 85 F.Supp. 745; Taylor v. Fine, D. C., 115 F.Supp. 68, 70; People v. Maddox, 46 Cal.2d 301, 294 P.2d 6; People v. Michael, 45 Cal.2d 751, 290 P.2d 852; People v. Martin, 45 Cal.2d 755, 290 P.2d 855; People v. Blodgett, 46 Cal.2d 114, 293 P.2d 57; People v. Beard, 46 Cal.2d 278, 294 P.2d 29; People v. Caritativo, 46 Cal.2d 68, 292 P.2d 513; People v. Dixon, 46 Cal.2d 456, 296 P.2d 557; In re Dixon, 41 Cal.2d 756, 761–762, 264 P.2d 513; Fricke Crim. Procedure, 4th Ed. p. 45; 79 C.J.S., Searches and Seizures, § 74, p. 867, and Sec. 1529, Penal Code.

Order reversed.

BARNARD, P. J., and MUSSELL, J., concur.



AUTOMOTRIZ DEL GOLFO DE CALIFORNIA S. A. DE C. V., Respondent,

v.

Erwin G. RESNICK, W. D. Cowan and R. William Cowan, Appellants.*

Civ. 21263.

District Court of Appeal, Second District, Division 2, California.

June 6, 1956.

Action for balance due on prices of eight automobiles sold by plaintiff to a corporation of which defendants were directors. A judgment of the Superior Court, Los Angeles County, for plaintiff was reversed by the District Court of Appeal, and

* Opinion vacated 306 P.2d 1.

its prior opinion, 292 P.2d 578, vacated, 297 P.2d 109, and on petition for rehearing, the District Court of Appeal, by the Court, held that defendants' constructively fraudulent payment to one of them of corporation's debt to him gave rise to cause of action in corporation's bankruptcy trustee and that corporation's individual creditors had no such cause of action.

Petition denied.

1. Corporations ⇐309(1)

A corporation director may not use his position to secure for himself any advantage over other creditors of corporation in payment of his claim against it.

2. Bankruptcy ⇐185

Bankrupt corporation's directors' constructively fraudulent payment to one of them of corporation's debt to him gave rise to cause of action in bankruptcy trustee as heir to all claims of corporation for moneys improperly diverted by directors, and corporation's individual creditors, including foreign corporation suing directors for balance due on prices of automobiles sold by plaintiff to bankrupt corporation, had no such cause of action.

Levy, Bernard & Jaffe, by George W. Rochester, Los Angeles, of counsel, for appellants.

Francis B. Cobb, Los Angeles, for respondent.

PER CURIAM.

[1, 2] Concerning respondent's contention that, aside from its claim of liability of appellants as joint adventurers, "there remains liability for the constructive fraud practiced by the corporate officers paying to Cowan $21,000 between March 17, 1953 and May 25, 1953", there can be no doubt that a director may not use his position to secure for himself any advantage over other creditors in payment of his claim. But the act of appellants in paying Cowan the $21,000 gives rise to a cause of action in the trustee in bankruptcy who was heir to all claims of the bankrupt corporation for its moneys improperly diverted by its directors. Individual creditors have no such cause of action after bankruptcy intervenes. 3 Collier on Bankruptcy, 14th Ed., sec. 60.57, page 1018; 6 Am.Jur. sec. 1166, page 1251; Gochenour v. Cleveland Terminals Bldg. Co., 6 Cir., 118 F.2d 89, 93, 94; Klein v. Leader Electric Corp., D.C., 81 F.Supp. 624, 626; Lovell v. Latham & Co., D.C.Ala., 211 F. 374, 376.

The petition for rehearing is denied.



142 Cal.App.2d 150

Paul W. FRY and Lola I. Fry, husband and wife, Plaintiffs and Respondents,

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a banking corporation, Defendant and Appellant.

Civ. 8710.

District Court of Appeal, Third District, California.

June 8, 1956.

Hearing Denied Aug. 1, 1956.

Action for malicious prosecution. The Superior Court, Lassen County, Ben V. Curler, J., rendered judgment for plaintiffs, and defendant appealed. The District Court of Appeal, Peek, J., held that evidence supported verdict.

Affirmed, and appeal from order denying new trial dismissed.

1. Malicious Prosecution ⇐18(1)

"Probable cause" does not depend upon knowledge of facts which satisfactorily prove guilt, and a person may act upon what appears to be true, even if it turns out to be false.

See publication Words and Phrases, for other judicial constructions and definitions of "Probable Cause".

2. Malicious Prosecution ⇐64(1)

In action against bank for malicious prosecution in charging plaintiff wife with

theft when she overdrew account as result of error in bank statement, evidence sustained verdict for plaintiffs in view of conflicting evidence on whether wife had given explanation to bank employee and had shown willingness to return the overdrawn amount.

3. Malicious Prosecution ⇐32, 56

There is no legal presumption of malice in prosecution, but it may be inferred from want of probable cause and may be shown by proof of lack of accuser's good faith.

4. Malicious Prosecution ⇐21(2)

If defendant in malicious prosecution action did not himself believe in guilt of plaintiff accused, fact that he disclosed facts to counsel and acted on advice of counsel will not shield him; defendant must believe that his charge is true.

5. Malicious Prosecution ⇐64(2)

In action against bank for malicious prosecution in charging plaintiff wife with theft for having overdrawn account because of error in bank statement, evidence indicating that bank employee knew of wife's good faith and intention to return the money, and that arresting officers were instructed to tell wife that they could let her go if she kept promise with reference to returning the money, supported jury's implied finding of malice in verdict for plaintiffs.

6. Malicious Prosecution ⇐64(1)

In action for malicious prosecution, evidence sustained finding implied in verdict for plaintiffs that bank employees had not made full disclosure to counsel and hence could not rely on advice of counsel.

7. Banks and Banking ⇐116(1)
Malicious Prosecution ⇐21(2)

Knowledge of bank's employee, that depositor had offered to correct mistake of overdrawing account, would be chargeable to bank manager, and hence manager's failure to inform counsel of such circumstance would preclude reliance upon advice of counsel as defense to action for malicious prosecution in charging depositor with theft for overdrawing account.

8. Malicious Prosecution ⇐69

In action for malicious prosecution, $15,000 compensatory damages and $10,000 punitive damages, plus attorney's fee paid in the prosecution, was not excessive where plaintiff wife had been arrested and spent a night in jail, all of which was reported on front page of newspaper.

9. Appeal and Error ⇐996, 1002

When jury has resolved conflicting evidence and inferences to be drawn therefrom in favor of prevailing party, its conclusion is conclusive on appeal in absence of showing that it was the result of passion or prejudice.

10. Appeal and Error ⇐1004(1)

The question on appeal is not the amount of damages as such that appellate court itself would have awarded, but whether court believes that damages are so excessive as to show passion or prejudice of jury.

11. Trial ⇐295(1)

Court must consider instructions given as a whole, rather than with reference to isolated words and phrases as used in some particular instruction singled out by party complaining.

12. Malicious Prosecution ⇐72(1)

Instructions in malicious prosecution action were sufficient where all instructions requested on probable cause, concerning which evidence was conflicting, as well as other essential elements of case, were given, and such instructions embraced proper definitions and explanations of all elements which were to be applied by jury to facts posed by evidence.

13. Appeal and Error ⇐110

Order denying motion for new trial was not appealable and purported appeal therefrom would be dismissed.

Pardee & Cady, Susanville, and Samuel B. Stewart, Christopher M. Jenks and Theodore Sachsman, San Francisco, for appellant.

J. Oscar Goldstein, P. M. Barceloux, Burton J. Goldstein, Goldstein, Barceloux & Goldstein, by Reginald M. Watt, Chico, for respondents.

PEEK, Justice.

This is an appeal by defendant from a money judgment in an action to recover damages for malicious prosecution and from the orders of the court denying its motion for a new trial and its motion for a judgment notwithstanding the verdict.

The plaintiffs, because of Mr. Fry's work as a mechanic on construction jobs, had lived in various parts of the state. Likewise because of the nature of his work they lived in a house trailer. Their permanent address, however, was the residence of their son-in-law at Redding. For several years, wherever they happened to be, they did all of their banking with the defendant. When they moved to Susanville in June of 1950 they followed their custom and opened a commercial account. At that time they either had accounts with or were financing the purchase of motor vehicles through defendant's branches at Paradise, Redding, Cedarville and Ukiah. On the 20th of that month they deposited $150 in their Susanville account by a transfer of their account from the Cedarville branch. During the same month two other deposits were made to their new account; one in the sum of $181.17 and the other in the sum of $100.48. By a mistake in defendant's office, plaintiffs' account was credited with a $1,200 deposit made by another customer. This erroneous credit was reflected in the June statement which was mailed on July 1 and showed their balance to be in the sum of $1,288.04. However, as the statement was mailed to them at "General Delivery, Susanville", it was not received until July 7 or 8. On July 6, prior to the time of receiving the statement, and in accordance with her husband's instructions, Mrs. Fry went to the bank for the purpose of withdrawing all but $100 from the account in order to pay off the balance on a new trailer they were buying in Redding. She was surprised when the teller showed her a ledger sheet which disclosed a balance of $1,288.04 in their account. However, she withdrew the sum of $1,188.04 by means of a check written by the teller and took the money with her to Redding. Because of her concern over what had transpired, she sought to reach her husband at his work, but the road was barricaded and she was unable to see him. She therefore continued on to her daughter's home in Redding. After a discussion with the daughter, it was decided that the money should be placed in their accounts at the defendant's Redding branch, $1,000 being deposited in a savings account and the remainder in a commercial account. On the following day, she returned to Susanville, and that evening, upon his return from work, informed her husband of what had occurred. His hours of work were such that he left home at approximately 6:30 a. m. and returned at approximately 6 p. m. He told her that a mistake had been made; that he believed they had more in their account than was shown by the statement, in other words more than $88.04; and that she should get their attorney and go to the bank and straighten it out. Although Mr. Fry requested time off during the week, his employer refused, telling him that he should wait until the following Saturday. On the following Tuesday morning, before they could get to the bank, the assistant manager, Mr. McClure, who was in charge of the bank in the absence of the manager, discovered the error. He immediately conferred with the bank's local counsel, who advised him to try and locate Mrs. Fry.

The record shows that a taxi stand was located directly across the street from the bank, but McClure testified that because he lacked transportation he asked the sheriff of Lassen County to drive him and another bank employee the four or five blocks to the trailer court where the Frys were living. Mrs. Fry testified that in reply to McClure's statement that she had taken some money from the bank which did not belong to her and his question as to when she would pay it back, she said that she and her husband had discovered the error; that they would be in the bank with their attorney on the following Saturday, and McClure replied that would be all right; that when she denied ownership of a Buick automobile (actually they owned a Hudson) which was parked nearby and to which McClure had referred, he said, "There is no use of lying, there is an officer reading your license plate," and that

she was "not going any place"; that she then handed to him the keys of her car and said that he could take the car and lock it up at the garage, and if there was anything wrong she would pay the storage. Her testimony concerning the occurrence was corroborated by her son who was there at the time. McClure's testimony concerning the same event was that Mrs. Fry acknowledged the mistake; that contrary to her testimony—that she and her husband would be in the bank on Saturday—she told him that her husband was in the Sacramento Valley looking for work, and as soon as he came home they would come in the bank and make settlement; that he made no inquiry as to when her husband would be home; that he inspected the registration certificate on the steering post of the car and noticed that it was being financed by defendant's Alturas branch; and that upon leaving he told her "not to leave town until the matter was cleared up." He also testified that no other attempt was made by anyone connected with the bank to talk to either Mr. or Mrs. Fry prior to her arrest; that he called the Paradise branch and determined that the Hudson was being financed through that branch but did not recall the balance which was due on the contract; that he also made calls to the Alturas and Ukiah branches and found out that the accounts there were not sufficient for the bank to exercise its right of offset; and that from the Ukiah branch he learned that the Frys were financing a Ford pickup truck there. Fry, upon learning of the incident at the trailer court, again endeavored to obtain time off to go to the bank, but again was told by his employer to wait until Saturday.

On the following day the bank manager, Mr. Cornelius, returned from his vacation and discussed the problem with McClure and the bank's attorney, Mr. Pardee. McClure testified he told them his version of what Mrs. Fry had said concerning the whereabouts of her husband and that they would call at the bank when he returned; that neither Pardee nor Cornelius asked as to when Mr. Fry would return; that they knew the Hudson was being financed through the Alturas branch and the Ford pickup through the Ukiah branch. On the following day a bank employee informed Cornelius that he had seen Fry the evening before at his trailer. In the meantime Cornelius had also learned the name of Fry's employer and endeavored to reach him by phone. In this he was unsuccessful but he was able to see him the next day. At the request of Cornelius, the employer Malfitano came to the bank in the company of Mr. Baker, his superintendent. Baker testified that Malfitano called him at the job and asked him to come to the bank. This was at about 11 o'clock in the morning. When he arrived Malfitano, who was talking to the bank manager, informed him that there had been some trouble, and because of what had happened he did not want Fry in his employ any longer, and he then gave Baker instructions to fire him. Accordingly Fry was discharged at the end of his shift that same evening.

McClure and Pardee both testified they believed Mrs. Fry's statement that she realized a mistake had been made. Pardee's testimony was that he had no idea of having her arrested and advised McClure to see the Frys and have the mistake corrected. He further testified that "it [was] possible" he gave no thought to the criminal aspect until after he had heard that Fry was to be fired from his job. Cornelius testified that upon learning of Fry's discharge, Pardee stated: "Well, that makes it look a lot different." He immediately went to his office, returning shortly to advise Cornelius that some action should be taken, and stating that he thought Mrs. Fry should be charged with theft. At the conclusion of his testimony Pardee said, "The one thing that impelled me to advise the making of the complaint was the fact that I knew that Fry was apt to lose his job, and he was in a very mobile condition."

The record shows that following this discussion Cornelius telephoned the bank's chief counsel in San Francisco concerning the matter and was told by him to do whatever its local attorney advised. Cornelius made no further effort to contact the Frys and that afternoon filed a criminal complaint charging Mrs. Fry with theft of the sum of $1,200. She was arrested and held

in the county jail until the following afternoon when she was released on bail. Her arrest and incarceration were reported on the front page of the local newspaper. At the preliminary hearing the complaint was dismissed because of insufficiency of the evidence. Thereafter the money was returned to the bank, and the plaintiffs brought this action for malicious prosecution. The jury, by its verdict, awarded Mrs. Fry $15,000 compensatory damages and $10,000 punitive damages. Mr. Fry was awarded the sum of $300 representing the fee paid by him to the attorney who represented Mrs. Fry in the criminal matter.

The first three contentions of defendant are that the evidence as a matter of law shows conclusively that it acted with probable cause and in good faith; upon the advice of counsel after a full and fair disclosure of all known information; and without malice.

[1, 2] It is true, as defendant states, probable cause does not depend upon knowledge of facts which satisfactorily prove guilt, Centers v. Dollar Markets, 99 Cal. App.2d 534, 222 P.2d 136, and that a person may act "on what appears to be true, even if it turns out to be false". White v. Brinkman, 23 Cal.App.2d 307, 312, 73 P. 2d 254, 256. But it is also true that the jury was not compelled to adopt McClure's statement, as does defendant in its argument, as to what Mrs. Fry said to him concerning the whereabouts of her husband. It could with equal propriety have found in accordance with her testimony as summarized herein. Again referring to the evidence pertaining to defendant's first contention, it shows testimony by McClure that Mrs. Fry told him her husband was in the Sacramento Valley seeking work, but neither he nor anyone else connected with the bank made any inquiry as to when Mrs. Fry expected him to return; and although the manager learned on June 14 that Mr. Fry could not have been in the Sacramento Valley as McClure had testified, but had been working in Susanville, he did not see fit to question the accuracy of McClure's account of his conversation with Mrs. Fry. The record further shows that the manager made no effort either to see or otherwise communicate with Mr. or Mrs. Fry although they were known to be living at a trailer court only four or five blocks from the bank. However, he did talk to Fry's employer, and the jury could well have inferred that Fry's discharge was the result of their conversation. Additionally there was the further testimony by McClure that when he talked with Mrs. Fry they both recognized that a mistake had been made; that he believed her to be truthful and that he so informed Pardee and Cornelius. Lastly there was the testimony of Pardee who stated that in the first instance he had no thought that a crime had been committed; but according to Cornelius, when Pardee learned that Fry was to be fired, he stated, "Well, that makes it look a lot different," and advised Cornelius he should "take some action to protect the bank's interest" which action he thought should be to "charge her with theft," and as previously noted, Pardee concluded his cross-examination with the statement that the one thing that "impelled" him to advise bringing the criminal action was his knowledge that Fry was to be fired and what he termed the Frys' "very mobile condition."

[3–5] Defendant's argument in support of its contention that the record fails to show any element of malice is also predicated upon the assumption that Cornelius disclosed all facts as he knew them to counsel and only acted upon the advice of counsel; hence there was a complete defense to this charge on the part of plaintiffs. The jury could also have found that Cornelius did not act in good faith in instituting criminal proceedings when he did since, by reason of what Mrs. Fry had stated she said to McClure, Cornelius knew that she intended to come into the bank and rectify the mistake which the bank had made. McClure had told him that he believed Mrs. Fry. The attorney had said that at the outset he did not believe a crime had been committed, and Cornelius made no effort either to see or otherwise communicate with Mr. or Mrs. Fry whom he knew were living a short distance from the bank. However he did contact Fry's employer and Fry was discharged that same day. Addition-

ally the jury could consider the testimony of Mrs. Fry, which was corroborated by her son, that during the course of her arrest the sheriff's radio carried an announcement to the arresting officers instructing them to tell her that if she would come in on Saturday as she promised, they could tear up the warrant and let her go. Defendant made no attempt either to explain or discredit this testimony, either by interrogation of the arresting officers, the sheriff and a matron, or by other evidence. While there is no legal presumption of malice, nevertheless it may be inferred from want of probable cause. It may be shown by proof of lack of good faith on the part of the accuser, and if a defendant does not himself believe in the guilt of the accused, then the circumstances relied on will not shield him. He must believe that his charge is true. Centers v. Dollar Markets, 99 Cal. App.2d 538–543, 222 P.2d 136. Applying the rule above set forth, it cannot be said that under the facts and circumstances heretofore summarized there was not sufficient evidence to support the implied finding of the jury as to malice.

[6, 7] Defendant argues in support of its next contention that since McClure and Cornelius stated they made a full and fair disclosure to their attorney, Pardee, and since Cornelius only acted upon Pardee's advice, a complete defense was made to the action. Here again defendant fails to consider the evidence adduced by plaintiffs directly in conflict thereto. Such evidence if believed, and it apparently was, was amply sufficient to sustain the jury's implied finding in this regard; that is, if Mrs. Fry's version of what transpired was accepted, the jury could properly have found that there had not been a full disclosure by McClure and Cornelius to defendant's counsel since he was not apprised of Mrs. Fry's statement that she and her husband would come to the bank on Saturday and correct the mistake, the knowledge of which was chargeable to Cornelius, the manager, if as she stated she had so advised McClure. Necessarily then, under such circumstances, reliance upon the advice of counsel would not be available. Hudson v. Zumwalt, 64 Cal.App.2d 866, 149 P.2d 457.

[8–10] Defendant's next contention, that the sums awarded for compensatory as well as punitive damages were excessive, is likewise without merit. The rule is too well established to warrant citation of authority that when the jury has resolved the conflicting evidence, and the inferences to be drawn therefrom, in favor of the prevailing party, its conclusion in the absence of a showing that it was the result of passion or prejudice is conclusive on appeal. Sandoval v. Southern California Enterprises, Inc., 98 Cal.App.2d 240, 256–257, 219 P.2d 928. The question on appeal is not the amount of damages as such that the appellate court itself would have awarded, but whether or not the court believes that the damages are so excessive as to show passion or prejudice on the part of the jury. 15 California Jurisprudence 2d 42, sec. 229. The conclusion of this court in this regard receives added strength from the fact that a like contention was made by defendant on its motion for a new trial, but the trial court denied the same and refused to disturb the award. Fall v. Coastwise Line, 116 Cal.App.2d 345, 357, 254 P.2d 58. Under such circumstances it is neither within the province of this court to reassess the amount of general damages nor the amount of punitive damages suffered by Mrs. Fry from the humiliation of being arrested and spending a night in jail, all of which was reported on the front page of the local newspaper. It was for the jury to determine the amount of mortification and injury to her character caused by such imprisonment and adverse publicity, and as noted above, in the absence of a showing that such determination was the result of passion or prejudice, this court may not interfere with that determination. 98 Cal.App.2d 240, 256–257, 219 P.2d 928.

[11, 12] Defendant's final contentions relate to certain instructions given by the trial court. From our examination of the instructions so attacked, it would appear unnecessary to discuss each with particularity. Since we must consider the instructions so given as a whole, rather than with reference to isolated words and phrases as used in some particular instruction singled out by the defendant, it is readily apparent

that no reversible error was committed by the trial court. It is sufficient to note that all of the instructions requested by defendant on probable cause (concerning which the evidence was obviously conflicting), as well as the other essential elements of a case founded on malicious prosecution were given; that is, the instructions so given embraced proper definitions and explanations of all of the elements of malicious prosecution which were to be applied by the jury to the facts posed by the evidence. When so viewed in the light of the rule as enunciated, it cannot be said that the jury was not fully and fairly instructed on all elements of the case. Bernstein v. Maimes, 126 Cal.App.2d 468, 272 P.2d 529.

[13] The purported appeal from the order denying defendant's motion for a new trial, not being an appealable order, is dismissed. The order denying defendant's motion for a judgment notwithstanding the verdict, and the judgment, are affirmed.

SCHOTTKY, J., concurs.



142 Cal.App.2d 198

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Robert E. MEARS, Defendant and Appellant.

Cr. 1108.

District Court of Appeal, Fourth District, California.

June 11, 1956.

Prosecution for murder with a prior manslaughter conviction. The Superior Court, San Bernardino County, A. D. Mitchell, J., entered judgment of conviction for second degree murder and defendant appealed therefrom and from order denying motion for new trial. The District Court of Appeal, Barnard, P. J., held that evidence sustained conviction.

Judgment and order affirmed.

1. Homicide ⇐254

Evidence disclosed such malice as would sustain conviction for second-degree murder. West's Ann.Pen.Code, § 188.

2. Criminal Law ⇐370

In murder prosecution, although question asked defendant as to whether or not it was a fact that he had several years ago knocked a man down in a fist fight and left him unattended, and that the man died, would better have been omitted, no error appeared in asking it, in view of fact it presented evidence material on issue of malice and was intended to show knowledge on part of defendant that in committing assaults in such manner he was endangering decedent's life. West's Ann.Pen.Code, § 188.

3. Homicide ⇐11

Malice as defined in homicide statute, does not require specific intent to kill. West's Ann.Pen.Code, § 188.

4. Homicide ⇐35

The distinguishing characteristic between murder and manslaughter is malice rather than the presence or absence of an intent to kill. West's Ann.Pen.Code, § 188.

5. Criminal Law ⇐822(1)

Instructions must be construed as a whole.

6. Criminal Law ⇐822(6)

In prosecution for murder, instruction pertaining to fact that a homicide may be murder in certain circumstances even in absence of an intent to kill, did not fail to distinguish murder from manslaughter and, when read in connection with other instructions, was not erroneous. West's Ann.Pen. Code, § 188.

7. Criminal Law ⇐781(2)

In prosecution for murder, where defendant stated to a bartender the morning he assaulted decedent that he had struck a man and had gotten blood on his pants, and later in the day told an officer that he would "cop to manslaughter before he would take

a murder rap", these two statements were sufficient to justify trial court in instructing jury on extrajudicial statements and declarations of defendant.

8. Assault and Battery ⇐96(2)

In prosecution for murder, instruction pertaining to provocation justifying an assault did not improperly inform jury that words alone could not serve as provocation which would reduce a killing from murder to manslaughter, where the instruction was not given in connection with any instruction on reduction of murder to manslaughter, but was given in connection with justification for assault.

Richard J. Weller, San Bernardino, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with the murder of William Mayne, and with a prior conviction of manslaughter in Illinois in 1948. He pleaded not guilty and admitted the prior conviction. A jury found him guilty of murder in the second degree, and he has appealed from the judgment and from an order denying his motion for a new trial.

There is no dispute as to the material facts, the appellant's testimony with respect to what occurred being substantially in accord with that of the witnesses. The appellant and Mayne were employed by a carnival which was showing in Fontana. Mayne was about 5′ 8″ tall and weighed 160 pounds, and the appellant is about six feet tall and weighs about 190 pounds. During most of the evening of May 10, 1955, the appellant, Mayne and three other employees of the carnival, Karczewski, Dunaway and Kinser, were in a bar in Fontana. During the evening there were two or three slight quarrels between the appellant and Mayne. After one of these Mayne approached the appellant and apologized, but the appellant paid no attention to him. Later, about 11:45 P.M. Mayne again approached the appellant and the appellant said "I told you to get away". Mayne, who was then very intoxicated, walked away and went out of the door. He told Kinser that he was going to go back and go to bed, and Kinser left with him.

About fifteen minutes later the appellant, Dunaway and Karczewski also left and went to a nearby pool hall. They then returned to the carnival grounds. On the way, the appellant stated to the other two that Mayne thought he was pretty smart and if he was slapped up a bit he would not be so smart. As they entered one gate of the carnival grounds, about 12:30 A.M., they saw Mayne and Kinser entering at another gate. The appellant took off his jacket and shirt and told Dunaway and Karczewski that he was going to talk to Mayne and have it out with him. As they approached each other the appellant said to Mayne "You think you are a smart son-of-a-*bith*". Mayne said: "Bob I never done anything to you". The appellant replied: "I don't think you will be so smart after I am through with you." The appellant hit Mayne twice on the side of the head, and Mayne fell down on his back. The appellant then kicked Mayne a couple of times in the ribs and chest and grabbed him by the belt and shook him. Karczewski and Dunaway told the appellant to quit and the appellant told Mayne to get up. Mayne did so and said: "Bob, I am sorry. I have had enough". The appellant said: "Get out of here, I want to see no more of you". Mayne went over to a water fountain and started to rinse his mouth out, and the appellant followed. The appellant said something to Mayne who stood up, and the appellant hit him two blows in the face and he fell to the ground. As Mayne lay on the ground the appellant kicked him two or three times in the upper part of his body. The other men told the appellant to leave him alone, and the appellant told Mayne to get up. Mayne tried to get up, and while he was in a sitting position the appellant knocked him down and kicked him again around the face. Dunaway told the appellant to leave Mayne alone, Mayne did not stir, and the appellant went to the fountain and threw some water on Mayne's face. He then told Kinser to take care of Mayne, say-

ing: "I have never had a man die on me yet and I don't want this one to." The four men then picked Mayne up and laid him on a platform under a canvas. There was blood coming out of Mayne's mouth, nose and ear, and there were cuts on the right side of his chin and forehead. Dunaway suggested that they get a doctor and the appellant agreed, but no doctor was called. As they were leaving the carnival grounds the appellant told the other men "Remember, whatever happens, you don't know nothing about it. You saw what happened to him, and the same could happen to you."

The four men then went to a couple of other bars and a drivein, and later went in search of some whiskey after the bars had closed. About 3:00 A.M. they returned to the carnival grounds, and the appellant said to the others: "Remember, we will get our story together, we found this man where he was." They found Mayne still breathing and with a pulse, but he did not appear to have moved. The other men told the appellant to call a doctor, and the appellant waited to change his trousers. The four men then went to a nearby police station where the appellant and Karczewski told the man on duty that they wanted an ambulance as there was a man in the park who was beaten up.

Two officers returned to the carnival with the four men. Mayne was lying in the same place with a large amount of blood on and around the head, with a six-inch pool of blood under his head. He appeared to have a very slight pulse and there was a large gash on his chin. An officer radioed for an ambulance and Mayne was taken to a hospital. Shortly thereafter, the officer received a radio message saying that Mayne had been pronounced dead on arrival at the hospital, and told this to the appellant. Shortly thereafter the appellant took his blood-stained pants, which he had previously removed, and climbing over a fence placed the pants in a nearby brush pile, where they were later found.

An autopsy on the body of Mayne was performed about 9:00 A.M. on May 11. The autopsy surgeon testified that his examination of the body showed that it had been a young man in good physical condition except for injuries. There were two lacerations in the scalp on the left side of the head, each extending about an inch and a half. There was a similar laceration on the chin, and a slight abrasion on the right cheek. The face was swollen and bruised all over, particularly on the right side. There were bruises on the right collar bone and in the front of the abdomen. The nose was badly bruised and broken. The doctor testified that the lacerations on the scalp and chin had rough edges, indicating that they were made with a blunt instrument and not by a fist; that they were similar to injuries which he had previously seen which had been caused by a kick with a boot or heavy shoe; that some of the other bruises could have been caused by a clenched fist; and that he did not think the injuries themselves would have caused death except for the blood fluid in the lungs, which stopped respiration. He expressed the opinion that the cause of death was shock and asphyxia, the latter meaning that due to hemorrhage resulting from these injuries the air could not get into the lungs.

[1] The appellant's first contention is that the evidence is not sufficient to support the verdict. It is argued that the evidence would not support an inference that the defendant intended to take the life of the deceased; that an implication of malice is not warranted since the blows causing the death were inflicted with the fist and there are no aggravating circumstances, and since such lacerations as here appear are common to all fistic encounters; and that since the injuries suffered by the deceased could not be considered great bodily injuries nothing more than manslaughter here appears.

The malice involved in murder is defined in Section 188 of the Penal Code, and may be express or implied. "It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." While there was no evidence here of a deliberate intention to take the life of Mayne the evidence does show that there was no considerable provocation, and was sufficient to justify an inference that the

appellant acted with an abandoned and malignant heart. It clearly appears that the appellant was the aggressor and that he repeatedly committed a brutal and unprovoked assault upon Mayne at a time when Mayne was obviously in no condition to defend himself, and when he was trying to avoid any encounter with the appellant. The attack did not consist of mere blows from a fist, but on each of three occasions after Mayne had been knocked to the ground the appellant kicked him in a vicious manner, which he must have known would inflict great bodily injury with probable danger to life, especially where the victim was left in an unconscious condition and uncared for for several hours. It may be inferred from the evidence that Mayne died from shock from the wounds thus inflicted, along with the asphyxia which resulted from the attack. The result is the same whether or not, as appellant argues, more experienced help while Mayne was being transported to the hospital might have saved his life. The evidence sufficiently supports the verdict. People v. Tubby, 34 Cal.2d 72, 207 P.2d 51; People v. Cayer, 102 Cal.App.2d 643, 228 P.2d 70; People v. Burns, 109 Cal.App.2d 524, 241 P.2d 308, 242 P.2d 9.

[2] It is next contended that the court erred in overruling an objection when the appellant was asked if it was not a fact that he had, in 1948 in Illinois, knocked a man down in a fist fight and left him unattended, and that the man died. The appellant replied in the affirmative to this question. It is argued that this involved the prior conviction which was admitted, but that the details comprising the prior offense were not admissible and must have had a prejudicial effect on the jury. This evidence was material on the issue as to whether malice was involved, and tended to show knowledge on the part of the appellant that in committing these assaults in this manner he was endangering Mayne's life. In the closing brief it is argued that this evidence was unnecessary since prior thereto the appellant had testified that he knew that a man beaten by him and left unattended might die. In his previous testimony, the appellant had made a qualified answer to the question asked which left the matter somewhat in doubt. While it may be conceded that this question would better have been omitted, no prejudicial error appears. People v. Lancey, 141 Cal. App.2d 168, 296 P.2d 53.

It is next contended that the court erred in giving an instruction concerning evidence of a prior offense, and the limited purpose for which it was received. It is argued that this instruction incorrectly assumed that such evidence had been received. This contention is based upon the appellant's interpretation of a part only of his testimony, and is without merit.

[3–6] It is next contended that the court erred in giving the following instruction:

> "A homicide may be murder, even where the specific intent to take life does not appear or does not exist. Thus, where the killing is involuntary, but happens in the intentional commission of an unlawful act, which, in its consequences, naturally tends to destroy life, it is murder; so, if the intent to kill is not made apparent, but the killing is unlawful and not done in the heat of passion, or the specific intent to take life not appearing, all the circumstances show an abandoned and malignant heart. In these, and in like cases, the malice aforethought is implied, and the law attributing to the slayer the intent to kill, although such intent is not made manifest as a fact."

It is argued that this instruction improperly told the jury that the intentional commission of an unlawful act which naturally tends to destroy life is murder, whether that unlawful act is a felony or a misdemeanor; that it fails to completely distinguish murder from manslaughter; and that it is incomplete in that is seems to say that implied malice is the only necessary ingredient of murder notwithstanding the fact that the killing is not unlawful. The implied malice as described in Section 188 of the Penal Code requires no specific intent to kill, and the distinguishing characteristic between murder and manslaughter is malice rather than the presence or absence of an intent to kill. While it is true that an assault "by any means of force

likely to produce great bodily injury" may be punished either as a felony or as a misdemeanor, Section 245, Penal Code, this phase of the matter was amply covered in other instructions given. Instructions must be construed as a whole and it would be impractical to include all of the various elements here involved in one instruction. The jury was here instructed that the thing that distinguishes manslaughter from murder is that the killing be done without malice, and that manslaughter is distinguishable from murder in that though in manslaughter the act which occasions the death be unlawful or likely to be attended by bodily mischief yet the malice, either express or implied, which is an essential element of murder is wanting. In the other instructions given the court defined malice and malice aforethought in the usual way, and fully instructed the jury on all elements of both murder and manslaughter. In this connection the appellant also complains of the following instruction: "The presence or absence in a homicide of an intent to kill is not the determining factor in drawing the distinction between murder and manslaughter, for murder may be committed where there is no intent to kill." This instruction was a correct statement of the law. People v. Bender, 27 Cal.2d 164, 163 P.2d 8; People v. Valentine, 28 Cal.2d 121, 169 P.2d 1. Assuming that there was some evidence which would have justified the jury in finding the appellant guilty of manslaughter the instructions, as a whole, sufficiently left that question to the jury, and it cannot reasonably be held that the jury was misled in that connection. No prejudicial error appears.

[7] It is next contended that the court erred by stating, in an instruction concerning extrajudicial statements and declarations of the appellant, that evidence had been received tending to show that on another occasion the appellant had made a statement tending to prove his guilt of the crime for which he was being tried. This instruction covered the difference between a confession and an admission against interest, and told the jury how each should be considered by it. The argument here made is that the instruction improperly assumed that there had been evidence of such a statement by the appellant, and that there was no evidence received justifying such an assumption. There was evidence that about 2:15 on the morning of May 11, the appellant told a bartender that he, the appellant, had struck a man and had gotten blood on his pants. On the afternoon of May 11, the appellant asked an officer as to the different degrees of murder and manslaughter and the penalty for them. The officer replied that he did not know. The appellant then told the officer that he would "cop to manslaughter before he would take a murder rap." These two instances were sufficient to justify the court in giving the instruction complained of. People v. Hinshaw, 194 Cal. 1, 227 P. 156; People v. Cooper, 81 Cal.App.2d 110, 183 P.2d 67. Under the instructions given, whether the statements made by the appellant constituted an admission was properly left to the jury.

[8] It is next contended that the court erred in giving the following instruction:

> "No words of abuse, insult or reproach addressed to a person or uttered concerning him, however grievous or opprobrious the words may be, will justify him in an assault by means of force likely to produce great bodily injury, and the provocation only of such words will not constitute a defense to a charge of having committed such an assault."

It is argued that this instruction should be read in connection with a later instruction as to the distinction between murder and manslaughter and the amount of provocation required to reduce the offense from murder to voluntary manslaughter, in which it was stated that provocation of a slight and trifling character which would not naturally arouse the other's passion would not be sufficient to mitigate the offense to manslaughter. Relying on People v. Valentine, 28 Cal.2d 121, 169 P.2d 1, it is argued that the two instructions, taken together, improperly told the jury that words alone could not serve as the provocation which would reduce a killing from murder to manslaughter; and that this instruction was an unwarranted invasion of the province of the jury. The instruction com-

plained of was not given in connection with any instruction on the reduction of murder to manslaughter, but was given in another and different connection relating to the justification for assault by means of force likely to produce great bodily injury. The instruction was proper in the connection in which it was given, and it is unthinkable that the jury could have been misled into giving it the interpretation which the appellant now ascribes to it.

The appellant's final contention, that the court erred in denying his motion for a new trial, is based upon the points already considered and is without merit. The issue as between murder and manslaughter was left to the jury, under sufficient instructions, and the record does not indicate that any miscarriage of justice has occurred.

The judgment and order are affirmed.

GRIFFIN and MUSSELL, JJ., concur.



142 Cal.App.2d 145

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Carl IKNER, Jr., Defendant and Appellant.

Cr. 5576.

District Court of Appeal, Second District, Division 3, California.

June 8, 1956.

Defendant was convicted of illegal possession of heroin. The Superior Court of Los Angeles County, Herbert V. Walker, J., entered judgment accordingly, and the defendant appealed. The District Court of Appeal, Parker Wood, J., held, inter alia, that evidence was sufficient to support conviction.

Judgment affirmed.

1. Criminal Law ⇐564(3)

Venue is a question of fact and may be established by circumstantial evidence.

2. Criminal Law ⇐304(5)

Courts may take judicial notice of geographical facts. West's Ann.Code Civ. Proc., § 1875, subd. 8.

3. Criminal Law ⇐304(5)

Court could take judicial notice that there are in city of Los Angeles a Ceres Avenue, a Sixth Street and a Seventh Street, and that Ceres Avenue in city extends in northerly and southerly direction between Sixth and Seventh Streets which extend easterly and westerly. West's Ann. Code Civ.Proc., § 1875, subd. 8.

4. Criminal Law ⇐322

In view of statute providing presumption that official duty has been regularly performed, in passing venue issue in narcotics prosecution, wherein evidence showed that Los Angeles police had arrested defendant on avenue between two streets, all of which bore identical names and were, under the evidence, so located as streets in Los Angeles, court could presume that officers were regularly performing their duties on such avenue which was within territory where officers were authorized to make arrests. West's Ann.Code Civ.Proc., § 1963, subd. 15.

5. Criminal Law ⇐564(1)

In prosecution for illegal possession of heroin, evidence was sufficient to support finding that venue of crime was County of Los Angeles, State of California. West's Ann.Health and Safety Code, § 11500.

6. Poisons ⇐9

Evidence supported conviction for illegal possession of heroin. West's Ann. Health and Safety Code, § 11500.

Walter L. Gordon, Jr., Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

In an information defendant was charged with violation of section 11500 of the Health and Safety Code, a felony, in that, on April 4, 1955, "in the County of Los Angeles, State of California," he unlawfully had heroin in his possession. It was also alleged therein that he had been convicted previously of violation of said section, a misdemeanor. Trial by jury was waived. Defendant was adjudged guilty. The allegation as to prior conviction was stricken out, on the court's motion, in the interests of justice. Defendant appeals from the judgment.

Appellant asserts that the prosecution failed to establish the venue of the crime; and that the evidence was insufficient to support the judgment.

Officer White testified that he is a police officer for the city of Los Angeles and is attached to the Newton Division (police station); on April 4, 1955, about 6:15 p. m., he saw defendant on the west side of Ceres, walking south bound in front of 649; defendant was alone; the witness (Officer White) and his partner (Officer Nall) were in a vehicle traveling north on Ceres; they had the defendant under observation from the time they first saw him; when they were about 35 or 40 feet from him, he apparently observed them; he (defendant) hesitated, then made a turn, a pause, and a throwing motion; then the witness (Officer White) observed something white leave defendant's hand and then, underneath the car (apparently a parked Mercury automobile), the witness saw papers hit the ground; defendant made the throwing motion with his right hand, and the witness kept the object under observation at all times; the witness saw where the object landed and marked the spot; later he (witness) went to the spot and picked up "the bindles," referred to herein as Exhibit 1, which were lying in the gutter next to a parked Mercury in front of 649 Ceres Avenue; on the way to the police station, in the police car, defendant asked the officers what they were going to book him on, and defendant also said, "You didn't see me throw anything"; prior to that statement, the witness had said that he saw defendant throw something; defendant also said, "Just because I happened to be there at the time you are going to pin a bum rap on me."; the witness took the bindles to the Newton Street Station, marked them for identification, placed them in an envelope, and transported them to Central property. On cross-examination, the officer said that the district in the vicinity of 649 Ceres was "Apartment houses and businesses and single residences also."; the judge asked if the district was "between Sixth and Seventh," and the officer replied that it was; the judge asked, "Isn't there a beer place around Ceres there between those streets?"; the officer replied, "Not between Sixth and Seventh." On cross-examination, he was also asked what department he was assigned to, what kind of car he used and if there was anything about the car to identify it as a police car. He replied that he was assigned to the Newton Division, that the car was a felony car, and it had an antenna on the roof of it and had a "square E" license plate.

Officer McCauley, an expert chemist, testified that he is a police officer of the city of Los Angeles, assigned to the investigation division as a chemist; he first saw Exhibit 1 (bindles) at 318 West First Street at the police property section; he examined five bindles and found that they contained heroin.

James Moore, a witness on behalf of defendant, testified that on said April 4, about 6:15 p. m., he was at a garage on Ceres Street between Sixth and Seventh; he saw the car (of the officers) toward Seventh on Ceres and saw the officers coming toward Sixth; when the car stopped he saw an officer call defendant to the car on the opposite side of the street, and he saw one officer go to the curb, where defendant was when he was called, and pick up several pieces of paper.

Defendant testified that on said April 4, about 6:15 p. m., he was walking south on Ceres Street, the police car was going north on Ceres, and he was arrested in front of 649 Ceres; he lived two blocks from there and he knew the neighborhood very well; he was on his way to the clean-

er, and the officers called him to the car and asked his name and what he had "ever been arrested for"; he replied, "Narcotics"; the officers started searching him, then they went away and picked up cigarette packages; they came back and said, "This is yours, isn't it?"; he replied that it was not his; the street was very crowded, and they took him off and handcuffed him; the heroin was not his; he had never seen it; he was standing by the officers' car talking to one of the officers while the other officer was across the street, where defendant had been walking; it was about ten minutes from the time they stopped until they found the heroin; defendant did not throw anything.

[1–4] No witness testified that the facts related by him occurred in the county of Los Angeles. No witness was asked by the district attorney or defense counsel whether such facts occurred in said county. The information alleged that the crime was committed in the county of Los Angeles, state of California. The case was tried in the superior court of the county of Los Angeles at the county seat of said county, which is the city of Los Angeles. The point with reference to failure to establish the venue was not raised in the trial court. Venue is a question of fact and may be established by circumstantial evidence. People v. Ford, 133 Cal.App.2d 695, 697, 284 P.2d 836. Defendant was arrested by police officers of the city of Los Angeles on Ceres Avenue between Sixth and Seventh Streets. Immediately prior to the arrest defendant had been walking in a southerly direction on the west side of Ceres Avenue. Courts may take judicial notice of geographical facts. In re Ryan, 61 Cal.App.2d 310, 314, 142 P.2d 769; Code Civ.Proc. § 1875, subd. 8. The trial court herein could take judicial notice that there are in the city of Los Angeles a Ceres Avenue, a Sixth Street, and a Seventh Street, and that the Ceres Avenue in said city extends in a northerly and southerly direction between said Sixth and Seventh Streets, which streets extend easterly and westerly. It is presumed that official duty has been regularly performed. Code Civ.Proc. § 1963, subd. 15. The trial court herein could presume that the police officers of the city of Los Angeles, in arresting defendant on Ceres Avenue between Sixth and Seventh Streets, were regularly performing their duty on a Ceres Avenue which was within the territory where they were authorized to make arrests, namely, within the city of Los Angeles, California. The chemist, who examined the heroin, was also a police officer of the city of Los Angeles. Defendant lived two blocks from the place where he was arrested.

In People v. De Soto, 33 Cal.App.2d 478, 92 P.2d 466, the defendant, who was convicted of burglary, contended that the venue had not been established. There was testimony therein that the burglary occurred at an apartment house at 524 East Miner Avenue. Also there was testimony therein by police officers of the city of Stockton, in San Joaquin County, that they were performing their official duties as police officers in said city when they arrested the defendant about a block from the apartment house at 524 East Miner Avenue. The trial court instructed the jury that said address was located in the city of Stockton, which was in the county of San Joaquin, California. It was held therein that there was no error.

In People v. West, 34 Cal.App.2d 55 at page 59, 93 P.2d 153 at page 155, the court said: "Under the facts of this case the jury were justified in concluding, as jurors, what they well knew as men and women, that the streets named by some of the witnesses meant certain well known and so named streets in the City of and County of Los Angeles."

In People v. Ford, supra, 133 Cal.App. 2d 695, 284 P.2d 836, a question was whether the venue was established as the county of Los Angeles, California. It was stated therein, 133 Cal.App.2d at page 697, 284 P.2d at page 837, that the officers who arrested Ford were police officers of the city of Los Angeles, and that the chemist who examined a truck, involved therein, was employed in the office of the sheriff of the county of Los Angeles. After stating other details the court said therein at page 698 of 133 Cal.App.2d, at page 838 of 284

P.2d: "Without going further into detail, it is enough to say that the evidence directly and logically points to the single inference that the offenses were committed in the County of Los Angeles."

[5] In the present case the evidence was sufficient to support a finding that the venue was the county of Los Angeles, state of California.

[6] Appellant argues, with respect to the alleged insufficiency of the evidence, that the officer did not see any narcotic in the possession of defendant; that at the time the officer saw defendant throw something he did not identify the object; and that there was no evidence that the narcotics were not in the gutter before the officer saw an object leave defendant's hand. As above shown, there was evidence that the officer saw defendant throw something; and the officer kept the object under observation, went to it, picked it up, and marked it for identification. At the trial he identified Exhibit 1 as that object. The object contained bindles of heroin. The evidence was sufficient to support the judgment.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



142 Cal.App.2d 222

Judith Kelly HOWARD, Plaintiff and Respondent,

v.

Lindsay Coleman HOWARD, Defendant and Appellant.

Civ. 21321.

District Court of Appeal, Second District, Division 1, California.

June 12, 1956.

Divorce suit, wherein interlocutory judgment was entered for plaintiff requiring payment of attorney fee, and defendant moved that county clerk be directed to render satisfaction of such judgment as respects attorney fee, and that sheriff cease making further levies of execution to collect interest on attorney fees. The Superior Court of Los Angeles County, Stanley Mosk, J., denied the motion and defendant appealed. The District Court of Appeal, Doran, J., held that interest was due on the attorney fees allowed, as respective form of writ of execution.

Affirmed.

See also 133 Cal.App.2d 535, 284 P.2d 966; 296 P.2d 592.

1. Interest ⇐38(1)

An interlocutory divorce judgment, requiring payment of attorney fee, was not an exception to general rule that money judgment bears interest at rate of seven per cent.

2. Interest ⇐22(1), 26

Form and wording of writ of execution for attorney fees and other items covered by interlocutory divorce judgment, in that dashes were typed in blank spaces, did not preclude allowance of interest, and use of such writ by plaintiff did not constitute waiver of interest.

3. Interest ⇐22(1)

The allowance of interest upon a money judgment is not dependent upon forms or phraseology, but interest is automatically allowed by law.

4. Interest ⇐22(1)

Right to interest on money judgment is not affected by any practices of county clerk, sheriff, or other ministerial officer.

5. Interest ⇐39(1)

It is elementary that where one party deprives another of money which is rightfully theirs pursuant to court order, it bears seven per cent interest from the date due.

Franklin W. Peck, Los Angeles, for appellant.

Edward M. Raskin, Los Angeles, for respondent.

DORAN, Justice.

This is an appeal by the defendant husband from an order denying appellant's motion asking that the County Clerk be directed to enter a full satisfaction of an interlocutory judgment of divorce as respects an attorney fee of $15,690 and costs, and that the Sheriff cease making further levies of execution to collect interest on said attorney fees. There is no controversy in respect to the attorney fees ordered to be paid to the wife's attorney, and the only question here involved relates to whether interest thereon is allowable.

The interlocutory judgment, dated June 5, 1952, ordered appellant to "pay directly to plaintiff's counsel", the attorney fee of $15,690 and costs, within 30 days after notice of entry of judgment, together with certain items of expense connected with the divorce case. As noted in appellant's brief, the judgment made no mention of interest. Mr. Howard appealed from portions of this judgment which was duly affirmed October 19, 1954, in 128 Cal.App.2d 188, 275 P.2d 93, and the reviewing court held that there was no abuse of discretion in awarding the $15,690 attorney fee. Thereafter, appellant refused to pay respondent's counsel any sums other than the principal sums set forth in the judgment, whereupon respondent took out an execution and placed same in the hands of the sheriff.

In the trial court, it was appellant's contention that no interest on the judgment was allowable for two reasons: (1) that the writ of execution issued by the clerk did not provide for interest thereon; and (2) that costs and attorney fees were mere incidents to plaintiff's principal cause of action, and consequently do not bear interest.

It is respondent's position that "Any judgment awarding money * * * automatically bears interest thereon at the rate of seven per cent per annum until paid, even though the judgment makes no provision for interest thereon. The trial court agreed with the respondent's contention, saying: "It seems to me a simple, elementary thing where one party deprives another party of money which is rightfully theirs, pursuant to Court order, it bears seven per cent interest from the date due. That is my holding".

The writ of execution is typewritten on the usual printed form, and specifies the amount of attorney fees and other items covered by the interlocutory judgment. Appellant makes the claim that interest was expressly excluded because "In the blank spaces appearing on the Writ, he (the Clerk) was at pains to type in a series of dashes clearly indicating that the Writ did not call for the collection of any interest whatsoever".

Respondent argues that this failure of the clerk to insert any amount of computed interest in the execution form, is of no consequence. The respondent further calls attention to the fact that actually the execution form does call for the collection of interest in its express directions to the sheriff, which are as follows: "These presents are therefore to command you to satisfy the said judgment *with interest* and costs as provided by law". (Italics added.) The trial court, in this connection, said: "I am not concerned with the forms in any respect. Both of you have to some extent relied on what the forms contain or omit. I don't think that is the least bit material. The only question is, what is the law. Does the law provide for interest on attorney's fees or does it not? If the forms are inadequate they will have to be changed then, not the law".

Appellant has "no quarrel with any of the decisions * * * to the effect that an ordinary money judgment bears interest at the rate of 7 per cent per annum, regardless of whether it so provides". The present judgment, in so far as attorney fees are concerned, is, according to appellant's brief, not an "ordinary money judgment" which would draw interest, but merely one where "attorney fees or costs are allowed as an incident to the basic relief awarded by a judgment".

[1] The above contention that the judgment here involved constitutes an exception to the general rule is untenable. That the provision for payment of attorney fees is

a vital and integral part of the judgment, cannot well be doubted. Nor is an attorney to be treated in this respect differently from any other person from whom money has been withheld after the entry of a judgment ordering its payment. In the instant litigation, as respondent points out, the attorney fees ordered paid have been withheld upward of two years.

Although not factually identical with the present case, there is judicial authority for the allowance of legal interest on attorney fees, and the conclusion is inescapable that no exception from the general rule should be made. In Huellmantel v. Huellmantel, 124 Cal. 583, 598, 57 P. 582, 585, the reviewing court said: "Plaintiff is entitled to recover interest at seven per cent. per annum, without compounding, upon * * * the allowance for attorney fees as originally made, from the date of the decree". This case was cited with approval in McNabb v. McNabb, 47 Cal.App.2d 623, 118 P.2d 869, 871, where the court said: "It was not necessary for the original judgment of the trial court, made at the time of the divorce action, to include provision for interest on the amounts as they accrued, although it might properly have done so".

[2–5] Likewise, appellant's arguments that the form and wording of the writ of execution precludes allowance of interest, or that its use by respondent constitutes a waiver of interest, are without merit. As observed by the trial court, the allowance of interest upon a money judgment is not dependent upon forms or phraseology, but is automatically allowed by law. Nor is such right dependent upon or affected by any so-called "practices" of the County Clerk, Sheriff, or other ministerial officer. In the language of the trial judge, it is "a simple, elementary thing that where one party deprives another party of money which is rightfully theirs, pursuant to Court order, it bears seven per cent interest from the date due."

The order is affirmed.

WHITE, P. J., and FOURT, J., concur.

142 Cal.App.2d 66

James M. CASE et al., Plaintiffs, Appellants, and Cross-Respondents,

v.

CITY OF LOS ANGELES, municipal corporation; Hollywood Village, Inc., a corporation; and Hollywood Maxwell Co., a corporation, Defendants, Respondents, and Cross-Appellants.

Civ. 20947.

District Court of Appeal, Second District, Division 1, California.

June 4, 1956.

Hearing Denied Aug. 1, 1956.

Action by owners of residence property for declaration that rezoning ordinance was unconstitutional and for injunction to prevent construction of factory. The Superior Court, Los Angeles County, J. F. Moroney, J., entered judgment declaring that the ordinance was arbitrary and discriminatory with respect to owners of property similarly situated and that it did not infringe or injure residence owners' rights in use and enjoyment of their property and was valid as to their contention and all parties appealed. The District Court of Appeal, White, P. J., held that questions whether spot zoning ordinance permitting construction of factory violated good zoning practice, and whether it was arbitrary and discriminatory with respect to owners of property similarly situated were not in issue in the instant action, and that evidence supported finding that ordinance did not constitute an arbitrary or unreasonable discrimination against owners of residence property.

Reversed in part and affirmed in part.

1. Municipal Corporations ⇐122(4)

In action by owners of residence property for declaration that rezoning ordinance was unconstitutional and for injunction to prevent construction of factory, evidence supported finding that ordinance did not constitute an arbitrary or unreasonable discrimination as against owners of residence property.

2. Municipal Corporations ⇐601(15)

Although continuation of zoning restrictions may have conferred benefits on

neighboring owners of residence property and enhanced value of their property, existence of such benefits did not generate interest protected by constitution against diminution by governmental authorities in proper exercise of police power, and city in its exercise of police power had right to modify its zoning regulations.

3. Declaratory Judgment ⇐129

Owners of residence property were entitled to declaration of their rights and duties with respect to zoning ordinance which changed zone of nearby 3½ acre tract from zone C–2 to zone C–M.

4. Declaratory Judgment ⇐366

In an action for declaratory relief, court is authorized to determine and declare only issues between parties to the action. West's Ann.Code Civ.Proc. § 1060.

5. Municipal Corporations ⇐122(1)

Questions of whether or not zoning ordinance permitting construction of factory violated good zoning practice and whether ordinance was arbitrary or discriminatory with respect to owners of property similarly situated were not in issue in action by owners of residence property for declaration of rights under ordinance. West's Ann.Code Civ.Proc. § 1060.

Brennan & Cornell, Los Angeles, for plaintiff.

Gerald Bridges, Wesley L. Nutten, Jr., Los Angeles, for defendants Hollywood Village, Inc., and Hollywood Maxwell Co.

Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., Alfred E. Rogers, Deputy City Atty., Los Angeles, for defendant City of Los Angeles.

WHITE, Presiding Justice.

The judgment from which all parties to the instant action have appealed reads, in part, as follows:

"It is adjudged, declared and decreed that Ordinance No. 100,775 of the City of Los Angeles, State of California violates good zoning practice and comprehensive zoning planning and does not satisfy or meet good zoning practice and was arbitrary and discriminatory with respect to owners of property similarly situated.

"It is further adjudged and decreed that Ordinance No. 100,775 of the City of Los Angeles, State of California does not infringe or injure the plaintiffs' rights in the use and enjoyment of their property and said Ordinance No. 100,775 is valid as against all contentions of the plaintiffs in this action.

"It is further adjudged and decreed that defendants have and recover from plaintiffs their costs of suit herein * * *."

Plaintiffs have appealed from the provision of the paragraph of the judgment first above quoted limiting the adjudication that said ordinance was arbitrary and discriminatory, to-wit: "with respect to owners of property similarly situated"; and from the whole of the second and third paragraphs above quoted. Defendants Hollywood Village Inc., Hollywood Maxwell Co. and the City of Los Angeles have appealed from the whole of the paragraph of the judgment first above quoted.

Defendant Hollywood Village Inc. was and is the owner of approximately 26 acres of land bounded on the south by Cahuenga Boulevard, on the north by Hollywood Freeway, on the east by Barham and on the west by Lankershim Boulevards. The parcel is long and narrow, having approximately one mile of frontage on Cahuenga and the Freeway, and a depth of only 75 to 300 feet, the remaining depth of Hollywood Village Inc.'s land having been condemned for the building of the Freeway. Said land had for many years been zoned C–2. Immediately prior to the building of the Freeway, portions of the 26 acres were rented to various tenants and produced an annual gross income in excess of $40,000. After the opening of the Freeway and the resulting diversion of traffic from Cahuenga Boulevard, only one tenant remained,—one who had been operating its business in a structure on said premises for approximately ten years pursuant to a variance from C–2 zone granted by the Los Angeles zoning authorities, and the annual gross income from said 26 acres was reduced to $4,500.

June 18, 1952, Hollywood Village Inc. applied for change of zone from C–2 to C–M on the 3⅓ acres immediately north of the portion of its land being so used under the permitted variance. Said 3⅓ acres has 538 feet on Cahuenga Boulevard and a depth of 233 to 300 feet northerly to the Hollywood Freeway. Defendant Hollywood Maxwell Co. had contracted to purchase said 3⅓ acres, said purchase being contingent upon the change of zone from C–2 to C–M. On November 26, 1952, Ordinance No. 100,775 so changing the zone of said 3⅓ acres was adopted. Although said ordinance had a stormy passage, it is conceded that all required formalities were observed and that it was adopted by the proper legislative body.

Plaintiffs, property owners and taxpayers of the City of Los Angeles, brought the instant action seeking a declaration that said ordinance is unconstitutional, null and void and an injunction to prevent the construction of any factory upon said 3⅓ acres.

Each of the plaintiffs owns residence property in the interior of an R–1 Zone. Between the properties of the plaintiffs and the 3⅓ acres so rezoned are properties south of Cahuenga and properties north of Hollywood Freeway which are zoned for business. Some of the plaintiffs pass said 3⅓ acre parcel in order to reach their residences from Los Angeles or from San Fernando Valley, and some of their properties overlook said 3⅓ acres. The nearest of plaintiffs' residence properties, as shown by the map in evidence, is about 800 feet distant by straight line and horizontally, and about ½ mile by road; and, according to testimony in the record, all their residences are in the surrounding hills.

The trial judge, upon agreement of all parties and their counsel, personally inspected the residences of the respective plaintiffs, the 26 acres zoned C–2, and the 3⅓ acres rezoned C–M.

The court found that in 1946, the Los Angeles City Council adopted Ordinance No. 90,500 and thereby established a comprehensive zoning plan for the entire city of Los Angeles; that by Ordinance No. 100,775 the City rezoned 3⅓ acres bounded by Cahuenga Boulevard, Hollywood Freeway and the remainder of said 26 acres owned by defendant Hollywood Village Inc.; "that all of the plaintiffs reside several blocks distant from the premises described in Ordinance No. 100,775 * * * that it is not true that the enactment of Ordinance No. 100,775 prejudiced or damaged the plaintiffs or any of them. * * *"; that said ordinance "violated good zoning practice and the rules of comprehensive zoning in permitting the changing from C–2 and R–4 to C–M for a fractional portion of the property owned by the defendant Hollywood Village Inc. to-wit 3⅓ acres and by giving to said defendants a special right or privilege not enjoyed by owners of other properties similarly located as the subject property, and was arbitrary and discriminatory and constituted spot zoning. The property of the plaintiffs was not similarly located to that of the subject property."

[1] The finding and declaration that the amendment to the zoning ordinance here complained of does not constitute an arbitrary or unreasonable discrimination as against plaintiffs is supported by the judge's view of the properties of all parties, in addition to testimony in the record which need not be here set forth.

[2] The changing of the zone from C–2 to C–M on the 3⅓ acres of land belonging to Hollywood Village Inc. does not restrict plaintiffs in the use of their own property. They have no vested right in the maintenance of restrictions on the property of defendants. It may be true that to continue the zoning restrictions upon defendants' property would confer benefits on neighboring owners, including plaintiffs, and enhance the value of their properties, but the existence of such benefits does not generate interests protected by the Constitution against diminution by governmental authorities in the proper exercise of the police power. The city in the exercise of its police power has the right to modify its zoning regulations from time to time. Wheeler v. Gregg, 90 Cal.App.2d 348, 365, 203 P.2d 37; Acker v. Baldwin, 18 Cal.2d 341, 345, 115 P.2d 455; Otis v. City of Los

Angeles, 52 Cal.App.2d 605, 613, 126 P.2d 954.

[3] As urged by plaintiffs, they were entitled to a declaration of their rights and duties with respect to said ordinance. Essick v. City of Los Angeles, 34 Cal.2d 614, 624–625, 213 P.2d 492, 499. In the instant action, the court declared said ordinance "valid as against all contentions of the plaintiffs in this action". Under the facts and circumstances of the instant action that declaration was proper.

Defendants' appeal seeks the reversal of the portion of the judgment which declares that said ordinance "violates good zoning practice and comprehensive zoning planning and * * * was arbitrary and discriminatory with respect to owners of property similarly located".

[4, 5] While ordinances for spot zoning and those which create monopolies are examples of illegal, unreasonable, arbitrary and discriminatory zoning, In re White, 195 Cal. 516, 234 P 396; Wilkins v. City of San Bernardino, 29 Cal.2d 332, 340, 175 P. 2d 542, in an action for declaratory relief under the provisions of Section 1060 of the Code of Civil Procedure the court is authorized to determine and declare only the issues between the parties to the action. In having been found in the instant action that none of plaintiffs' properties is "similarly situated" to that zoned by Ordinance No. 100,775, and that none of plaintiffs' rights are infringed by it, the paragraph of said judgment from which defendants have appealed is a declaration concerning matters not properly in issue.

The portion of the judgment providing that "It is adjudged, declared and decreed that Ordinance No. 100,775 of the City of Los Angeles, State of California violates good zoning practice and comprehensive zoning planning and does not satisfy or meet good zoning practice and was arbitrary and discriminatory with respect to owners of property similarly situated" is reversed.

In all other respects the judgment is affirmed.

DORAN and FOURT, JJ., concur.

The PEOPLE of the State of California, acting by and through the Department of Public Works, Plaintiff and Appellant,

v.

S. & E. HOMEBUILDERS, Inc., et al., Defendants and Respondents.

Civ. 21335.

District Court of Appeal, Second District, Division 1, California.

June 7, 1956.

Rehearing Denied June 26, 1956.

Hearing Denied Aug. 1, 1956.

Eminent domain proceeding by Department of Public Works. The Superior Court, Los Angeles County, Allen W. Ashburn, J., entered judgment for owner of condemned land and Department appealed from the award. The District Court of Appeal, Doran, J., held that fact that condemned land was subject to oil and gas leases and that lessees were unwilling to relinquish their surface rights to the land was not a factor to be considered in determining availability of land for its highest and best use and in determining fair market value and severance damages, since condemned property is to be valued as if owned by single person, regardless of separate interests therein.

Judgment affirmed.

Eminent Domain ⇦134

Fact that condemned land was subject to oil and gas leases and that lessees were unwilling to relinquish their surface rights to the land was not a factor to be considered in determining availability of land for its highest and best use and in determining fair market value and severance damages, since condemned property is to be valued as if owned by single person, regardless of separate interests therein. West's Ann. Code Civ.Proc. § 1246.1.

Robert E. Reed, Sacramento, George C. Hadley, R. B. Pegram, John N. McLaurin, Los Angeles, for appellant.

W. Sumner Holbrook, Jr., Holbrook, Tarr, Carter & O'Neill, Francis H. O'Neill, Los Angeles, for respondents.

DORAN, Justice.

The plaintiff condemner, appeals from a judgment rendered after a jury's verdict awarding the owner of so-called Parcel 2, the sum of $111,930 as fair market value for said parcel and $31,114 as severance damage. The eminent domain proceeding here involved was instituted for the purpose of acquiring this and other parcels of land in fee for use in construction of what is known as the Harbor Freeway.

Parcel 2 consists of 13.65 acres which is part of a larger tract of 27.25 acres owned by the defendant Bank of America, herein referred to as respondent. Except for 4.04 acres, all of respondent's land, including Parcel 2, was separately leased to Universal Consolidated Oil Company and Shell Oil Company for so long as oil and gas are produced in paying quantities. The oil field has been estimated to have a remaining life of 14 or more years. Amendments to the complaint excepted from acquisition all oil, mineral and gas below a 100 foot level and allowed slant drilling beneath such level. No oil wells or other structures are located on the part sought to be taken. It appears that neither oil company is at this time willing to relinquish the lease rights to use the surface of the land.

It is appellant's position that the property "was not presently available for light industrial use and could not become available for such use for the life of the oil field, some 14 or 15 years, because of the existing oil leases". Witnesses testified that the highest and best use of the entire parcel was for light manufacturing purposes, either exclusively, according to the State's witnesses, or in conjunction with oil production purposes according to respondent's witnesses. In respect to this matter, appellant contends that the trial court committed prejudicial error in refusing to instruct the jury that the oil and gas leases might be considered for the purpose of determining the availability of the property for its highest and best use, and in instructing that such leases are immaterial for the purpose of determining fair market value and severance damages.

At the outset of trial, it was stipulated that the date of valuation to be considered was the date of commencement of the trial, namely, December 6, 1954. On inquiry by the trial judge, the State expressly elected, as provided in Code of Civil Procedure, § 1246.1, to have the award at the first stage of the trial in lump sum form as to the interests of all parties, and to relegate division of the total award as between individual interests, to a second stage of the trial in which the State would not participate.

Valuation testimony was given by the respondent's three expert witnesses, respectively, estimating the value of the land taken as $184,350, $211,636, and $191,156. The State's witnesses, on direct examination, fixed the estimated value as $53,048, $50.600, and $55,634. On cross-examination of the State's witness, Mason, it appeared that the $53,048 estimated value placed by such witness, was based upon what the witness called the highest and best "available use", considering the oil leases, and assuming that the land would for this reason not be available for industrial use for some 14 years. As stated in respondent's brief, "Questioned as to what value he would have placed upon the property had it been in single ownership, i. e., without oil leases thereon, he admitted a full value for the part taken would have been $87,939". As hereinbefore stated, the jury's award was $111,930.

"The general legal doctrine as stated by the courts is that compensation must be paid for the land that is taken, regardless of the separate interests in the land, and that the sum of the separate values of the divided interests may not exceed the value of the whole. This general rule is embodied in statutes in a number of different states". Orgel, Valuation under Eminent Domain, 1953, Vol. 1, Sec. 109, pp. 461–462. In other words, the property to be taken is valued as if owned by a single person, regardless of separate interests therein.

This rule is reflected in Section 1246.1 of the Code of Civil Procedure, previously mentioned, which provides that "Where there are two or more estates or divided interests in property sought to be condemned, the plaintiff is entitled to have the amount of the award for said property first determined as between plaintiff and all defend-

ants claiming any interest therein". In the instant case, the State expressly elected to have the award so made.

While conceding the existence of this general rule, "Appellant's position is that the General rule does not apply to the Specific situation under consideration, considering the limited hybrid nature of the taking involved". Appellant contends that "A general rule is the mere means to achieve the ultimate end", and that in the instant situation, its application will result in a "misexpenditure of public funds".

Many cases from California and other jurisdictions have been cited by appellant and respondent. Unfortunately, none of these decisions deal with a factual situation comparable to that here involved. However, an examination of such cases indicates adherence to the general rule hereinbefore mentioned, and fails to show that the facts presented in the instant controversy call for any special exception thereto. Moreover, as set forth in respondent's brief, "there is not one California decision, which extensive research has developed, to the effect that it is proper to say that a property such as here, immediately usable, legally and practically, for industrial subdivision purposes, is not 'available' therefor because of *private contractual* agreement existing *between* two of the *co-owners* of interest in such property in an action where the condemning body seeks to acquire the fee simple estate". (Respondent's italics.)

Whatever the situation may be in cases involving legal restrictions imposed by government, or practical difficulties rendering "highest and best use" of the property impossible, neither limitation is here applicable. No legal restrictions such as zoning ordinances, etc. prevent industrial use of the property, nor is there any practical impediment to such use. There are no surface structures on the land, and all that is necessary is the cooperation of the interested parties. That the lessee oil companies have presently declined to quitclaim the right to surface use under the leases is of no special significance, since under the general rule, the property to be taken in to be valued as if owned by a single person.

It is to be noted that such cooperation between the parties is mentioned in a letter from one of the oil companies, stating, "please be advised we will cooperate with you in the industrial development of your property subject to our lease, and will endeavor to relocate such of our installations as may be possible * * * As and when your subdivision plans are available * * * kindly so advise and we will give the matter our attention".

As in most cases of this kind, there is a material disagreement between the expert witnesses called by the respective parties. As will be seen from the figures previously given, the jury's award was a figure somewhere in between the estimates given,—in other words, well within the scope of the testimony. It was clearly within the jury's province to weigh and evaluate the testimony given, and to consider the basis for the opinions given. The award was for the entire parcel regardless of individual interests therein, and nothing has been shown to indicate that the same was excessive.

Consideration of the instructions as an entirety, leads to the conclusion that the trial court was guilty of no reversible error either in the giving of particular instructions or in the refusal to give requested instructions. The record discloses that both parties to the controversy were accorded great liberality in the presentation of their respective claims and in the introduction of evidence relating thereto. As respondent suggests, it is possible that this liberality resulted in the admission of certain testimony as to value which did not accord with the general rule hereinbefore mentioned. Be that as it may, this is not a matter of which the appellant can complain.

Nor can any legitimate complaint be made because the trial court sought to make plain to the jury that the parcel in question was to be valued as if owned by one person, regardless of the separate interests therein. Had the appellant's requested instructions been given, the jury could well have been

left with a confused and contradictory idea of its function in this matter. There is no merit in any of the appellant's contentions.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.



142 Cal.App.2d 160

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Frank JENNINGS, Defendant and Appellant.

Cr. 2643.

District Court of Appeal, Third District, California.
June 8, 1956.

Hearing Denied July 5, 1956.

Defendant was convicted of assault with a deadly weapon in the Superior Court, Siskiyou County, James M. Allen, J., and from the judgment of conviction the defendant appealed. The District Court of Appeal, Third District, Van Dyke, P. J., held, inter alia, that the admission of a hacksaw which was found in basement of accused's home by officers who searched home without a search warrant and which saw, according to expert witness, could have been the one which had been used to saw off barrel of shotgun left at scene of shooting was error but not reversible under the facts and evidence including positive testimony of victim that accused shot him.

Judgment affirmed.

1. Criminal Law ⇐1144(13)

On appeal from judgment of conviction evidence would be viewed most favorably in support of judgment.

2. Witnesses ⇐267

In prosecution for assault with a deadly weapon with intent to commit murder, wherein accused had been permitted to show that victim bore ill will toward accused to extent that on one occasion victim had said that if accused continued to interfere with association between victim and accused's ex-wife victim would kill accused, refusing to permit accused, on cross-examination of victim and of accused's daughter, to show that victim possessed ill will toward accused's minor daughters was within discretion of trial court in limiting cross-examination.

3. Criminal Law ⇐338(1)

Error cannot be predicated upon court's refusal to go into matters which would have involved inquiries collateral to the case being tried.

4. Criminal Law ⇐696(6)

In prosecution for assault with deadly weapon with intent to commit murder, wherein accused's daughter, who was called to testify for purpose of establishing that victim bore ill will toward accused, in reply to request to fix time when incident of ill will had occurred, replied, "It was before he was jerking me around that day", and court observed that answer was not responsive, but no motion to strike was made at that time, granting motion to strike such response during argument to jury was within trial court's discretion, where the type of evidence stricken had been explicitly ruled by court to be inadmissible and testimony which came in was one of incidents of ill will which counsel for accused had unsuccessfully sought to prove before.

5. Criminal Law ⇐596(1)

In prosecution for assault with deadly weapon with intent to commit murder, refusal to grant continuance to permit accused to obtain testimony of sheriff to effect that accused had complained to sheriff about antagonistic conduct of victim toward accused was within trial court's discretion, where it had been well established that accused and victim were not friendly and that on one occasion victim had threatened to kill accused, so that the matter to be shown by sheriff's testimony would have been cumulative at best.

6. Criminal Law ⇐596(1)

Trial court must be allowed considerable discretion as to continuances for purposes of producing cumulative testimony.

7. Criminal Law ⇐419(1)

In prosecution for assault with deadly weapon with intent to commit murder, wherein there had been testimony that a red or red and black pickup truck had been seen in vicinity of crime, and victim had testified that he had seen such truck being driven away and when arrested accused was driving a red and black pickup, exclusion of evidence of instructions allegedly given by some unidentified person to dispatcher of highway patrol that they were to search for a blue pickup automobile was not error since such evidence could have a bearing only if person had been a witness and had testified in chief that vehicle seen near scene of shooting had been a red pickup.

8. Criminal Law ⇐419(1)

In prosecution for assault with deadly weapon with intent to commit murder, wherein there had been testimony that a red or red and black pickup truck had been seen in vicinity of crime and victim had testified that he had seen such vehicle being driven away, proffered evidence of instruction given by unidentified person to dispatcher of highway patrol that they were to search for blue pickup automobile was not rendered admissible because counsel objected to calling such person because of such person's hostility.

9. Criminal Law ⇐382

In prosecution for assault with deadly weapon with intent to commit murder, wherein there had been testimony that a red or red and black pickup truck had been seen in vicinity of crime and victim had testified that he had seen such vehicle driven away, accused was not entitled to have highway patrol records admitted as proof that officers had been searching for a man driving a blue pickup because information had come into office that whoever fired the shot had been driving such a vehicle, since, except as in impeachment of some witness, such alleged facts were immaterial.

10. Criminal Law ⇐394

When search is made without a warrant, burden is upon prosecution, if it seeks to use evidence thus obtained, to show proper justification.

11. Searches and Seizures ⇐7(27)

The consent to search of house without warrant must be that of man whose house is searched or that of someone able to speak for him.

12. Searches and Seizures ⇐7(27)

Evidence that at time when father was in jail charged with serious crime minor daughters were questioned for hours by police officers and thereafter older daughter accompanied officer in search of house failed to show consent to search.

13. Criminal Law ⇐394, 1169(1)

In prosecution for assault with deadly weapon with intent to commit murder, admission of evidence of search of accused's home and finding of hacksaw which, according to expert witness, could have been the one which had been used to saw off barrel of shotgun left at scene of shooting, and that it had fresh metal filings in its teeth when examined, was error where such evidence was obtained without a search warrant, but error was not reversible under facts and evidence, including positive testimony of victim that accused had shot victim, etc.

14. Criminal Law ⇐670

In prosecution for assault with deadly weapon with intent to commit murder, wherein accused's 17 year old daughter testified that she had seen a gun in accused's pickup, proffered proof that the first time daughter ever told anyone about gun was when she told the sheriff's office after she had been continually interrogated for 14 hours, and because of her age was susceptible to implanting of testimony in her mind, was properly rejected, where trial was held long after questioning had been done and daughter had ample time to recover from any oppression by officer, if such occurred.

15. Criminal Law ⇐829(1)

An instruction that if a defendant did not have knowledge that he would need to

deny or to explain evidence against him, it would be unreasonable to draw inference unfavorable to him because of his failure to so deny or explain, was properly refused as argumentative, where trial court gave usual instructions as to constitutional right of a defendant to abstain from testifying but that jury could take such fact into consideration as tending to indicate the truth of such evidence as he had neither denied nor explained and as indicating that it might be reasonably inferred that, among inferences which could be reasonably drawn from failure to explain or deny, inferences unfavorable to defendant were the more probable.

16. Criminal Law ⇐867

Denial of motion for mistrial because of alleged prejudicial misconduct on part of officers in that immediately after close of evidence and while people were still in court officers had asked accused to leave the building was within trial court's discretion where officers' conduct, even if wrongful, could not have affected accused's right to a fair trial and it was not shown that, any juror was advised of the incident.

J. Everett Barr, Yreka, Gerald L. Shannon, Dunsmuir, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier and J. M. Sanderson, Deputy Attys. Gen., for respondent.

VAN DYKE, Presiding Justice.

[1] Appellant herein was charged by information with the crime of assault with a deadly weapon with intent to commit murder. He was tried to a jury and found guilty of the included offense of assault with a deadly weapon. The following is a sufficient statement of facts to enable us to consider the assignments of error. We have stated them most favorably in support of the judgment, as we must on appeal.

About 10 P.M. on March 15, 1955 in the small town of Dorris, California, one Manley M. Gravier, commonly known as "Jack", was awakened by a knock on the door of the trailer house in which he resided. He arose, picked up a flashlight and opened the door. As he did so, a voice said, "Jack Gravier". Gravier shone the light toward the sound of the voice and answered, "Yes". At the same time he saw appellant pointing a shotgun at him. As the light struck appellant's face, he lowered his face to the stock of the shotgun. Gravier ducked to his left. Appellant fired, the charge striking Gravier in the right shoulder, tearing away the deltoid muscle. The force of the blast spun Gravier to his right and back and he reached for his gun which lay close at hand on a shelf. He ran outside in time to see a pickup with a red top being driven away. He saw a shotgun lying in the snow near his trailer. He went back into the trailer house and called the chief of police, one Byard Kelly. Kelly's wife answered the phone. Gravier then went next door to the home of Ted Wright, the assistant chief of police of Dorris. By that time Mrs. Wright, who with several others had heard the sound of the shot, was investigating to determine the source of the noise. Gravier told Mrs. Wright he had been shot, and she took him to the hospital in her car. Mrs. Wright and Mrs. Kelly returned to the scene of the shooting and found a sawed-off shotgun lying about seven feet from the door of the trailer. A little over an hour later, appellant was stopped and arrested at a road block approximately 62 miles from the scene of the shooting. He was then driving a red and black Dodge pickup and was wearing clothing similar to that which Gravier had observed being worn by his assailant. Several other witnesses testified they had seen a red and black pickup in the general area where the shooting took place, either shortly before or after the shooting occurred. Three days after the shooting a short piece of shotgun barrel was found 22 yards away from a garage which was used by appellant and which was three houses away from appellant's house in Dunsmuir. The shotgun found outside Gravier's house trailer and the short piece of barrel were both submitted to the State Bureau of Criminal Identification for examination, and an expert from the bureau testified that the shotgun and the piece of barrel had been at one time joined together to form one shotgun barrel. The

expert testified that in his opinion the short piece of barrel had been detached from the gun by being sawed off with a hack saw. On March 16th, a search of appellant's house revealed a hack saw with fresh metal particles in its teeth. Gravier positively identified appellant, whom he knew, as being the man who shot him. Defendant did not, during the trial, take the stand in his own behalf.

[2, 3] Appellant contends that the trial court erred in prohibiting him from showing by cross-examination of Gravier and in other ways that Gravier bore ill will toward appellant's minor daughters. He had been permitted to show that Gravier bore ill will toward the appellant to the extent that on one occasion he had said that if appellant continued to interfere with the association between Gravier and appellant's ex-wife Gravier would kill him. Such evidence, of course, went to the credibility of Gravier, who was the only witness who had identified appellant as having fired the shot at Gravier. But the trial court refused to permit appellant, on cross-examination of Gravier and of appellant's daughter, to show that Gravier also possessed ill will toward the children. This ruling was within the discretion of the trial court in limiting cross-examination. It is difficult to see how ill will toward the minor children would have stood as impeachment against Gravier. There might be cases, of course, where such testimony would have an impeaching value, but in this case it appears from the record that if it had any value whatever, it could only have been very slight and error cannot be predicated upon the court's refusal to go into matters which would have involved inquiries collateral to the case being tried. While no California case directly on this point has been found, a direct ruling contrary to appellant's contentions was made in Wimberley v. State, 95 Tex.Cr.R. 102, 252 S.W. 787, 790, where the court said:

> "* * * Before we would reverse a case for the rejection of evidence supposed to show animus or evil motive on the part of a state witness, such evidence must in some way indicate appellant as the object of the dislike or prejudice of the witness. That one had had a fight with relatives of the accused against whom such party testified, would not show animus on his part against the party on trial."

[4] Karleen Jennings, a daughter of appellant, aged about fifteen at the time of trial, was called on behalf of appellant. Apparently the purpose of calling her was to establish that the witness Gravier bore ill will toward defendant. In the course of her testimony, she was asked to fix the time when an incident of ill will had occurred. She replied as follows: "It was before he was jerking me around that day." The court observed that the answer was not responsive, but at that time no motion to strike was made. The witness proceeded to fix the date and testified as before stated that on that occasion Gravier had threatened to kill appellant. After the close of evidence and after counsel for the People had made the opening argument, counsel for appellant addressed the jury as follows: "I think we ought to clear up one thing right away, and I think I will take that up before we discuss anything else * * * the District Attorney intimates, apparently, that Mr. Gravier was shot in the line of duty. The only antecedent matter that we have, showing twice, in the company of Mrs. Jennings, and once, in roughing up the little Karleen Jennings, according to her testimony." At that point counsel for the People objected there was no such testimony and an argument ensued concerning it. The reporter's notes were referred to, and counsel for appellant asked that the testimony be read directly to the jury. Again the court observed that the statement had not been responsive to a question. Counsel replied that it had not been stricken. Thereupon, counsel for the People moved to strike and the motion was granted. Counsel for appellant cited the act of the court in striking the testimony after the close of evidence as prejudicial misconduct, and he urges the same contention here. It is, of course, unusual to strike testimony after the close of evidence and during argument to the jury. But here the record shows that the type of evidence which was stricken had, before it crept in-

to the record by a non-responsive answer to a question, been explicitly ruled by the court to be inadmissible; that is, the court had ruled out testimony as to the ill will of Gravier toward appellant's children. It is fair to assume from the record that the testimony which came in was one of the incidents of ill will which counsel for appellant had unsuccessfully sought to prove before. We have already said that the exclusion of such testimony was not error and we think that when the court struck it out in line with its previous rulings, it acted within its discretion.

[5, 6] It was asserted by counsel for appellant during trial that prior to the commission of the crime appellant had complained to the sheriff of the county about antagonistic conduct of Gravier toward him. Appellant sought to prove this as part of his showing that Gravier was biased toward him. He first attempted to show it on cross-examination of Gravier. An objection was made that the question assumed matters that had not been proved. The court suggested that he ought first to prove that the incident occurred and that the sheriff's testimony would be admissible for that purpose. (It may be said also that appellant himself could have so testified.) Appellant complains of the court's refusal to grant a continuance to permit him to obtain the testimony of the sheriff. The sheriff had been on the stand as a witness, and on cross-examination was asked if the time when he arrested appellant was the first time he had ever seen him. He had said that it was. He was then asked if appellant had not once visited him regarding a complaint about Gravier. An objection was sustained to the question. The matter was dropped at that point and both sides excused the sheriff from further attendance on the trial. At the close of evidence, counsel for appellant asked for a continuance until the sheriff would return. The court replied the case could not be delayed another day for that purpose inasmuch as counsel had excused the sheriff from further attendance. Counsel asserted that the matter of the complaint to the sheriff had been ruled out when the sheriff had been on the stand. The court said that no offer of proof as to what the complaint was had been made at that time. On the following day before the case went to the jury, counsel for appellant made a further effort for a continuance to obtain the sheriff's testimony. He made a showing of his diligence in attempting to reach the sheriff overnight and also made an offer of proof. Further continuance, however, to obtain the attendance of the sheriff was denied. We think error cannot be predicated upon the foregoing. It had been well established that the two men were not friendly, in fact, that on one occasion Mr. Gravier had threatened to kill Jennings; that he bore ill will toward appellant was sufficiently shown. The matter that was to be shown by the sheriff's testimony, that is, the matter of the complaint as to Gravier's conduct toward appellant's daughter would have been cumulative at the best. A trial court must be allowed considerable discretion as to continuances for the purpose of producing cumulative testimony.

[7–9] Appellant contends that the court committed error in excluding evidence of instructions given to the dispatcher of the highway patrol that they were to search for a blue pickup automobile rather than a red one. There had been testimony that a red or a red and black pickup had been seen in the vicinity of the crime and Gravier had testified that he had seen such a car being driven away. When arrested, appellant was driving a red and black pickup. Appellant called a dispatcher to the stand and asked her if she had received a message from the sheriff's office concerning the search for the man who had shot Gravier. The witness testified she had received such a message, that she had made notes of what she had been requested to broadcast which had been later entered in a desk log. The book was handed to her and she was asked to read her entries concerning what the message had been. When she had done so, she was asked what type of truck the officers had been told to intercept. An objection to the question was sustained. Appellant's counsel argued to the court that he was attempting to show by the highway patrol's records that for an hour

their instructions had consistently been to look for a blue pickup, and he offered to prove from the record that some unidentified person had phoned the dispatcher, requesting that the highway patrol be alerted to intercept a blue pickup. Said the court: "If you can put the person that made that statement on the stand and ask the question if he made such statement, and he denies it, I have to admit it * * * Mr. Barr: I would have to call him as a hostile witness. The Court: That makes no difference." We do not see how proof that some unidentified person had called the dispatcher and asked that the patrol be alterted to intercept a blue pickup could have had any bearing upon the questions at issue in this case, save only if that person had been a witness who had testified, in chief, that the car seen in and about the scene of the shooting and leaving the scene of the shooting had been a red pickup. In short, as the court said, it was a matter of impeachment and until and unless evidence was given that a witness so testifying was the one who had called and asked that the patrol be instructed to intercept a blue pickup, proof that such a call had come in from someone was inadmissible. Evidently, counsel knew whom he charged with having made the call to the patrol but objected to calling that person because of the witness' hostility. This did not make the proffered evidence admissible. After the foregoing ruling had been made and later on during the trial, counsel for appellant had the highway patrol records produced in court. He sought to introduce them as proof that the officers had been searching for a man driving a blue pickup because information had come into the office that whoever fired the shot at Gravier had been driving such a vehicle. Again it was pointed out to him by the court that, except as in impeachment of some witness, the facts were immaterial. We think the court was right. We are unable to see, even assuming that someone had informed the sheriff's office that the person seen leaving the scene of the crime had been driving a blue pickup that such proof could have been material except by way of impeachment, and that would be so only in case that person was shown to have been a witness who had testified contrary to the information he had later passed on to the officers. Although there was some discussion about whether or not the official files could be introduced in evidence because they were confidential files, we think it unnecessary to discuss that matter since they were in any event inadmissible.

An officer testified during the trial that he had found a hack saw in the basement of appellant's home. This hack saw was introduced in evidence and an expert witness testified that it could have been the one which had been used to saw off the barrel of the shotgun left at the scene of the shooting and that it had fresh metal filings in its teeth when examined. Appellant objects that the receipt of this evidence as to the hack saw and its introduction in evidence as an exhibit was error because the officer who found it had had no warrant to search appellant's home. At the time the officers went to appellant's home, the appellant had been arrested and was in jail. The officers went to his home about 3:30 in the morning. The appellant's daughters were there; one was fifteen, one was seventeen. They questioned the girls for a long time. A police matron had accompanied the officers. The officer testified the two girls had admitted them, and that, in the course of their questioning of the girls, the elder girl accompanied an officer to the basement where the hack saw was found. The girls knew that their father had been arrested and was in jail. The search of the basement and the discovery of the hack saw occurred at 8:40 A.M. Before the hack saw was introduced in evidence, counsel for appellant established that the search had been made without a warrant and objected that the evidence was inadmissible, having been unlawfully obtained. The officer testified that he had found the hack saw on a work bench in the basement of appellant's home. It was introduced in evidence. On cross-examination the officer testified that when he went to appellant's residence it was occupied by the two

girls. Motion was thereupon made to strike his testimony concerning his search and his finding of the hack saw from the record and to admonish the jury to disregard it. Counsel further assigned the introduction of the hack saw as prejudicial misconduct. Thereupon, in an apparent attempt to show consent, the prosecuting attorney asked the officer if he had talked to anyone at the appellant's residence. The officer said he had; that he had approached the front door and was admitted by the two daughters; that he had the police matron with him; that they talked to the girls, and "Shirley Jennings accompanied me on the search, she was with me at the time"; that they sat in the front room and talked with the girls and told them their father was in jail; that the girls had not been to bed; that in fact they were interrogated until five that evening. He said that no one except the two girls had given him permission to enter the house.

[10–13] To begin with, there appears to be not the slightest reason or excuse for the failure of the officers to obtain a search warrant. To get a search warrant is a simple matter and requires little time. When, under the circumstances shown here, a search is made without a warrant, the burden is upon the prosecution, if it seeks to use evidence thus obtained, to show proper justification. Badillo v. Superior Court, 46 Cal.2d 269, 294 P.2d 23. Respondent here contends that consent was shown. We think not. The consent, of course, must be that of the man whose house is searched or that of someone able to speak for him. It is mere pretense under the circumstances shown here to claim that the two minor daughters could give or had given consent to the search of their father's residence. It is idle to suppose that they would have in any way interfered with the police officer searching the house. They knew their father had been arrested, was in jail and charged with a serious crime. They had been questioned for hours before the search was made. There is no showing whatsoever that consent was even asked. What is shown is that after hours of questioning the officer simply searched the house, and the fact that he was accompanied by the older girl proves nothing in the way of consent. Respondent argues further that the use of the hack saw in evidence, and the testimony as to its condition and the place where it was found could not be prejudicial even if erroneous. Respondent says: "The hack saw was only a small bit of circumstantial evidence of appellant's guilt, and in view of the other overwhelming evidence of his guilt, could not have affected the result of the trial." It is strange that if the prosecuting attorney viewed the circumstantial evidence of the hack saw and its discovery as merely a small bit of circumstantial evidence, he would have run the risk of a reversal of a conviction by using it at all. As a matter of fact, the hack saw was a material link in the chain of circumstantial evidence. A fair inference from its being found where it was, when it was, and in the condition it was when found, is that the appellant himself had used the instrument to saw the shotgun in two, which gun in turn had been used to shoot Gravier. It was all a part of the proof of planning and premeditation and of intent to kill.

Nevertheless, on the whole record here we have concluded that the judgment appealed from ought not to be reversed because of the error in receiving the hack saw in evidence and in admitting the testimony concerning it. We have the positive testimony of Gravier that appellant shot him; the fact that Gravier was well placed to identify him and knew him well; that he was able then to describe in fair detail the clothes appellant was wearing when intercepted; we have Gravier and other witnesses' testimony as to the pickup truck leaving just after the shooting; we have appellant intercepted wearing such clothes and in such a truck 62 miles away within an hour and fifteen minutes after the shooting; we have the fact the shotgun barrel was freshly sawed off and the part sawed off found near a garage used by appellant and within a few doors of appellant's home; and we have the fact that appellant declined to take the stand and explain, if he could, the incriminating evi-

dence against him. We do not believe that if the hack saw and the testimony about it had not been received in evidence the result would have been the acquittal of appellant.

[14] Shirley, the elder daughter of appellant, a witness for the People, testified that on March 14th she looked in her father's pickup, searching for a lost compact. She looked behind the seat and there saw a gun. When shown the gun with which Gravier had been shot, she said she did not think the one she saw in the pickup was the same. She said she had never seen the gun in the pickup before. On cross-examination she was asked who she had told about the gun and replied it had been Officer Banich; that he had been questioning her for quite some time. She was then asked, "How long in hours?" Objection was made and sustained that the question constituted improper cross-examination. Thereafter, counsel for appellant, addressing the court in the absence of the jury, offered to prove by Shirley that the first time she ever told anyone about this gun was when she told the sheriff's office after she had been continually interrogated for fourteen hours. He argued that she was a young girl (she was 17) and that in common with those of her age group would be susceptible to implanting of testimony in her mind. The proffered proof was rejected. We find no error in this ruling. The trial was held long after the questioning had been done; she had ample time to recover from any oppression by the officer if such occurred, and when she testified at the trial that she saw the gun, it would have been purely conjectural to have assumed that she still was under such influence, that she was not then telling the truth.

[15] Appellant did not take the stand as a witness in his own behalf. The trial court gave the usual instructions as to its being the constitutional right of a defendant to abstain from testifying if he wished to do so. The court told the jury, however, that if he did not testify they could take that fact into consideration as tending to indicate the truth of such evidence as he had neither denied nor explained and as indicating that it might be reasonably inferred that among the inferences which could be reasonably drawn from his failure to explain or deny, inferences unfavorable to the defendant were the more probable. The court told the jury that in deciding whether or not to testify, the defendant could choose to rely on the state of the evidence and upon the failure, if any, of the People to prove every essential element of the charge against him; and that no lack of testimony on his part would supply a failure of proof by the People. Defendant proposed and the court refused to give a further instruction that if a defendant did not have the knowledge that he would need to deny or to explain evidence against him, it would be unreasonable to draw an inference unfavorable to him because of his failure to so deny or explain.

We think the court fully and fairly instructed the jury on the subject of defendant's choice of remaining off the witness stand, and that it was unnecessary to give the instruction proposed and refused. By its nature it is merely argumentative and tells the jury nothing that they would not know without the instruction being given.

[16] Just before the case went to the jury and in the absence of the jury, counsel for appellant moved the court to declare a mistrial because of alleged prejudicial misconduct on the part of the officers in that immediately after the close of the evidence and while people were still in the court and about the court room, they had misconducted themselves toward the appellant. In support of the motion appellant testified that after the adjournment of the afternoon before he was standing at the top of the stairs with his younger daughter Karleen; that several officers approached and told him to leave the building. He asked them if he was under arrest and they said he was not but they wanted him to get out. They said they did not want him hanging around. They spoke in a quiet tone of voice; they were in uniform. He left the building. He said other people were present, standing in the hallway, back toward the court room from the head of the stairs where he was standing; he thought there were three, but he did not know who they were. A motion

for a mistrial was denied. There is no error here. Clearly, it was within the discretion of the court to deny the motion, and indeed it is questionable whether any other action of the court would have been proper. There is no explanation in the record as to why the officers would forbid appellant the right to be in the court house. There may have been justification. If there was not, then their conduct was wrongful. However, we cannot see that it could have affected the appellant's right to a fair trial. It was not shown that any member of the jury was advised of the incident.

The judgment is affirmed.

PEEK and SCHOTTKY, JJ., concur.

Hearing denied; CARTER, J., dissenting.



142 Cal.App.2d 73

MAXWELL CAFE, Inc., Petitioner and Appellant,

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Russell S. Munro, Director (substituted in the place and stead of Kenneth H. Leitch as Director of the Department of Alcoholic Beverage Control), Doe One, Doe Two and Doe Three, Defendants and Respondents.

Civ. 21311.

District Court of Appeal, Second District, Division 3, California.

June 4, 1956.

Rehearing Denied June 27, 1956.

Hearing Denied Aug. 1, 1956.

Proceeding for writ of mandate to compel Board of Equalization to annul order revoking general on-sale license to sell alcoholic beverages at saloon and restaurant. The Superior Court, Los Angeles County, Arnold Praeger, J., denied writ of mandate and petitioner appealed. The District Court of Appeal, Vallée, J., held that evidence was sufficient to show that the licensed premises were used for purposes contrary to public welfare and morals and was sufficient to warrant revocation of the license.

Judgment affirmed.

1. Intoxicating Liquors ⇐106(1)

Whatever is suffered or permitted by agent and employees of liquor licensee is attributed to the licensee.

2. Intoxicating Liquors ⇐106(4)

Owner of a liquor license has responsibility to see to it that the license is not used in violation of law.

3. Mandamus ⇐172

In proceeding for writ of mandate to compel Board of Equalization to annul its order revoking liquor license, power of factual decision is in the Board of Equalization and scope of review of the Board's decision by the District Court of Appeal is limited to determining whether such decision is supported by substantial evidence and the District Court of Appeal may not reweigh the evidence. West's Ann.Bus. & Prof.Code, §§ 24200, 25601; West's Ann. Const. art. 20, § 22.

4. Mandamus ⇐168(4)

In proceeding for writ of mandate to compel Board of Equalization to annul its order revoking general on-sale license to sell alcoholic beverages at saloon and restaurant, evidence was sufficient to show that the corporation, which owned and operated the saloon and restaurant, suffered and permitted licensed premises to be used for purposes contrary to public welfare and morals and to warrant revocation of the liquor license. West's Ann.Bus. & Prof. Code, §§ 24200, 25601; West's Ann.Const. art. 20, § 22.

5. Corporations ⇐1

Generally a corporation is distinct legal entity separate from its stockholders and from its officers, but there are circumstances in which corporate entity will be disregarded and corporation will be considered in law as alter ego of persons composing it, as when corporation is but instrumentality through which one or more persons, who are sole owners of capital stock, for convenience transact their business, and in-

justice to third persons results from double relationship.

6. Corporations ⇦1

It is only under exceptional circumstances that the corporation may be disregarded and there must be affirmative proof or direct inference from proof that there is such unity of interest and ownership as indicates cessation of individuality and separateness of individuals and corporation and corporation must be treated as separate entity until such proof is made.

7. Corporations ⇦1

Mere ownership of all stock and control and management of corporation by one or more individuals is not of itself sufficient to warrant disregarding corporate entity.

8. Corporations ⇦1

In absence of confusion of corporation with individual affairs, or failing to disclose to third parties existence of two entities, or abuse or bad faith in exercise of corporate control, corporate entity will not be disregarded.

9. Corporations ⇦1

A change in ownership of stock does not change liabilities of corporation and one may not derive advantages that result from corporate form of doing business and escape disadvantages of the corporation.

10. Corporations ⇦1

In proceeding for writ of mandate to compel Board of Equalization to annul its order revoking general on-sale license to sell alcoholic beverages at saloon and restaurant, wherein corporation contended its license could not be revoked for violations after December 27, 1951, in view of fact corporation was merely agent for shareholders who purchased all corporation stock on that date, and corporation requested court to pierce corporate veil and apply doctrine of alter ego, evidence was insufficient to warrant Board to disregard corporate entity. West's Ann.Bus. & Prof.Code, § 25601; West's Ann.Const. art. 20, § 22.

11. Intoxicating Liquors ⇦103

When a liquor license is issued to a corporation it retains and is responsible for the license until it is suspended or revoked and transfer of stock to corporation does not result in transfer of license from corporation to transferee of stock as mere transfer of stock of corporate licensee cannot be used as device to enable licensee to escape responsibility for its violation of the Alcoholic Beverage Control Act. West's Ann.Bus. & Prof.Code, §§ 23008, 23009, 23951, 23953, 23961, 24200, 25601.

12. Mandamus ⇦168(4)

In proceeding for writ of mandate to compel Board of Equalization to annul its order revoking general on-sale liquor license, wherein corporation alleged that after present shareholders purchased entire stock of corporation new liquor license was issued to petitioner-corporation and that corporation could not be charged with violations which occurred prior to issuance of new license, evidence was sufficient to show new license was not issued to petitioner corporation at that time, but that same license was transferred and continued in fact. West's Ann.Bus. & Prof.Code, § 25601; West's Ann.Const. art. 20, § 22.

George W. Rochester, Beverly Hills, for appellant.

Edmund G. Brown, Atty. Gen., Howard S. Goldin and Edward M. Belasco, Deputy Attys. Gen., for respondents.

VALLÉE, Justice.

The Board of Equalization revoked petitioner's general on-sale license to sell alcoholic beverages at Maxwell Cafe, a saloon and restaurant. The appeal is from a judgment denying a writ of mandate to compel the board to annul its order and reinstate the license.[1]

The accusation filed against petitioner charged 41 violations of section 25601 of the Business and Professions code[2] in that

1. The Board of Equalization made the order of revocation. The writ was directed to the Department of Alcoholic Beverage Control which was given the power of licensing, suspending, and revoking licenses effective January 1, 1955. Const. art. XX, § 22, as amended November 2, 1954.

2. Formerly section 58 of the Alcoholic Beverage Control Act. (2 Deering's Gen

from May 31, 1947 to February 11, 1954 it did suffer and permit persons to resort and remain on the licensed premises in a drunken condition, to sell, give, and use narcotics, to solicit other persons to engage in homosexual acts, and to engage in bookmaking and other forms of gambling on the premises.

The hearing officer of the board who received the evidence found that petitioner did, from about May 31, 1947 to September 3, 1953, permit and suffer the licensed premises "to be used as a place to which persons did resort thereto and commit lewd acts and other violations of the law contrary to public welfare and morals resulting in the arrests of 41 persons." He concluded petitioner had violated section 25601 and recommended revocation of the license. The findings and recommendation were adopted by the board as its decision. Thereafter the superior court denied a writ of mandate after reviewing the record before the board.

The question is whether the evidence is sufficient to warrant revocation of the license. Petitioner is a corporation. On October 22, 1946 an on-sale license number P–3688–H was issued to the corporation. The record does not show who were the stockholders of the corporation prior to December 27, 1951. On December 27, 1951 Max Newman, Sidney Newman, brother of Max, and Henry Newman, son of Sidney, purchased all the stock of the corporation and since that date Max Newman has been president and general manager of the corporation and in sole, active charge of the licensed premises. The hearing officer found that prior to December 27, 1951 the Newmans had no connection with the corporation. He also found that "[o]f the 41 arrests, eight occurred between 12–14–52 and 9–3–53 or since the Newmans took over this corporation, seven being vag lewd arrests and one on suspicion of a narcotic violation. None of the arrests were brought to the attention of Max Newman." There was no evidence that any one of the persons arrested had been convicted of any public offense.

Petitioner argues that since there was no evidence any one of the persons arrested had been convicted, the evidence is insufficient to support revocation of the license. Counsel relies on Stoumen v. Reilly, 37 Cal.2d 713, 234 P.2d 969, 970. His reliance is misplaced. In Stoumen an indefinite suspension was reversed. The finding of the board was that the petitioner "'kept and permitted his licensed premises to be used as a disorderly house in that * * * persons of known homosexual tendencies patronized said premises and used said premises as a meeting place.'" In stating the facts, the court said "there was no showing that any of those arrested were convicted." It was not held that it was necessary to show convictions. The court stated 37 Cal.2d at page 715, 234 P.2d at page 970: "There was no evidence of any illegal or immoral conduct on the premises or that the patrons resorted to the restaurant for purposes injurious to public morals" and 37 Cal.2d at page 716, 234 P.2d at page 971, "[t]he terms of the section [section 58, now Bus. & Prof.Code, § 25601] refer to conduct on the premises or resort thereto for improper purposes." Cf. Cornell v. Reilly, 127 Cal.App.2d 178, 273 P.2d 572.

[1–4] In the present case there was evidence of illegal and immoral conduct on the licensed premises and that patrons resorted to the premises for purposes injurious to public morals. There was evidence that numerous homosexual acts were committed on the premises, that liquor was sold to obviously intoxicated persons, and that beer was sold to minors—all of which were done in the immediate presence of police officers. There was evidence that

Laws, 1944, Act 3796.) Section 25601 reads: "Every licensee, or agent or employee of a licensee, who keeps, permits to be used, or suffers to be used, in conjunction with a licensed premises, any disorderly house or place in which people abide or to which people resort, to the disturbance of the neighborhood, or in which people abide or to which people resort for purposes which are injurious to the public morals, health, convenience, or safety, is guilty of a misdemeanor."

some of the homosexual activities and some of the arrests took place in the presence of petitioner's employees. Further, the board could infer knowledge of such activities on the part of Max Newman. He was present on the premises every day from 2 p. m. to 2 a. m. Some of the activities took place where any one could see them. His testimony was merely that none of the items in the accusation had been brought to his attention. He did not testify he had not observed such conduct after be became manager. He did testify that none of the arrests had been brought to his attention, and the board so found. Whatever is suffered or permitted by the agent and employees of a licensee is attributed to the licensee. The owner of a liquor license has the responsibility to see to it the license is not used in violation of law. Mantzoros v. State Bd. of Equalization, 87 Cal.App.2d 140, 144, 196 P.2d 657; Cornell v. Reilly, 127 Cal.App.2d 178, 273 P.2d 572. The evidence was such that the board could well conclude Maxwell Cafe was not only a saloon and restaurant where homosexuals merely gathered as members of the public to eat and drink, as was the case in Stoumen v. Reilly, supra, 37 Cal.2d 713, 234 P.2d 969, but was a place where homosexuals openly solicited partners and actually engaged in homosexual practices. The power of factual decision is in the board. We may not reweigh the evidence. The scope of review of the board's decision is limited to determining whether it is supported by substantial evidence. Chosick v. Reilly, 125 Cal. App.2d 334, 270 P.2d 547; Marcucci v. Board of Equalization, 138 Cal.App.2d 605, 292 P.2d 264. There is substantial evidence that petitioner suffered and permitted the licensed premises to be used for purposes contrary to public welfare and morals. The board has power to revoke a license when its continuance would be contrary to public welfare or morals. Bus. & Prof.Code, § 24200.

Of the 41 arrests, 33 took place prior to December 27, 1951, the time the Newmans purchased all the stock of the corporation, and 8 took place thereafter, 7 of the 8 in 1953. Of the 8 arrests, 7 were for homosexual acts committed on the premises in the presence of police officers, and the other was for suspicion of possessing narcotics. There was no evidence that either of the Newmans or any of petitioner's employees had any ground for suspecting the person had narcotics in his possession. Petitioner contends it cannot be charged with or its license revoked because of acts which occurred before the Newmans acquired all the stock. The argument is that the referee found there had been no prior disciplinary action against the corporation; after the Newman family purchased the stock the corporation was merely its agent; the court on the facts should pierce the corporate veil, apply the doctrine of alter ego, and hold that the Newmans cannot be charged for violations for which they were in no way responsible.

Assuming, without deciding, that the board could have gone behind the corporate form, the record is devoid of any evidence that the corporation was the alter ego of the Newmans. The only witness who testified before the hearing officer in behalf of petitioner was Max Newman. He testified: I am and have been since December 1951 the president and general manager of Maxwell Cafe, a corporation. The present owners acquired the stock of the corporation on December 27, 1951. Prior to that date I had no connection with the business. Henry Newman, by brother, Sidney Newman, Henry's son, and I acquired the stock. My co-owners "are not there. I run it exclusively." I work at the place 7 nights a week from 2 p. m. to 2 a. m. watching the employees and the patrons. "I want to clarify something Mr. Avery asked me and it just dawned upon me. Some time after acquiring this stock, there is some stock in the name of Sarah Bedell is my sister, Louis Bedell is her son, which is also a nephew of mine. I stated before that the only stock was Henry Newman, Sidney Newman and Max Newman, but that is not correct." None of the relatives who are in with me now had any connection with the corporation before December 27, 1951.

[5–7] There was no other evidence on the subject.

Generally a corporation is a distinct legal entity separate from its stockholders and from its officers. There are circumstances in which the corporate entity will be disregarded and the corporation will be considered in law as the alter ego of the persons composing it, as when the corporation is but the instrumentality through which one or more persons, the sole owners of the capital stock, for convenience transact their business and injustice to third persons results from the double relationship. (12 Cal.Jur.2d, 604, § 7 et seq.) It is only under exceptional circumstances that the corporation may be disregarded. Judelson v. American Metal Brewing Co., 89 Cal.App. 2d 256, 262, 200 P.2d 836. There must be affirmative proof or direct inference from proof that there is such unity of interest and ownership as indicates cessation of the individuality and separateness of the individuals and the corporation. Id., 89 Cal. App.2d 263, 200 P.2d 836. The corporation must be treated as a separate entity until such proof is made. Relley v. Campbell, 134 Cal. 175, 176, 66 P. 220. Mere ownership of all the stock and control and management of a corporation by one or more individuals is not of itself sufficient to warrant disregarding the corporate entity. Norins Realty Co. v. Consolidated A. & T. G. Co., 80 Cal.App.2d 879, 883, 182 P.2d 593.

[8–10] Max Newman and his relatives are the stockholders of petitioner corporation, but they are the stockholders. Their power is simply to act as stockholders. Estate of Winder, 99 Cal.App.2d 83, 85, 221 P.2d 193. Their power is to vote the stock. "In the absence of confusion of corporate with individual affairs, or failing to disclose to third parties the existence of the two entities, or abuse or bad faith in the exercise of corporate control, the corporate entity will not be disregarded." Shafford v. Otto Sales Co., Inc., 119 Cal.App.2d 849, 862, 260 P.2d 269, 277. A change in the ownership of the stock does not change the liabilities of the corporation. One may not derive advantages that result from the corporate form of doing business and escape the disadvantages of the existence of the corporation. There was no evidence as to who are the directors of the corporation. There was no evidence with respect to the amount of stock owned by Max Newman or by any one of the other stockholders. There was no evidence which indicated cessation of the individuality and separateness of the individuals and the corporation. All the evidence shows is that several individuals own the stock and that Max Newman is president and general manager of the corporation and that he works on the licensed premises. There was no evidence which would have warranted the board in disregarding the corporate entity.

[11, 12] Petitioner says that at the time the Newmans purchased the stock Max Newman reported the purchase to the board and his fingerprints and those of the other stockholders were taken, and that in "January 1952 the Board passed the transfer of the license to the present stockholders and issued the same license number to the corporation it had had under the original and all intervening transferors." It is argued it follows that a new license was issued to petitioner corporation at that time and it cannot be charged with violations which occurred before that. There is no evidence in the record to support the assertions of petitioner. The hearing officer stated at the hearing that "the license has never been transferred to Mr. Newman. It is still in the corporate name." Counsel for petitioner then said he was moving to strike all testimony pertaining to arrests which occurred more than one year prior to the filing of the accusation on the ground, among others, of "the transfer to Mr. Newman of the stock in the corporation."[3] There is no evidence that Max Newman reported the purchase of the stock to the board or that any fingerprints were taken or that a new license was issued. Petitioner relies on section 23961 of the Business and Professions Code which provided that

3. Counsel for petitioner here did not represent it before the hearing officer.

all applications for a transfer of a license shall be referred to the state liquor administrator and by him investigated and reported on to the board.[4] A licensee is any person holding a license. Bus. & Prof.Code, § 23009. A corporation is included in the word "person." Bus. & Prof.Code, § 23008. A corporation applicant must state in its application the names of its principal officers and directors. Bus. & Prof.Code, § 23951. An application of a corporation must be signed by an officer under its seal. Bus. & Prof.Code, § 23953. A corporation is treated as a distinct entity. When a license is issued to a corporation it retains and is responsible for it until it is suspended or revoked. The transfer of the stock of a corporation does not result in the transfer of the license from the corporation to the transferee of the stock. The mere transfer of the stock of a corporate licensee cannot be used as a device to enable the licensee to escape responsibility for its violations of the Alcoholic Beverage Control Act. Cf. Coletti v. State Board of Equalization, 94 Cal.App.2d 61, 209 P.2d 984. Petitioner at all times held license No. P–3688–H; not one license prior to December 27, 1951 and another thereafter. The board found continuance of license No. P–3688–H would be contrary to public welfare and morals; not some other license.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

4. Section 23961 read: "All applications for an alcoholic beverage license or for a transfer of such a license shall be immediately referred to the State Liquor Administrator for investigation and report. The State Liquor Administrator shall cause a complete investigation to be made of the applicant and the premises to determine whether they qualify under this division and whether the provisions of this division have been complied with, and he shall investigate all matters connected therewith which may affect the public welfare and morals. He shall report the result of his investigation to the board."

Prior to 1953 section 23961 was section 21.1 of the Alcoholic Beverage Control Act. 2 Deering's Gen.Laws, Act 3796, Stat.1945, c. 1401, p. 2633, § 13.1.

Section 23961 was repealed in 1955. Stat.1955, c. 447, p. 911, § 63. Subject matter now covered by § 23958.

141 Cal.App.2d 771

Gerald B. WALLACE, Petitioner,

v.

The SUPERIOR COURT of the State of California, IN AND FOR COUNTY OF PLACER, Hon. Grover W. Bedeau, Judge, Lillian Rechenmacher, as County Clerk, Ex Officio Clerk of the Superior Court of the State of California, In and For the County of Placer, and Registrar of Voters of Placer County, and John G. Piches, Real Party in Interest, Respondents (two cases).

Civ. 9074, 9077.

District Court of Appeal, Third District, California.

May 23, 1956.

Original writ proceeding. The District Court of Appeal, Van Dyke, P. J., held that government code section purporting to impose residence qualification as prerequisite to election to office of judge of Superior Court was invalid as being in conflict with qualifications set forth in constitution for such office.

Order accordingly.

1. Certiorari ⇐1

If proceeding in Superior Court culminating in decision that candidate was ineligible for office were treated as having been brought under Elections Code, § 2900, rather than as an ordinary mandate proceeding, candidate would have no remedy by appeal; but appellate courts would not be without jurisdiction to review Superior Court's action through original writ proceedings; and it would be competent for District Court of Appeal to treat candidate's prohibition petition as a petition in

certiorari to review jurisdiction of Superior Court to order his name to be omitted from primary election ballots. West's Ann. Elections Code, § 2900.

2. Constitutional Law ⇐36
States ⇐46

Where constitution prescribes qualifications for state office, Legislature can neither add to, nor detract from, qualifications so prescribed; and persons selected by people for state office and eligible according to constitution have constitutional right to such office.

3. Constitutional Law ⇐16

When construing constitutional provisions, proceedings of constitutional convention may be referred to and considered.

4. Judges ⇐4

Government Code section purporting to impose residence qualification as prerequisite to election to office of judge of Superior Court was invalid as being in conflict with qualifications set forth in constitution for such office. West's Ann.Gov.Code, § 69500; West's Ann.Elections Code, § 2900; West's Ann.Const. art. 6, § 6.

Tindall & Tindall, Auburn, and Bradford, Cross, Dahl & Hefner, Sacramento, for petitioner.

F. L. Sinclair, Roseville, for real party in interest.

Al. B. Broyer, Dist. Atty., Auburn, Franklin Tuttle, Deputy Dist. Atty., Auburn, for respondents.

VAN DYKE, Presiding Justice.

The Legislature of 1955, Government Code, § 69609, created an additional judgeship in the Superior Court of Placer County and the Honorable Leland J. Propp was by the Governor appointed to that office. The office is now to be filled by election. Petitioner, Gerald B. Wallace, is a candidate for election to said judgeship, and a primary election is to be held within said county on June 5th next. Petitioner filed his declaration of candidacy for said office with respondent Lillian Rechenmacher, as County Clerk of Placer County, and, save for the matter of his eligibility, petitioner has complied with all the requirements of law entitling him to have his name placed upon the primary election ballots. On April 17th one John G. Piches, as petitioner, filed in the Superior Court of Placer County a petition for a writ of mandate ordering the omission of Mr. Wallace's name from the ballot on the ground that he was not an eligible candidate because he had not been a resident of the County of Placer for two years immediately preceding said date of June 5, 1956. Section 69500 of the Government Code provides that:

> "No person is eligible for election to the office of judge of the superior court unless he has (a) been a citizen of the United States and a resident of this State for five years and of the county in which he is elected for two years next preceding his election, * * *."

Mr. Wallace appeared in said proceeding and asserted that he could comply with all residence requirements including the county residence requirement. He further asserted that that portion of said section which required residence for two years within the county was unconstitutional and therefore void. He has steadily maintained this contention in every way open to him and he still here maintains the invalidity of that requirement as being in conflict with the qualifications set forth in the Constitution for the office of judge of the superior court. His objections upon constitutional grounds were overruled by the Superior Court and after a hearing upon the fact of residence that court determined that he could not meet the statutory county residence requirement and that he was not therefore entitled to have his name placed upon the primary ballot.

After the respondent court had filed in the cause a written memorandum of decision declaring that petitioner herein was not eligible for the office and further declaring that the challenged enactment was constitutional, and after the respondent court had ordered findings and judgment prepared in accordance with the memorandum, petitioner herein filed in this court on May 10th last a petition for a writ of prohibition. Although when his petition was

signed and verified the order of the respondent court had not been made, it was made and entered by the respondent court on May 9th, one day before said petition was filed herein. This is shown by the answer of respondents and it was stipulated during argument before this court that this court may, if it decides this matter on the merits, issue a final writ without further intermediate proceedings.

[1] At the outset and before considering the constitutionality of the challenged legislation we are met with the claim that the proceeding in the respondent court was brought under the provisions of Section 2900 of the Elections Code; that there is no right of appeal from that decision; further that the decision of the respondent court in that proceeding is final as of the date of its entry and that the appellate courts are without jurisdiction to review the court's action through an original writ proceeding. Reliance is placed upon Matter of Snyder, 158 Cal. 218, 110 P. 820, McDonald v. Curry, 158 Cal. 160, 110 P. 480, Communist Party v. Peek, 20 Cal.2d 536, 556, 127 P.2d 889, and Donnellan v. Hite, 139 Cal.App.2d 43, 293 P.2d 158. Section 2900 of the Elections Code provides as follows:

> "Whenever it is made to appear by affidavit to the Supreme Court, district courts of appeal, or superior court of the proper county that an error or omission has occurred or is about to occur in the placing of any name on, or in the printing of, an official primary election ballot, or that any wrongful act has been or is about to be done by any person charged with any duty concerning the primary election, or that any neglect of duty has occurred or is about to occur, such court shall order the officer or person charged with such error, wrong or neglect forthwith to correct the error, desist from the wrongful act or perform the duty, or show cause why he should not do so."

In McDonald v. Curry, supra [158 Cal. 160, 110 P. 481], it was said of this section that by it "a very ample concurrent jurisdiction has been conferred upon this court, the District Courts of Appeal, and the superior courts to correct by a summary proceeding any misconduct of the officers charged with the duty of carrying out the provisions of the law." In Matter of Snyder, supra, it was said that: "According to the terms of the act, the jurisdiction of the superior courts in their respective ('the proper') counties is just as extensive and complete as the jurisdiction of the Supreme Court, and, as there is no provision for an appeal in this class of contests, their judgments are final when entered." In Donnellan v. Hite, supra, where the petition in mandate, addressed to the district court of appeal, asserted that the registrar of voters of Los Angeles County was preparing ballots to be used at a primary election to the office then held by petitioner when no election to that office could properly be held, the court denied its writ upon the ground that Section 2900 of the Elections Code gave to petitioner a plain, speedy and adequate remedy at law. It then treated the petition in mandate as the beginning of an action in the district court of appeal pursuant to said code section, declaring that the remedy afforded by the code section was more speedy and adequate than would be a writ of mandate. Treating the proceedings in respondent court as having been brought under the Elections Code and not as an ordinary mandate proceeding, it would appear that petitioner here has no remedy by appeal. But nothing said in the cited opinions can be construed as declaring an intent on the part of the legislature to prevent this court from acting under its constitutional power to issue writs of mandate, prohibition and certiorari. The act itself does not expressly so declare. Rather, the absence of appeal creates one of the conditions under which original writs will issue. We hold, therefore, that it is competent for this court to treat the pleadings of petitioner herein as a petition in certiorari to review the jurisdiction of respondent court to order petitioner's name to be omitted from the primary election ballots.

It is conceded that petitioner herein is in all things qualified to be a candidate for the office of superior court judge save

only that he does not and cannot meet the requirements of Section 6950 of the Government Code which requires of such a candidate that he shall have resided in the county two years next preceding his election. We have concluded that it was and is beyond the power of the legislature to add this qualification in view of the fact that the Constitution has established the exclusive qualifications that can be required for the office of superior court judge. The Constitution of 1879, art. 6, § 5, originally created the office of superior court judge. It was not theretofore known to the law. Nor prior courts as established by the Constitution of 1849, art. 6, were justices courts and other inferior courts and many of the district courts included more than one county. For the office of district judge the Constitution of 1849 set up no qualifications. In 1850, St.1850, p. 335, the legislature required that district judges should be citizens of the United States and residents of the state for two years prior to election or appointment, but these statutory qualifications obviously did not carry over and attach to the constitutional office of judge of the superior court created by the Constitution of 1879. That Constitution, however, did state what should be the qualifications of that office. Section 25 of Article VI provided that: "No one shall be eligible to the office * * * of a judge of a Supreme Court, unless he shall have been admitted to practice before the Supreme Court of the State." At that time admission to practice before the Supreme Court required three years' residence in the state prior to admission. In so far as judges of the superior court were concerned, the constitutional requirement of qualifications remained as originally enacted until 1926 when the section was amended to provide that no one should be eligible to the office of judge of a superior court unless he should have been admitted to practice before the Supreme Court for a period of at least five years immediately preceding his election or appointment. Qualifications for admission to practice before the Supreme Court have varied materially from time to time, but always they have included residence in the state. They have also included various requirements touching training in the law and the possession of good moral character. It is thus to be observed that the Constitution, while always requiring admission to practice before the Supreme Court, has by implication included within its scope such qualifications as from time to time such admission would require, and has declared no other qualifications.

[2] In 34 American Law Reports, 2d, page 155, and following, there appears an exhaustive annotation upon the subject of the authority of legislatures to impose qualifications for the holding of constitutional offices. It is commonly held that state constitutions are to be considered as limitations of power and unless the legislative act is prohibited expressly or impliedly by the constitution it must be held valid. It sometimes is said that before a court will declare an act unconstitutional it must be such beyond a reasonable doubt. The difficulty arises when the constitution, in creating a constitutional office, has stated qualifications therefor but has not expressly declared that the stated qualifications are exclusive. As noted, our Constitution has, since its first enactment, contained constitutional statements as to the qualifications required of superior court judges. Concerning such a situation the law generally may be stated to be as follows:

"* * * [W]here the constitution prescribes the qualifications for state office, the legislature can neither add to nor detract from the qualifications so prescribed. Persons selected by the people for a state office and eligible according to the constitution have a constitutional right to such office." 81 C.J.S., States, § 87, p. 998.

3 McQuillin on Municipal Corporations, 3d Ed., section 12.58, page 234, says:

"It, however, the constitution prescribes the qualifications of an officer it is, of course, beyond the power of the legislature to impose additional qualifications. It is self-evident that a statute cannot change the qualifications fixed by the constitution. * * *"

In an Annotation in 47 American Law Reports, page 481, it is stated:

"With but one exception, the courts have recognized the general rule that when a state Constitution names the qualification for a constitutional office, the legislature has no authority to prescribe additional qualifications, or to remove any of the requirements provided for in the Constitution, unless that instrument, expressly or by implication, gives the legislature such power."

In Imbrie v. Marsh, 3 N.J. 578, 71 A.2d 352, 356, 18 A.L.R.2d 241, an opinion by Mr. Chief Justice Vanderbilt stated the matter as follows:

"'It would seem but fair reasoning upon the plainest principles of interpretation, that when the Constitution established certain qualifications as necessary for office, it meant to exclude all others as prerequisites. From the very nature of such a provision the affirmation of these qualifications would seem to imply a negative of all others * * *. A power to add new qualifications is certainly equivalent to the power to vary them.' 1 Story, Commentaries on the Constitution, § 625.

"'The legislature cannot add to the constitutional qualifications of an officer.' 1 Cooley on Constitutional Limitations, 140."

In Kivett v. Mason, 185 Tenn. 558, 206 S.W.2d 789, 791, the above statements of the rules of construction in respect to the matter at hand were sustained. There a judge was disbarred from practice of law. Thereafter the legislature enacted a law requiring as a qualification to hold judicial office that a judge be a practicing attorney. On the issue as to whether the disbarred judge could continue to hold office the court said:

"* * * We think, however, that the Constitution on its face furnishes affirmative evidence that its authors deliberately refrained from inserting a provision which would require that only lawyers be selected as judges of the Courts for which article 6 of the Constitution provides. Nowhere in article 6 or elsewhere in the Constitution, in so far as we have been able to find, is there any reference to lawyers in connection with who shall be the judges of our Courts. [We have noted that a like situation obtains under our Constitution of 1849.] * * *

* * * * * *

"* * * This constitutional right given the voters of Claiborne County to elect whoever they please within the constitutional age and residential requirements cannot be thus abridged by the legislature. The rule applicable here is that approved by this Court quoting from Cooley's Constitutional Limitations thus:—'Another rule of construction is, that when the constitution defines the circumstances under which a right may be exercised * * * the specification is an implied prohibition against legislative interference to add to the condition'. * * *"

Many of the rules of construction in a situation where the Constitution has prescribed qualifications for a constitutional office are contained in State ex rel. Powers v. Welch, 198 Or. 670, 259 P.2d 112. In that case the State Constitution fixed the qualifications for the office of county surveyor as follows: "No person shall be elected, or appointed to a county office, who shall not be an elector of the county; * * *." Const. art. 6, § 8. The state legislature had added a requirement that the county surveyor must be registered under the laws of Oregon as a registered professional engineer or a registered professional land surveyor. The court held that the statute conflicted with the constitution and was, therefore, void.

[3] When construing constitutional provisions the proceedings of the constitutional convention may be referred to and considered. People v. Chapman, 61 Cal. 262; Matter of Smith, 152 Cal. 566, 93 P. 191; Story v. Richardson, 186 Cal. 162, 198 P. 1057, 18 A.L.R. 750; Fox-Woodsum Lumber Co. v. Bank of America N. T. & Sav. Ass'n, 7 Cal.2d 14, 59 P.2d 1019. In

the following we refer to "Debates and Proceedings of the Constitutional Convention of the State of California, E. B. Willis and P. K. Stockton, Official Stenographers." The work is in three volumes and is the report of the proceedings of the Convention. The Committee of the Convention on Judiciary numbered among its members many well-known lawyers of the time, including two who had been members of the Supreme Court. The Convention likewise numbered among its members many men standing at the forefront of the legal profession of their time. It appears on page 78 and following of the Proceedings that there was introduced a proposed judicial system with suggested amendments of the one then existing, to be incorporated in the new Constitution as the judicial system of the state. It was proposed to divide the state into convenient judicial districts as had been done under the old Constitution in each of which one or more district judges should be elected. Where, however, the Constitution of 1849 had been silent on the matter of qualifications it was proposed to fix in the new Constitution the following qualifications in the following language for the office of district judge:

> "Sec. 18. No person shall be eligible to the office of District Judge unless he be learned in the law and has attained the age of thirty-five years; and who has not, for five years next preceding his election, been a resident of the district, and a citizen of the United States and of this State."

Similar qualifications were proposed for the continued office of county or probate judge, the stated age requirement being thirty years instead of thirty-five. The proposal was referred to the committee. It is thus apparent that from the first the Convention was considering fixing requirements for judicial offices and of course this was done by men who were well aware that this in itself was a departure from the existing Constitution. The reference to superior courts and the proposed change from district courts first appears on page 249; and again, and as to these new offices then being considered, there was (page 393) a proposal that the qualifications should be stated as follows:

> "No one shall be eligible to the office of Justice of the Supreme Court unless he be at least thirty-five years of age, and shall have been admitted to practice before the Supreme Court of the State; *and no one shall be eligible to the office of Judge of a Superior Court unless he be at least thirty years of age, and shall have been admitted to practice before the Supreme Court of the State.*" (Emphasis added.)

The matter of qualifications for judicial office was the subject of extensive and at times almost vitriolic debate. The following appears on page 1002:

> "Mr. Shurtleff. Mr. Chairman: I have a substitute for section twenty-four.
>
> "The Secretary read:
>
> " 'No one shall be eligible to the office of Justice of the Supreme Court, or of the office of Judge of a Superior Court, unless he shall have been admitted to practice in the Supreme Court.' [Note this would have eliminated age qualifications.]
>
> "Mr. Shurtleff. * * * I see nothing in the history of this State that requires that there should be a limitation upon the age of those who are to be eligible to that office. One of the members of the Judiciary Committee, who I am sorry to see is absent now, held the office of Chief Justice when he was only twenty-nine years of age—at least of Justice, and he was made Chief Justice when thirty-one. Another distinguished jurist of this State, long since passed away, Hugh Murray, was called to the Supreme bench at the early age of twenty-seven, and officiated as Chief Justice at twenty-nine. * * * I think, therefore, it is unwise to make this limitation. Nobody claims that young men have been put in to the detriment of public interest. We hear no complaint, and I think it would be unwise to make this restriction. * * *

"Mr. White. Mr. Chairman: I wish to say a word in favor of the young men. This is not the first, it is the third attempt to strike at the young men. There is no instance in the State where young men have been elected to office and failed in the discharge of their duties on account of their age, and I am opposed to putting any barrier in their path of advancement."

After discussion the amendment was adopted. It excluded any age requirements in the constitutional statement of qualifications for judicial office. In Volume 3 of the Proceedings the following appears under date of February 12, 1879: "Report of the Committee of the Whole on the article on the Judiciary". (Page 1350.) The Secretary read: "Sec. 24. No one shall be eligible to the office of Justice of the Supreme Court, or to the office of Judge of a Superior Court, unless he shall have been admitted to practice before the Supreme Court of the State." An amendment was offered by Mr. McCoy to strike out the words: "or to the office of Judge of a Superior Court". Debate followed. "Mr. McCoy. The reason I offer this is that in some counties they have no lawyers eligible to the office under this provision. Mr. Hager. * * * [B]efore a man should be allowed to occupy the position, he should have devoted himself to the profession and have risen, as other men have, to the proper point. Suppose you allow any citizen in the county to become a judge. Why, it would not be whether he is the best qualified for the place, but rather, whether he is the most skillful politician." "Mr. Schell. * * * I hope this motion will be voted down. The gentleman says, if the people want to elect an incompetent man, that is their look out, and we have nothing to do with it. I say not. It is a matter in which every citizen of this State is interested. He is paid out of the State treasury, in part, and every citizen in this State has a right to go into that Court and have his claim settled. * * * It is an outrage upon decency to strike out this qualification." The motion to strike was lost. The record of the Proceedings shows that on February 25th there was offered an amendment to the proposed section 23 of Article VI of the Constitution to amend the proposed qualification of admission to practice before the Supreme Court to admission to practice before "a Court of Record". Mr. Tinnin spoke as follows: "Mr. President: It has been ascertained since this article was passed to its present stage that there are many counties in this State that have no lawyer who is licensed to practice in the Supreme Court, and under this present system it would really be impossible in these counties to carry out the scheme as it now stands. As a matter of justice to the people in the several counties in this State, that are situated far from the capital, this amendment should be adopted. It will not in any way injure the interests of the State. These lawyers will be fully as competent to discharge the duties of the position as those who have license to practice in the Supreme Court." Mr. Belcher addressed the Convention: "Mr. President: It may be that in several counties there are lawyers who have never been admitted to practice before the Supreme Court and have practiced before the District Courts; but as it has been said in this Convention before if you are seeking somebody to perform special duties and special business, you seek somebody who is qualified to perform such duties. * * * You may say that there are lawyers who are fit to be admitted and who are not so. I say if there are such, let them come and get admitted to the Supreme Court. Why not? If there be in Siskiyou, or Trinity, somebody who wants to be elected Judge of a Superior Court, and who has not been admitted to practice before the Supreme Court, why not let him come if he is competent? No lawyer should be on the bench when he is not fit to appear before the Court to which his case may go. * * *" The discussion ranged wide and included the challenge to the requirement that eligibility even on the Supreme Court should require admission to practice. In the end the qualifications heretofore stated were adopted.

These debates show that the matter of qualification to hold judicial office, and particularly with regard to the newly-created office of superior court judge, were the subject of much consideration by the Convention; that though after the proposed creation of the superior court had been before the Convention there was no debate expressly upon the matter of a residential requirement, nevertheless, before that stage had been reached, and while the Convention was considering the old classification of district courts, a proposal to provide a residential requirement for those courts never contained in the Constitution of 1849 was presented. The record of the Proceedings does not disclose specifically what happened to this residential requirement. But no such qualification appears after the system of superior courts was hit upon. In view of a residential requirement having once been proposed, it is only fair to assume that the omission of such a requirement in the final draft was not accidental, but purposeful. We see it was recognized that in some of the counties there would be few lawyers admitted to practice before the Supreme Court who would be eligible to be judges and in some counties it was suggested that there would be no person so qualified. Indeed, that is the situation which is closely approached, if not attained, in some of the counties today.

The challenged legislation, while purporting to impose a residence qualification as a prerequisite to election, does not so limit gubernatorial appointments to fill vacancies and often the governors of the state have appointed members of the bar to the office of superior court judges to fill such vacancies though the appointees had never resided in the counties to which they were thus called.

[4] It is our view that the Constitution having originally stated the qualifications for the office of judge of the superior court and having from time to time either reenacted these qualifications without material change or changed them to require, as presently, a term of practice in addition to admission to the bar, it has at all times so fixed those qualifications as to render it beyond the power of the legislature to add or detract therefrom and that, therefore, the challenged legislation is unconstitutional. The situation presented then upon this record is this: Purporting to act under Elections Code Section 2900, Mr. Piches asserted to the Superior Court of Placer County that the respondent County Clerk was wrongfully intending to place upon the primary ballot the name of petitioner here; that this wrong consisted in the alleged fact that he had not resided in Placer County during the two years preceding the date of the primary election. It is our view this petition wholly failed to state any cause for proceeding under said Section 2900 and that the act of the Superior Court in ordering that, for the asserted reason, the name of petitioner must be omitted from the primary ballots was an act in excess of jurisdiction reviewable herein.

For the reasons given, the order of the Superior Court must be and it is hereby annulled.

SCHOTTKY and PEEK, JJ., concur.



142 Cal.App.2d 137

SAN GABRIEL VALLEY READY-MIXT, a corporation, and San Gabriel Foothill Ready-Mixt, a corporation, Plaintiffs,

v.

Henry A. CASILLAS, Defendant and Appellant,

San Gabriel Valley Ready-Mixt, a corporation, Respondent.

Civ. 21490.

District Court of Appeal, Second District, Division 3, California.

June 8, 1956.

Rehearing Denied June 22, 1956.

Action for unpaid balance upon concrete sold and delivered by plaintiffs to defendant. The Superior Court of Los An-

geles County, Harold P. Huls, J., rendered judgment for plaintiffs, and defendant appealed. The District Court of Appeal, Shinn, P. J., held that evidence was sufficient to support finding that, due to insufficiency of supply of concrete in area, parties had abandoned written contract and substituted oral agreement for sale at higher price.

Judgment affirmed.

1. Novation ⇐12

To prove novation, seller was required to establish agreement with buyer to abandon and extinguish written contract and to substitute new and valid contract, subject to all rules concerning contracts in general. West's Ann.Civ.Code, §§ 1530–1532.

2. Novation ⇐1

Though buyer orally agreed to pay more than contract price for future deliveries of concrete, in absence of agreement to substitute oral contract for written contract, buyer's agreement to pay increased price would be without consideration.

3. Novation ⇐4

Buyer's oral agreement to pay more than contract price for future deliveries of concrete, without more, would be insufficient to effect novation.

4. Novation ⇐13

Where parties discontinued performance of written contract upon seller's notification that it could no longer supply concrete at contract price, and buyer orally agreed to pay more than contract price for future deliveries of concrete, question for trial court in action by seller for such increased amount, was whether each of parties intended, by discontinuing performance and entering into new arrangement to release other and to be released from written contract.

5. Novation ⇐7

In determining whether parties effected novation upon seller's notification that it could no longer furnish concrete at contract price and buyer's subsequent oral agreement to purchase concrete at higher price, intention of parties would be controlling.

6. Novation ⇐13

Question of intention of parties would be one of fact, in determining whether parties intended and therefore did effect novation of written contract to sell and buy concrete at certain price.

7. Appeal and Error ⇐989

The District Court of Appeal has no jurisdiction except as to questions of law.

8. Appeal and Error ⇐996

The District Court of Appeal is bound by findings that are based upon reasonable inferences of fact.

9. Sales ⇐150(1)

The law will not permit one to avoid obligation to sell and deliver property upon sole ground that due to fluctuating supply and prices he would lose money by fulfilling obligation.

10. Sales ⇐183

Where parties entered into written contract whereby one would sell and deliver and other would buy concrete at certain price, even though prevailing prices of concrete in area subsequently fell below contract price, buyer would nonetheless be bound by contract to pay contract price.

11. Sales ⇐93

Where seller notified buyer that because of shortage of supply it could no longer furnish concrete at contract price, and buyer said that he would and did buy concrete elsewhere, if there was mutual understanding that buyer could and would buy concrete elsewhere and that neither party would demand further performance of contract by other, abandonment of contract would have been effected.

12. Novation ⇐4

Where parties, who had abandoned written contract whereby one was to sell and other to buy concrete at certain price, entered into new oral contract for sale and purchase at higher price, parties thereby effected novation.

13. Novation ⇐12

In action for unpaid balance upon concrete sold and delivered by plaintiffs to

defendant, evidence was sufficient to support finding that, due to insufficiency of supply of concrete in area, parties had abandoned written contract and substituted oral agreement for sale at higher price.

14. Sales ⇐365

In action for unpaid balance upon concrete sold and delivered by plaintiffs to defendant, findings, though contradictory, were sufficient to support judgment for plaintiffs, since findings, which were made by reference to certain paragraphs of pleadings, and findings favorable to defendant were no doubt prepared by counsel inadvertently, and would be disregarded where opposite to other specific findings which supported judgment.

15. Trial ⇐397(2)

In action for unpaid balance upon concrete sold and delivered by plaintiffs to defendant, absence of direct finding as to terms of oral agreement found to have been substituted for prior written contract was not error in view of finding of given number of yards sold and delivered at certain price.

16. Trial ⇐397(2)

In action for unpaid balance upon concrete sold and delivered by plaintiffs to defendant, findings in favor of plaintiffs upon alleged oral agreement in substitution of prior written contract effectually disposed of defendant's cross-complaint for damages for breach of original written contract, and precluded existence of error in respect to alleged insufficiency of findings in that regard.

Clyde P. Harrell, Jr., Woodland Hills, for appellant.

Paul T. Erskine, Alhambra, for respondent.

SHINN, Presiding Justice.

San Gabriel Valley Ready-Mixt, respondent, recovered judgment against Henry A. Casillas, appellant, in the amount of $2,924.67 as the balance unpaid for concrete sold and delivered to defendant.

Responsive to the allegations of the complaint the court found that on or about January 21, 1953, the parties entered into a written contract by which plaintiff agreed to furnish concrete for the construction of 307 houses, the quantity to be approximately 6,140 cubic yards at $9.45 per yard. The first delivery was made on or about February 2, 1953; April 21, 1953, by mutual oral agreement, the written contract was abandoned and the parties orally agreed upon the terms of a new contract under which the amount of concrete to be delivered would be only some 800 cubic yards and the price to be paid for the same $11.52 per yard; that the oral contract was substituted for the written one; prior to April 21, 1953, plaintiff delivered 125 cubic yards at $9.52 per yard; through September 1, 1953, plaintiff delivered 704 cubic yards at $11.52 per yard and defendant incurred a further indebtedness to plaintiff in the amount of $1,021.92 for "piers, sales tax, cartage and standby time." The total amount earned by plaintiff was $10,315.61 of which defendant had paid $7,390.94. It was further found that the written contract was abandoned and abrogated on or about April 21, 1953. The findings as to quantities delivered were in accordance with stipulations at the trial. It was also stipulated that the only factual issue was whether the written contract had been abandoned and a new contract substituted in its place. This is the principal question on the appeal, defendant contending that there was insufficient evidence to justify the finding of a novation. The findings are criticized in other particulars.

[1] In order to prove a novation it was necessary for plaintiff to establish an agreement with defendant to abandon and extinguish the written contract and to substitute therefor a new and valid contract, Civ. Code, §§ 1530, 1531, subject to all the rules concerning contracts in general, § 1532.

There was evidence of the following facts: In March, 1953, De Martino, a salesman for San Gabriel Foothill Ready-Mixt, agent of San Gabriel Valley Ready-Mixt, told appellant there would be a shortage of cement and that they would be unable to meet defendant's demands except with cement imported from the north, and that they could not continue to furnish the same at

the contract price, whereupon defendant replied "To hell with it; I will get it from someone else." During the following two weeks defendant purchased concrete from Consolidated and Jewel City. At that time cement shipped from the north was being sold locally at from $11.52 to $12.50 per yard. After a discussion of prices defendant requested De Martino to speak to Rodeffer, owner of San Gabriel Valley, and said that if the latter would come down in his price $1 per yard, to $11.52, defendant might buy from plaintiff. Shortly thereafter defendant was advised by De Martino that deliveries would be made at $11.52 per yard and defendant stated he would purchase the same at that price. Deliveries started immediately thereafter and were continued into the month of September. Plaintiff furnished statements twice a month showing quantities delivered, all of which were priced at $11.52 per yard, except for errors during the months of June and July when certain deliveries were inadvertently charged at $12.52 per yard. Defendant called attention to the errors and they were corrected. For the quantities so delivered defendant paid $128.12 on June 10, 1953, $967.52 on June 27, $4,452.60 on August 10 and $663.16 on August 27. He was fully aware of the prices being charged at the several times deliveries and payments were made. There was evidence that defendant did not object to the price of $11.52 per yard, and while defendant testified that he did make objection we must assume that the court resolved the conflict in favor of plaintiff.

[2–13] Defendant does not and could not deny that he agreed to pay the increased price. His contentions are that he did not abandon the contract or release plaintiff from it, and that therefore his agreement to pay the higher price was without consideration. In the absence of an agreement to substitute the oral contract for the written one defendant's agreement to pay the increased price would have been without consideration. Unquestionably there was an agreement to pay the increased price but this alone would have been insufficient to effect a novation. Western Lithograph Co. v. Vanomar Producers, 185 Cal. 366, 197 P. 103; Grant v. Aerodraulics Co., 91 Cal.App.2d 68, 204 P.2d 683. The question for the trial court was whether each of the parties intended by discontinuing performance and entering into the new arrangement to release the other and to be released from the written contract. There was no express agreement for such releases. The finding that releases were effected, which is implied in the finding of abandonment, rests upon the circumstances and the conduct of the parties from which their intentions were to be inferred. Among those circumstances were the following: Plaintiff informed defendant that it was allocated only three loads of cement per day from the available local supply and that it could not fill defendant's requirements; defendant thereupon pointedly announced that he would buy his concrete elsewhere, and proceeded to do so. This would not necessarily indicate an intention on defendant's part to release plaintiff from its contract. But defendant, finding himself losing money, renewed negotiations with plaintiff for future deliveries at an increased price and paid the same without objection. The question for us is not whether the court could have inferred from these facts that the parties did not agree upon an abandonment of the contract and it may well be that the court would have been warranted in reaching that conclusion. The question is whether the court was required to infer there was no mutual intention to abandon. The intention of the parties was controlling. Producers Fruit Co. v. Goddard, 75 Cal.App. 737, 243 P. 686; Alexander v. Angel, 37 Cal.2d 856, 236 P.2d 561. The question of intention was one of fact and since we have no jurisdiction except as to questions of law we are bound by findings that are based upon reasonable inferences. Douillard v. Woodd, 20 Cal.2d 665, 668, 128 P.2d 6. The law will not permit one to avoid his obligation to sell and deliver property upon the sole ground that due to fluctuating supply and prices, he would lose money by fulfilling them. If the prices had gone below the contract price defendant would still have been bound by his contract. That the supply fell short and the price increased were events that plaintiff should

have anticipated. Otherwise, such contracts would be worthless. We do not doubt that the trial court took these facts into consideration. Upon the other hand it was reasonable that the court should infer that when the parties agreed that plaintiff would make no more deliveries it was defendant's intention not to require further deliveries by plaintiff and that he considered himself freed from any obligation to accept deliveries if such were tendered. He would have had good reason for treating the agreement as terminated. If there was a mutual understanding that defendant could and would buy his concrete elsewhere and that neither party would demand further performance of the contract by the other, this would have effected an abandonment of the contract. Entering into a new oral contract under those circumstances would have effected a novation. Hooke v. Great Western Lumber Co., 54 Cal.App. 681, 202 P. 492; Haberman v. Sawall, 72 Cal.App. 576, 237 P. 776; Sistrom v. Anderson, 51 Cal.App.2d 213, 124 P.2d 372. We cannot say, as a matter of law, that the parties did not have an intention to substitute the oral contract for the written one.

[14] Defendant criticizes the findings as being contradictory and insufficient. The criticism that they are contradictory is well-founded but when they are considered so as to make good sense they are not in our opinion insufficient. The court found the parties entered into an agreement under which plaintiff was to furnish 6,140 cubic yards of concrete at $9.45 per yard, as alleged in the complaint. The same facts were alleged in defendant's answer and the court found all these allegations to be untrue. They were also alleged in the cross-complaint filed by defendant and were found to be untrue. The court also found it was not true that after April 21, 1953, plaintiff failed to deliver concrete at $9.45 per yard or at less than $11.52 per yard, although it also found that 704 cubic yards were sold and delivered at $11.52 per yard which, of course, was a fact that was admitted by the pleadings and in the stipulated facts. We would treat these conflicts seriously were we not convinced from past experience with findings made by reference to certain paragraphs of the pleadings that the findings which are in favor of defendant were no doubt prepared by counsel while in a state of listless abstraction and unawareness of the facts to which they relate or their significance. We, therefore, disregard the findings which, due to obvious inadvertence and inattention, are the opposite of other specific findings which fully support the judgment.

[15] It is true, as defendant contends, that there was no direct finding as to the terms of the oral agreement but there is a finding of a given number of yards sold and delivered at $11.52 per yard from which it is to be understood that the parties agreed on that price.

[16] Defendant had a cross-complaint for damages based upon alleged breach of the original contract by plaintiff. The findings in favor of plaintiff effectually dispose of the claims asserted by cross-complaint.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.



142 Cal.App.2d 114

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Arvie Dean HENRY, Defendant and Appellant.

Cr. 5541.

District Court of Appeal, Second District, Division 3, California.

June 7, 1956.

Rehearing Denied June 21, 1956.

Hearing Denied July 5, 1956.

Defendant was convicted of statutory rape. The Superior Court of Los Angeles County, Charles W. Fricke, J., entered judgment on the verdict and entered an order denying defendant's motion for new trial, and defendant appealed. The District Court of Appeal, Parker Wood, J.,

held that alleged confession of defendant was inadmissible because evidence failed to prove the corpus delicti, and that Superior Court abused its discretion in denying motion for new trial on ground of newly discovered evidence.

Judgment and order reversed, and cause remanded for new trial.

1. Criminal Law ⇐517(4)

The corpus delicti must be established before a confession of a defendant is admissible in evidence.

2. Criminal Law ⇐517(4)

The corpus delicti must be proved by evidence outside confession of defendant, before confession is admissible, but prosecution is not required to establish the corpus delicti by such proof as is required to establish guilt.

3. Criminal Law ⇐517(4)

In order to lay a foundation for the admissibility of a confession, it is not necessary that the corpus delicti be proved beyond a reasonable doubt, and slight or prima facie proof is all that is necessary.

4. Criminal Law ⇐517(4)

In order to lay a foundation for admissibility of a confession, the corpus delicti may be proved by circumstantial evidence.

5. Criminal Law ⇐517(4)

In order to lay a foundation for admissibility of a confession, proof of the corpus delicti does not necessarily require proof that the crime was committed by the defendant, but it is necessary to prove that the crime was committed.

6. Rape ⇐4

An essential element of the crime of rape is that the female is not the wife of the accused. West's Ann.Pen.Code, § 261.

7. Rape ⇐51(2)

In establishing the corpus delicti of the crime of rape, prima facie proof of the nonmarriage of prosecutrix to defendant is required. West's Ann.Pen.Code, § 261; West's Ann.Code Civ.Proc. § 1833.

8. Rape ⇐36

In statutory rape prosecution, burden was on prosecution to prove that defendant was the perpetrator of the rape. West's Ann.Pen.Code, § 261, subd. 1.

9. Criminal Law ⇐517(4)

Where, excluding alleged confession of defendant, there was no testimony in statutory rape prosecution, that prosecutrix was not married to some one at time of alleged offense, and there was no testimony that she had had sexual intercourse with defendant, corpus delicti was not proved, and alleged confession was not admissible in evidence, though prosecutrix, who was the daughter of defendant, was only 13 years of age, and when called as a witness she gave as her surname the same surname as defendant and used word "Miss" with such surname, and stated that she had not been married to defendant, and admitted she was living at the home of defendant at time of alleged rape. West's Ann.Pen.Code, § 261, subd. 1; West's Ann. Code Civ.Proc. § 1833.

10. Criminal Law ⇐938(1)

Trial court abused its discretion in refusing to give defendant a new trial of statutory rape prosecution, on ground of newly discovered evidence consisting of an affidavit made by prosecutrix, who was defendant's daughter, stating that she had never had sexual intercourse with defendant, that the act of intercourse, which resulted in the birth of her baby, was had with a 17 year old boy, whom she did not desire to name, and that she had named her father as the father of her child because she was angry with him and because she was just coming out of the influence of ether. West's Ann.Pen.Code, § 261, subd. 1.

Ellery E. Cuff, Public Defender, and Richard F. Bird, Deputy Public Defender, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and James L. Mamakos, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

In an indictment defendant was charged with violating section 261, subdivision 1, of the Penal Code, in that, on April 24, 1953,

he unlawfully had sexual intercourse with Vickie Henry, a female person thirteen years of age and not the wife of defendant. In a jury trial, he was convicted. He was sentenced to state prison. He appeals from the judgment and the order denying his motion for a new trial.

Appellant contends that the court erred in receiving evidence of his purported written confession; and that the verdict is contrary to the evidence.

Section 261 of the Penal Code provides, in part: "Rape is an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, under either of the following circumstances: 1. Where the female is under the age of eighteen years; 2. * * *."

Vickie Henry, called as a witness by the People, was fifteen years of age at the time of the trial. The deputy district attorney asked her: "Are you presently or have you ever been married, Miss Henry?" She replied: "I refuse to answer that question on the grounds of incrimination." The judge told her that she would have to answer the question. The deputy district attorney then asked her if she would answer the question. She replied: "I refuse to answer it." The judge said: "Answer the question: are you married?" The witness did not answer. Then the judge said: "Did you ever get married?" The witness did not answer. The judge said: "This witness will be remanded to custody of the Juvenile Court, insubordinate."

She then testified that she was fifteen years of age, was born April 2, 1941 (1940); she was in grade A9 at school; defendant is her father; she was living with her father in April, 1953; in January, 1954, she was in the General Hospital and she gave birth to a baby; the baby was alive at the time of the trial; the act of sexual intercourse which was responsible for the baby occurred in 1953; she did not have more than one act of intercourse with the person who was the father of the baby; she was thirteen years of age at that time; she has not been out of Los Angeles County since the early part of 1953; she has not been married to the defendant; she has been living in the family home (home of her father) since she left Juvenile Hall.

Edna Henry, the mother of Vickie, testified that Vickie was born April 2, 1940.

Officer Brantley testified that he had a conversation with defendant on January 28, 1954, at a police station; Officer Hannibal was also present at the conversation; the statements of the defendant were freely and voluntarily made, without promise of reward or immunity; the statement of defendant was reduced to writing by the witness (Officer Brantley), who wrote the statement verbatim; the written statement was shown to defendant, who was asked to read, correct, and sign it. The witness was then asked, "Did he do so?" The witness replied, "He did." That document, "a penciled document bearing a pen-and-ink signature Arvie D. Henry," was shown to the witness, and he testified that the penciled portions of it, above defendant's signature, were in the witness' handwriting, and that the portion below that signature—the time, date, address, name of witness and name of witness' partner—was also in the witness' handwriting; he saw the signature of defendant placed on that document.

Thereupon the deputy district attorney offered the document in evidence. Defendant objected to the offer, stating that the corpus delicti had not been established. He argued that there was no evidence that an act of intercourse took place between the girl and someone to whom she was not married. The objection was overruled, and the document, which was read in evidence (Exhibit 1), was as follows:

> "The first act of sexual intercourse I had with Vickie was in the first part of May, 1953. It was in the morning of a weekday. I don't remember the exact day, but it was in the morning. My wife had gone to work and Vickie got in bed with me. We are a very close family, and the children often got in bed with me. I was fondling her and she asked me what I was doing. Then I asked her didn't she want me to do that. She said she didn't know. Then I went ahead and had an act of sexual intercourse. I don't think that I got more than about one-quarter

of an inch of my penis in her that time. The second and third acts were complete, and I experienced an orgasm on all three. It is possible that her child is mine but I'm not sure. Signed, Arvie D. Henry. 3:50, 1/28/54. Newton detectives, Officer Brantley and Hannibal."

On cross-examination, Officer Brantley testified that before defendant answered any of the officer's questions, defendant said, in effect, that he would rather talk to his wife before he went into this; the officer told him that it was customary in the officer's work to complete his investigation before he would permit a defendant under arrest to interview his family; he (officer) did not tell defendant he could not see his wife until he signed the document.

Defendant testified that he did not have intercourse with Vickie at any time; he did not tell Officer Brantley or any police officer that he had sexual intercourse with Vickie; he signed Exhibit 1; the officer promised him—they had an agreement that defendant could see his wife and talk to her if he signed the paper; he did not have any idea what it was he was signing; after he had signed it, the officers told him that his daughter had said he was the father of her baby. On cross-examination he said he saw the officer writing a statement; after he had finished writing, the officer handed the paper to defendant and said that if defendant would sign it he could speak with his wife; defendant signed the paper without reading it; the statements in the document are not true.

Defendant made a motion for a new trial on the following grounds: newly discovered evidence; court erred in receiving evidence of purported confession of defendant, because the corpus delicti had not been proved; and insufficiency of the evidence. In support of the motion on the ground of newly discovered evidence, defendant filed an affidavit made by Vickie Henry. That affidavit stated as follows:

"1. I [Vickie Henry] was a witness for the People at the trial of the above-entitled cause, in which it is charged that the above-named defendant, who is my father, had sexual intercourse with me on or about April 24, 1953.

"2. I did not then and never had sexual intercourse with the defendant, my father.

"3. The act of sexual intercourse, which resulted in the birth of my baby in January of 1954, was had with a 17-year-old boy of my acquaintance. I do not desire to name this person, for I have kept him out of this case thus far and desire to continue to do so, even though I have been requested to name him by name. One of such requests has come recently from the Public Defender's office through its investigating staff.

"4. When I named my father as the father of my child, I was angry with him, and, also, I was just coming out from under the influence of ether, (I had been under ether for three days) and did not realize what severe punishment he might receive as the result of my naming him. It was because of my anger toward my father, and my desire to protect my boy friend, that I named my father at that time.

"5. To me, my father is the best father that ever lived. I regret the falsehood I have told in this matter about him, and wish to retract it and to see justice done."

[1–5] The corpus delicti must be established before a confession of a defendant is admissible in evidence. Hall v. Superior Court, 120 Cal.App.2d 844, 847, 262 P.2d 351. It is to be noted, however, that it was held in People v. Cowling, 6 Cal.App. 2d 466, 471, 44 P.2d 441, that, under circumstances where there was no prejudice to defendant, it was not error to receive defendant's admissions in evidence prior to establishing the corpus delicti. The corpus delicti must be proved by evidence outside the confession of a defendant, but the prosecution is not required to establish the corpus delicti by such proof as is required to establish guilt. People v. Hudson, 139 Cal. App. 543, 544, 34 P.2d 741. In order to lay a foundation for admissibility of a confession, it is not necessary that the corpus delicti be proved beyond a reasonable

doubt. People v. Davis, 47 Cal.App.2d 331, 335, 117 P.2d 917. "Slight or *prima facie* proof is all that is necessary." People v. Hudson, supra, 139 Cal.App. 544, 34 P.2d 742. The corpus delicti may be proved by circumstantial evidence. People v. Ives, 17 Cal.2d 459, 463, 110 P.2d 408. Proof of the corpus delicti does not necessarily require proof that the crime was committed by the defendant, People v. Ward, 134 Cal. 301, 306, 66 P. 372; but it is necessary to prove a crime was committed.

[6–9] An essential element of the crime of rape is that the female is "not the wife of the perpetrator." Pen.Code, § 261. In establishing the corpus delicti of the crime of rape, prima facie proof of the nonmarriage of the female to the perpetrator of the crime is required. "Prima facie evidence is that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence. * * *" Code Civ.Proc. § 1833. A principal question herein is whether there was prima facie proof that Vickie was not married to "the perpetrator." This is an unusual case. (In the usual case there is testimony by the prosecutrix that she has not been married to the defendant and she had sexual intercourse with defendant.) In the present case there was testimony by Vickie that she had not been married to the defendant, but there was no testimony that she had not been married to someone else. The deputy district attorney did not ask her if she had sexual intercourse with defendant. The deputy public defender (counsel for defendant) did not ask her that question. Therefore, as the case now stands—excluding the alleged confession, there was no testimony that the prosecutrix was not married to someone at the time of the alleged offense, and there was no testimony that she had sexual intercourse with defendant. Other than the testimony regarding the alleged confession, there was no testimony indicating who was the perpetrator. Counsel for the People state in their brief that "when an action is sought against an individual it is the implicit contention of the People that such individual committed the proscribed act, or in other words, that the defendant was the perpetrator of the act." It seems to be the argument of counsel for the People that "the perpetrator" of the crime of rape, within the meaning of said section 261, is the person who is charged by complaint, information or indictment with the crime. Counsel for the People assert further that if "the People must show that the prosecutrix was unmarried to whoever was her partner in the sexual act where there is no independent evidence connecting the defendant with the act, the People are burdened with a demand extremely difficult to uphold." The burden, of course, is upon the prosecution to prove that defendant was the perpetrator. It cannot be assumed that defendant perpetrated the crime. Counsel for the People assert that there was prima facie proof of nonmarriage of Vickie, in that, the evidence shows: (1) Vickie, when called as a witness, gave her name as Miss Henry—a surname which was the same as the surname of her father; (2) she had not been married to defendant; (3) Vickie had not been outside Los Angeles County since the early part of 1953; she was living at the home of her father in April, 1953. Counsel for the People also argue that it is extremely improbable that a girl thirteen years of age would have been married. In People v. Gonzalez, 6 Cal.App. 255, 91 P. 1013, defendant, who was convicted of rape, contended that there was no proof that the girl was not his wife. The court said, 6 Cal.App. at pages 257–258, 91 P. at page 1013: "It is admitted that there is no direct evidence that the prosecutrix is not the wife of the defendant. There was no attempt to establish this element of the case, but there is some testimony from which the inference might be drawn that the parties were not married. On the other hand, all the testimony of this character introduced by the prosecution might have been true, and yet such a marriage exist. * * * The age of the girl as testified to by the defendant (thirteen) was not such as to compel the assumption that there was no valid marriage between the parties for this reason. Marriage under the age of legal consent without consent of parent or guardian is made voidable only under our

statute * * *. The circumstances and evidence strongly support the inference that there was no marriage, but we cannot accept or indorse the view that, where there is ample opportunity for the prosecution to prove this element of the crime directly, that indirect evidence will suffice. We feel particularly disinclined to this view as applied to this case, owing to the unsatisfactory character of the evidence upon which the conviction rests." In the present case, notwithstanding the evidence regarding the same surname, not having been married to defendant, not having been outside the county, and living at defendant's home, a marriage between Vickie and someone other than the defendant might have existed. There was not sufficient proof of the nonmarriage of Vickie to establish the nonmarriage element of the corpus delicti, and there was not a proper foundation for receiving the alleged confession in evidence.

Also, it is to be noted that neither the district attorney nor the public defender asked Vickie whether she had intercourse with defendant. Other than the testimony regarding the alleged confession, there was no testimony connecting defendant with the alleged crime. Also, with reference to signing the alleged confession, it is to be noted that the officer admitted that, in response to defendant's request for permission to talk to defendant's wife before he answered questions, the officer told defendant, in effect, that the officer would complete his investigation of the crime before he would permit defendant to interview his family.

[10] Appellant also asserts that the court erred in not granting a new trial on the ground of newly discovered evidence. The alleged newly discovered evidence is stated in the affidavit of Vickie, above quoted, which was filed in support of the motion for a new trial. Respondent asserts that appellant did not use reasonable diligence to discover or produce the purported evidence stated in the affidavit; that before the trial appellant's counsel should have interviewed Vickie, if he had any doubt concerning her testimony; and that he could have interrogated her at the trial (regarding intercourse with defendant). With reference to not asking Vickie, at the trial, if she had intercourse with defendant, counsel for defendant states in effect that since the district attorney did not ask that question, he (counsel for defendant) should not ask the question unless he had information that her answer to the question would be favorable to his client. Vickie was the prosecuting witness, and that fact presupposes that her answer to such a question would be adverse to defendant. There is nothing in the trial record that should have indicated to counsel for defendant that she would have answered as stated in her affidavit. There is nothing in the record that indicates a lack of reasonable diligence on the part of defendant or his counsel in not discovering prior to or during the trial the alleged facts stated in her affidavit. The case of People v. De Coe, 25 Cal.App.2d 522, 77 P.2d 883, wherein defendant (father of the girl) was convicted of rape and his motion for new trial on ground of newly discovered evidence was denied, is factually distinguishable from the present case. In that case the girl made two affidavits before the trial, denying her original story that she had intercourse with her father; and at the trial she denied the statements in her affidavits. A reference to the file on appeal in that case shows that the motion for a new trial was based on a letter sent by the girl to her mother. (A part of the letter had been erased.) The court said, 25 Cal.App.2d at page 525, 77 P.2d at page 885: "At most, the so-called 'newly discovered evidence,' if anything, was just another contradiction and is merely cumulative." In the present case, the girl had not been asked, at the trial, if she had intercourse with defendant and she did not testify to that effect. Her affidavit in support of the motion was not "another contradiction" and was not cumulative. So far as appears from the record, her affidavit was the first information defendant or his counsel had as to the alleged facts stated in the affidavit. Those alleged facts were, of course, very material—they pertained to the main issue in the case, as to which the district attorney (and defendant's counsel) made no inquiry

of Vickie at the trial. Some of the statements in the affidavit were that she never had sexual intercourse with defendant; she had sexual intercourse with a 17-year-old boy; when she named her father as the father of her baby she was angry with her father, she was just coming from under the influence of ether, and she did not realize the severe punishment her father might receive as a result of her naming him; and she desired to protect her boy friend. In denying the motion for a new trial the judge said, in part, that "there is no showing that if she were called [as a witness] she wouldn't pull the Vth Amendment on us again." Of course, there is no assurance as to her demeanor as a witness, but her statements are in affidavit form and it is reasonable to assume that her testimony would include those statements. In any event the defendant should have the opportunity of trying to present the newly discovered evidence for the consideration of the trier of the facts. It was an abuse of discretion not to grant the motion for a new trial.

The judgment, and the order denying the motion for a new trial, are reversed and the cause is remanded for a new trial.

SHINN, P. J., and VALLÉE, J., concur.
Hearing denied; SPENCE, J., dissenting.



142 Cal.App.2d 428

Alice M. BAKER and A. W. Baker, Plaintiffs, Cross-Defendants and Appellants,

v.

Peter VAN DOLZER and Ferol Van Dolzer, Defendants, Cross-Complainants and Respondents.

Civ. 8745.

District Court of Appeal, Third District, California.

June 19, 1956.

Action by vendors to quiet title wherein purchasers brought a cross-action for damages for fraudulent misrepresentations. The Superior Court, Sonoma County, Hilliard Comstock, J., entered judgment for purchasers on their cross-complaint and vendors appealed. The District Court of Appeal, Peek, J., held that evidence established that vendors made fraudulent representations to purchasers concerning the water supply and condition of the premises in question, and that such representations were an important part of the consideration for the purchase.

Judgment affirmed.

1. Fraud ⇐58(1, 2)

In action by vendors to quiet title wherein purchasers brought a cross-action for damages for fraudulent misrepresentations, evidence established that vendors made fraudulent representations to purchasers concerning the water supply and condition of the premises in question, and that such representations were an important part of the consideration for the purchase.

2. Brokers ⇐19, 31

Where a vendor agreed with purchasers to resell certain property for purchasers, acceptance of such agency as a broker bound him to act in the highest good faith towards purchasers and precluded him from obtaining any advantage over them in any transaction connected with the agency by the slightest concealment or misrepresentation, and imposed upon him the duty of disclosing any fact within his knowledge amounting to a disavowal of the trust relationship or an intention to deal with the property to his own advantage or to the disadvantage of purchasers.

3. Vendor and Purchaser ⇐187

Where vendor agreed with purchasers to resell certain property in question and get the purchasers' money out for them, such agreement put purchasers in a position of not having to keep up payments on their contract, and of being relieved of any obligation to assert their claims of fraud against vendor or to rescind their contract on account thereof, and, under such circumstances, vendor was estopped from declaring a forfeiture against purchasers for nonpayment under their contract.

4. Vendor and Purchaser ⇐101

Once a vendor has estopped himself from declaring a forfeiture under the strict terms of a land contract, or waived strict provisions thereof in respect to the time of payments, he may not revive his right to declare a forfeiture without giving unequivocal notice of his intention to do so and a reasonable time and opportunity to comply with the terms of the contract.

5. Vendor and Purchaser ⇐110, 334(1)

Where vendor agreed with purchasers to resell certain property and get purchasers' money out for them, deeding such property, after entering into such agreement, without consideration, to his wife, and having her bring a suit to quiet title, and joining with her on contracting to sell the property to some other purchasers, was a clear violation of trust entitling original purchasers to recover the total of payments on the contract because of such breach of trust, and to a cancellation of the contract.

6. Pleading ⇐236(5)

Granting or withholding of permission to file amendment to pleadings to conform to proof is a matter largely within the discretion of the trial court, and such rule should be liberally construed in order that substantial justice is done.

7. Appeal and Error ⇐959(3)

In the absence of a showing of gross abuse of discretion by trial court in granting or withholding permission to file amendments to pleadings to conform to proof, action of the trial court in such respect will not be disturbed on appeal.

Leonard J. Karsevar, Petaluma, for appellants.

Frank W. Finn, Sebastopol, for respondents.

PEEK, Justice.

This is an appeal by the plaintiffs and cross-defendants from a judgment in favor of the defendants and cross-complainants in an action to quiet title to certain real property situated in Sonoma County. At the conclusion of the trial before the court, judgment was entered in favor of the defendants in the sum of $3,178.24, being the amount of their payments under the contract. The judgment further ordered that a lien be imposed upon the real property as security for the payment of the judgment, and that upon the judgment being duly satisfied the plaintiffs' title be quieted as against defendants. The plaintiffs now appeal contending first, that the evidence was insufficient to support the findings and judgment; second, that there was no rescission as a matter of law; third, that the agreement for the sale of the real property was forfeited by defendants at the time of the alleged rescission; and fourth, that the court erred in allowing defendants to file their second amended cross-complaint to conform to proof. It is our conclusion that none of such contentions warrant interference with the judgment of the trial court. It is our further conclusion that, except as to such deletions, additions or modifications as are necessary for a determination of the questions raised on appeal, the opinion of the trial court correctly treats and disposes of all issues involved. It is therefore adopted as the opinion of this court and is as follows:

* * * * * *

"Plaintiff Alice M. Baker commenced this action against defendants as a simple suit to quiet title. Defendants filed an answer joining issue on all the allegations of the complaint wherein said plaintiff claimed title to the real property described in the complaint. Defendants also filed an amended cross-complaint charging A. W. Baker with fraud in connection with the sale of said property by him to cross-complainants under a written agreement for sale of real estate between A. W. Baker and cross-complainants, executed by the parties and bearing a date of April 12, 1947. The allegations of fraud particularly stressed at the trial were those concerning misrepresentation of the water supply and of the condition of the dwelling house on the premises.

"Both cross-defendants, describing themselves as plaintiffs and cross-defendants, answered the amended cross-complaint admitting the allegations thereof to the effect that A. W. Baker was acting individually and as the authorized agent of Alice M.

Baker, his wife, and the allegations of the cross-complaint respecting the amounts which had been paid by cross-complainants on account of the contract as well as the dates of payments. All the allegations of fraud were denied.

[1] "The evidence disclosed that A. W. Baker had, without a valuable consideration, conveyed the premises to Alice M. Baker, his wife, by deed executed and acknowledged one day prior to the verification of the complaint and recorded five days after the filing of the complaint.

"Both cross-complainants testified unequivocally that prior to signing any writing in connection with their purchase or making any deposit, A. W. Baker stated and represented to them that the well on the property was a good one and that there was plenty of water; that after their making a deposit of $500 and signing a memorandum of agreement on the morning of April 12, 1947, to purchase the property for $9,600, payable in installments with interest as provided therein (cross-complainants Exhibit "A"), Baker came to the premises on the afternoon of said date and stated that he had forgotten to tell them that the well was on adjoining property and that three contiguous neighbors, including the occupants of the premises in question, all used the water but there was plenty for all, at which time they inquired more particularly as to the supply and he replied that there was plenty for all the users and enough to give away, whereupon Baker added, in pencil, to the memorandum of agreement the words 'Community all use water all pay upkeep.' Cross-complainants testified that they believed said representations and relied upon them in making the purchase and would not have purchased had they not so believed and had they known that the water supply was insufficient.

"Baker admitted that he had represented that the well was a good one and that there was plenty of water. Later on in his testimony he qualified this to some extent by asserting that he had told them there was plenty of water 'except for irrigation.'

"The evidence in support of the allegations of the cross-complaint with respect to fraud concerning the water supply is clear and convincing and preponderates strongly in favor of cross-complainants. Defendants testified that the well went dry and the pump commenced to suck air about July or August, 1947, and thereafter until the rains commenced in the fall there was an insufficient amount of water for the household even with the utmost care and economy in conserving its use and none whatever for the other normal purposes of the three-acre tract, notwithstanding one of the neighboring users had drilled a new well and was making no draft upon the system connected to the property in question. The testimony of Baker to the effect that he had always had plenty of water and no trouble at all with the water supply was substantially overcome and discredited, not only by the overwhelming testimony concerning a shortage of water in the system in the summer season both before and after 1947, but also by the very clear and convincing testimony of the witness Dorothy C. Simpson, a school teacher having no interest in the outcome of this litigation, residing on adjoining property, who had in 1944 and prior thereto been a tenant on the 14 acres owned by Baker since approximately 1943 and subdivided by him, of which the three acres in question is one of three parcels all served by said water system at the time of the sale to cross-complainants. Mrs. Simpson testified that she lived on the Imelde property (14 acres) for a couple of years prior to early 1944; that she had occupied the only dwelling house then on the premises; that in November, 1943, Baker came to her and announced that he had bought the property; that she had several conversations with Baker concerning the water supply; that about two weeks after Thanksgiving 1943, in the tank house on the premises, Baker had asked her how good the water supply was, and that she had told him they had had trouble early that summer in that it had taken from two and one-half to three months to fill the tank by steady pumping, and the supply was so low that the pump sucked air, and that on a later occasion, near a Wagner apple tree on the premises, she had told Mrs. Baker that the water supply was not good for a

place of that size and that they had had to watch it and pump carefully. It was established that at the time of said conversations there was only one dwelling house on the entire 14 acres; that there was only one kitchen faucet and no bathroom or toilet in the house, and no lawn or garden for lack of water. This witness further testified that her present property adjoined the rear end of the Baker property, and that they had drilled a well thereon in May, 1944, after which, about June, 1944, Baker had come to her and in the presence of her husband and her mother stated that he was short of water and would like to draw water from her well and pipe it to his premises for his livestock. Mrs. Simpson also testified that the water in the well in question was low and insufficient for the use of the premises in 1942 and 1943, and that notwithstanding there was always a good wind for the windmill there were times when the well pumped dry and they had to carry water.

"In view of the foregoing it must be held that the testimony of cross-complainants, corroborated by that of Mrs. Simpson, and partially corroborated by the admissions of Baker himself, clearly establishes fraud in respect to the water supply. There is no doubt that the condition of the water supply and representations in reference thereto were an important and material part of the consideration for the sale.

"In respect to the allegations of fraud concerning the house being new and never having been occupied, the evidence, while not so overwhelming as that on the subject of the water, still fairly preponderates in favor of cross-complainants. They both testified that they commented to Baker that the house appeared to be brand-new, to which he replied in the affirmative and stated that it had never been occupied. Baker's testimony was that he had only replied that it had never been rented, and that he told them it was built out of an old blacksmith shop. The conflict in this testimony must be reconciled in favor of the cross-complainants, not only because the testimony of Baker was substantially impeached in respect to his denial of any knowledge of a shortage of water, but likewise by his own indefiniteness and inconsistencies in other portions of his testimony. For example, at one point, he testified that he truly had no recollection whatever of making the penciled notation on the memorandum of agreement, and, at another, stated he was certain that he had written this on the agreement at his office. At one juncture, he stated he had no recollection whatever of agreeing to list the property, or to sell it for the Van Dolzers in order to get their money out of it for them, yet plaintiffs' Exhibit No. 2 in evidence clearly shows that such a listing was made under date of September 15, 1947. He had no recollection of any complaint about the well, nor of having written the $25 check in evidence which was shown to have been used to repair windmill damage existing prior to the sale. His testimony was in conflict with respect to the state of completion of the house at the time of sale, in that he first testified that at said time they had just about gotten through building or rebuilding it, then later said that it had been finished about a month before the sale, and at still another point admitted that over a couple of months period he and his wife, his son-in-law and his wife, and his mother-in-law had all occupied the house for different brief periods of time.

* * * * * *

"The evidence brought out and established to the satisfaction of the court that cross-complainants, promptly after the discovery of the shortage of water and of the fact that the house was not new, and that it had been occupied, complained of said matters to A. W. Baker and demanded that these matters be made right or that they be repaid their money, and that at said time (the date of which is convincingly established as September 15, 1947, when the listing and authority to sell was signed by Peter Van Dolzer and accepted in writing by A. W. Baker, as shown by plaintiffs' Exhibit 2 in evidence) Baker stated he could not return their money but would get it out of the deal for them by reselling the place, and that he accepted an agency for that purpose and assumed the trust involved therein, which was never by him disavowed or terminated prior to the time when he conveyed the legal title, which had remained

of record in his name, to his wife, and had her commence the action to quiet title.

"Obviously, it is the theory of the Bakers that when the Van Dolzers ceased making payments on the contract about April 1, 1948, they forfeited all rights thereunder. This position is not tenable under the circumstances of this case.

"* * * As late as April 22, 1948, the attorney for the Bakers wrote the attorney for the Van Dolzers as follows:

> "'Mr. Baker is merely the agent authorized by Mr. Van Dolzer and on behalf of the Van Dolzers. He could not offer it for sale on his own behalf nor in any way except as the authorized agent of Van Dolzers. So far as I know Mr. Van Dolzer still has his contract with Baker and if he wishes to cancel it he can do that in accordance with the authority to sell which he gave to Mr. Baker. It must therefore be specifically understood that the Bakers do not, can not and would not proceed in any matter concerning the sale of the property save and except as the agents of the Van Dolzers.'"

[2] "This is corroborative of the continuance of the agency and trust relationship which arose under the facts connected with the listing of September 15, 1947. There is no evidence that such agency was ever terminated or that Baker ever withdrew from the trust assumed by him when he agreed to resell the property and get the Van Dolzers' money out for them. On the subject of this agreement, the court has not overlooked the fact that Baker denies its existence, but here again the evidence preponderates in favor of the Van Dolzers' claim. Not only is Peter Van Dolzers' testimony corroborated by the existence and terms of the written listing agreement, but it is in no way substantially contradicted by Baker who, at one point in his testimony, stated he had no recollection of any complaint about the well, but at another impliedly admitted such complaints when he testified, 'I turned him over to Artie. I never listen to complaints.' The acceptance of the agency by Baker bound him as a broker to act in the highest good faith towards his principal and precluded him from obtaining any advantage over his principal in any transaction connected with the agency by the slightest concealment or misrepresentation, and imposed upon him the duty of disclosing any fact within his knowledge amounting to a disavowal of the trust relationship or an intention to deal with the property to his own advantage or to the disadvantage of his principal. 4 Cal. Jur. 569; Restatement—Trusts, Volume 1, page 431; paragraph 170; Restatement—Trusts, Volume 1, page 553, paragraph 205; Langford v. Thomas, 200 Cal. 192, 252 P. 602.

[3–5] "Not only was Baker precluded by his trust relationship from taking any advantage of his principal during the continuance thereof, but he was also, aside from the trust relationship, estopped under all the circumstances from declaring a forfeiture against the Van Dolzers. While time was of the essence of the written agreement, all payments were made and accepted after the date upon which they strictly fell due. In addition to this, the agreement to sell the property and get the Van Dolzers' money out for them put them in a position of not having to keep up the payments and of being relieved of any obligation to further assert their claims of fraud or to rescind the contract on account thereof, so long as they relied upon and were lulled into a sense of security by the promise and continued efforts of Baker to adjust and settle the controversy by selling the property for them. Once a vendor has estopped himself from declaring a forfeiture under the strict terms of an agreement such as that with which we are dealing, or waived the strict provisions thereof in respect to the time of payments, he may not revive his rights to declare a forfeiture without giving unequivocal notice of his intention to do so and a reasonable time and opportunity to comply with the terms of the contract. (25 Cal.Jur. 617, et seq.)

"Plaintiffs and cross-defendants have failed to establish a good title in themselves against defendant and cross-complainants. While they show that the legal record of title stood in the name of Alice M. Baker at the time of the commencement of the

action, they failed to establish grounds for the removal of the cloud upon the title created by the contract with the Van Dolzers and their rights thereunder. Only by restoring to the Van Dolzers the amounts paid under the contract can the Bakers' title be cleared. The acts of Baker in deeding the property, without consideration, to his wife, having her bring this suit, and then joining with her in contracting to sell it to Marvin LaMar and Lyndal A. LaMar, his wife, as shown by the evidence, was a clear violation of trust entitling the Van Dolzers to recover any loss in the value of the trust estate, namely, the total of their payments on the contract, resulting from the breach of trust; further, the establishment of the fraud in defense of the suit to quiet title and under the affirmative allegations of the cross-complaint entitles the Van Dolzers to recover the amount of their payments under the contract, and to a cancellation of the agreement. The evidence showed that the total of said payments was $3178.24."

The court thereupon entered its order directing that plaintiffs and cross-defendants pay to defendants and cross-complainants the sum of $3,178.24; that defendants and cross-complainants have judgment against plaintiffs and cross-defendants for said sum, together with their costs; that upon judgment for said amount being duly satisfied plaintiffs' and cross-defendants' title as against defendants and cross-complainants be quieted and defendants and cross-complainants thereupon and thenceforth be debarred from asserting any claim of title under or by virtue of said agreement for the purchase of the real property described in the complaint; and that a lien be imposed upon said real property and all right, title, interest, estate or equity of plaintiffs and cross-defendants, or either of them, therein, as security for the payment of the judgment to defendants and cross-complainants.

In addition to the contentions made before the trial court, which contentions are again made on appeal and which we have concluded were properly determined by that court, plaintiffs now contend that the court erred in allowing defendants to amend their cross-complaint to conform to proof by alleging in Paragraph VIII thereof that, based upon the listing agreement, the sale by plaintiffs to certain other parties was for the account of defendants. It is plaintiffs' contention that such amendment constituted an entirely new cause of action predicated upon a trust relationship, and that they were not warned by the pleadings that the listing contract would be material in a determination of the case. The record, however, shows that during the trial, after evidence had been introduced by defendants without objection from plaintiffs regarding the listing contract, and after plaintiffs themselves introduced the document pursuant to a stipulation between the parties, the question concerning an amendment to conform to proof was raised. It should further be noted that at all times it was plaintiffs' contention that the listing agreement had expired or had otherwise been revoked or terminated. We refer to the comment of the court at the time defendants' motion was granted:

> "Now, it is clear, I think, from the language of the cross-complaint as amended and from the original cross-complaint that there has been a theory of the cross-complainants from the start that there was some sort of a promise to refund to them the money that they had in this property. It was perhaps somewhat inartificially pleaded. It is clear from the evidence in the case, which is in without objection, that they have interpreted the listing of the property with the Bakers with the object of selling it and getting their money out of it as a promise to get their money out of it and refund it to them * * *. While I am fully cognizant and sensitive to the situation that a Court should not advise lawyers how to plead their cases, * * * I also deem it to be the law and the duty of a judge that where technicalities of pleading appear that threaten the substantial rights of the parties, the case having been tried upon a certain theory, the evidence is all in, that it is not

only the right but the duty of a judge to direct amendments to conform to proof."

[6, 7] It is the well established rule that the granting or withholding of permission to file amendments to pleadings to conform to proof is a matter largely within the discretion of the trial court, Farnsworth v. Hunter, 11 Cal.2d 27, 77 P.2d 840 and that the rule should be liberally construed in order that substantial justice is done. Carman v. Athearn, 77 Cal.App.2d 585, 175 P.2d 926. Hence, in the absence of a showing of gross abuse of that discretion, the action of the trial court will not be disturbed on appeal. 11 Cal.2d 27, 31, 77 P.2d 840.

The judgment is affirmed.

VAN DYKE, P. J., and McMURRAY, J. pro tem., concur.



142 Cal.App.2d 207

Marcos GONZALES, Petitioner and Respondent,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, an unincorporated association; Thomas E. McShane, and A. C. McGraw, as International Representatives thereof; International Association of Machinists, Local Lodge No. 68, an unincorporated association; Robert Roller, as President of said Local Lodge; Reese Conte, as Secretary of said Local Lodge; Edward Peck, as Treasurer of said Local Lodge, Respondents and Appellants.

No. 16536.

District Court of Appeal, First District, Division 1, California.

June 12, 1956.

Rehearing Denied July 12, 1956.

Hearing Denied Aug. 8, 1956.

Action by former union member against union and others to obtain reinstatement of former member as a union member and to recover for loss of wages and mental distress. The Superior Court, City and County of San Francisco, John B. Molinari, J., granted relief sought and union and others appealed. The District Court of Appeal, Bray, J., held, inter alia, that where union rules required two-thirds vote of those voting on question of expulsion, and there were 29 yes votes, 14 noes, and one blank, or a total of 44 votes, casting of the blank ballot constituted voting, and 30 votes would have been necessary to achieve the required two-thirds vote, and, therefore, the 29 affirmative votes were not sufficient to sustain the attempted expulsion.

Judgment affirmed.

Opinion, 294 P.2d 69, vacated.

1. Labor Relations ⇐115

Union's international president had power to decide wrongly as well as rightly, and president's finding that there had been a two-thirds vote in favor of union member's expulsion from union could not alone, even if erroneous, justify member's noncompliance with appeal rules of the union.

2. Labor Relations ⇐113

Where parent union constitution provided that international president should decide all constitutional questions subject to the right of appeal and constitutional provision which union member was charged with violating provided a penalty of a fine or expulsion or both, and local union constitution provided that membership could substitute another punishment for that recommended by trial committee, international president, in event he affirmed action of local union in finding member guilty but felt that penalty imposed was too great, could reverse the penalty, but determination of new penalty would be for local union.

3. Labor Relations ⇐115

Where union's rules provided penalty of fine or expulsion or both for conduct with which union member was charged, and penalty of expulsion was imposed upon union member by union, international president's reduction of penalty to a $500 fine and an appropriate apology constituted a violation of union's rules for appellate

procedure, and made futile for union member to invoke further appellate rules of union, and gave member right to appeal to courts for relief without further exhausting his administrative remedy under union rules.

4. Labor Relations ⇐141

Where local union's constitution provided that rules of order governing parliamentary procedure should be printed in copies of parent union's constitution and that no other rules should apply, and parent union's constitution made Robert's Rules of Order the parliamentary law of both parent and local unions except in cases otherwise provided for by parent union's constitution, if there were any conflicts between Robert's Rules and provisions of either constitution, such constitutional provision would necessarily prevail.

5. Labor Relations ⇐108

Where there was no provision in either parent or local union's constitution for rescinding action of membership in voting on recommendations of a trial committee, and parent union's constitution made Robert's Rules of Order the parliamentary law of both parent and local unions, except in cases otherwise provided for by such constitutions, attempting to rescind, by a standing vote, an action which was required to be taken by secret vote constituted a violation of the Constitution and the rules and, therefore, was void.

6. Labor Relations ⇐111

The union's procedure in expelling member would have to be such as would afford accused member substantial justice, and requirements of fair trial would be imposed even though union rules failed to provide therefor, and union action in expelling member without notice and in his absence on August 2nd, after member had had notice of proceedings up to July 19 action exonerating him, violated those rudimentary rights which would give union member a reasonable opportunity to defend against the charges made.

7. Labor Relations ⇐108

Where union rules required two-thirds vote of those voting on question of expulsion, and there were 29 yes votes, 14 noes, and one blank, or a total of 44 votes, casting of the blank ballot constituted voting, and 30 votes would have been necessary to achieve the required two-thirds vote, and, therefore, the 29 affirmative votes were not sufficient to sustain the attempted expulsion.

8. Labor Relations ⇐90

A clearly erroneous administrative construction of a definite and unambiguous provision of union constitution could not operate to change its meaning.

9. Labor Relations ⇐92

The Constitution of union constitutes a contract with the members.

10. Labor Relations ⇐510

In determining whether exclusive jurisdiction to grant damages for improper expulsion of union member by union lay in Labor Relations Board on theory that expulsion constituted an unfair labor practice, there could be no question of unfair labor practice where no such charge appeared in petition, and answer denied allegations and challenged jurisdiction of court but said nothing about unfair labor practices, and damage sustained was not charged nor treated as result of an unfair labor practice but as result of breach of contract. National Labor Relations Act, § 8 as amended by Labor Management Relations Act, 1947, § 101, 29 U.S.C.A. § 158.

11. Labor Relations ⇐114

Improper expulsion by union of union member does not constitute an "unfair labor practice" which, under the National Labor Relations Act, takes jurisdiction away from the courts. National Labor Relations Act, § 8 as amended by Labor Management Relations Act 1947, § 101, 29 U.S.C.A. § 158.

See publication Words and Phrases, for other judicial constructions and definitions of "Unfair Labor Practice".

12. Labor Relations ⇐505

The National Labor Relations Board is given no jurisdiction or authority by the National Labor Relations Act to review legality of any disciplinary action taken by union against one of its members, or to order a member's reinstatement in the

union, or to award damages resulting from his wrongful expulsion, but such powers remain in the courts of law. National Labor Relations Act, § 8 as amended by Labor Management Relations Act, 1947, § 101, 29 U.S.C.A. § 158.

13. Labor Relations ⇐768

In action by improperly expelled union member against local and parent unions for damages, evidence supported award of $6,800 damages for loss of wages.

Phoenix & Kennedy, Redwood City, for appellants.

McMurray, Brotsky, Walker, Bancroft & Tepper, by Lloyd E. McMurray, San Francisco, for respondent.

BRAY, Justice.

The superior court rendered judgment reinstating petitioner in the International Association of Machinists and awarding him $6,800 damages for loss of wages and $2,500 for mental distress. All respondents[1] in the lower court are appellants here.

Questions presented.

1. Was petitioner excused from exhausting his administrative remedies?

2. Did the lodge violate the constitutions of the organization?

3. Are the International President's interpretations binding on the courts?

4. Damages: (a) Does the Labor Management Relations Act, 1947, 29 U.S.C.A. § 141 et seq., Taft-Hartley Act apply? (b) Is the award supported?

Facts.

This proceeding grew out of the recommendation in 1948 by petitioner, as a member of the investigating committee of the lodge, that one Nelson be denied admission to membership. Thereafter petitioner was physically assaulted by Nelson. Petitioner, believing that the assault was instigated by Charles Truax, who was the International Representative, filed suit in the superior court against both Nelson and Truax for damages for injuries received in the assault. A nonsuit was granted in favor of Truax and a judgment in favor of petitioner against Nelson for $10,000. July 7, 1950, petitioner was tried by the trial committee of the lodge for violation of article XXV, section 1, Grand Lodge Constitution.[2] July 19th, the trial committee at the regular bi-monthly meeting submitted to the lodge its verdict—"guilty as charged," and its recommendation that petitioner be expelled from the association. Thereupon pursuant to article K, section 7 of the constitution, the membership present voted on the action of the committee.[3] The vote was 43–31 against sustaining the verdict.[4] August 2, 1950, at a regular meeting a motion was made to rescind the action of July 19th rejecting the verdict of the trial committee. A standing vote showed 38 yes, 4 no. Thereupon a secret ballot vote was taken on a motion to sustain the "guilty" verdict of the committee. This resulted in 31 yes, 12 no, 2 blank ballots. A secret

1. They are the International Association of Machinists, an unincorporated association, Thomas E. McShane, and A. C. McGraw, as International Representatives thereof; International Association of Machinists, Local Lodge No. 68, an unincorporated association, Robert Roller, as President of said Local Lodge, Reese Conte, as Secretary of said Local Lodge, Edward Peck, as Treasurer of said Local Lodge.

2. "* * * any member * * * circullating or causing in any manner to be circulated any false or malicious statement * * * falsely or maliciously attacking the character, impugning the motives or questioning the integrity of any officer of the Grand Lodge * * *." The charges were preferred by Truax and were based upon the allegations in petitioner's complaint in the civil action that Truax directed and ordered Nelson to perpetrate the assault and battery on petitioner.

3. This provides that the recommendation of the committee may be amended, rejected, or another punishment substituted by a majority vote of those voting. To expel, however, the required vote is two-thirds of those voting.

4. July 28, 1950, Truax appealed to the Grand Lodge from this action of the lodge. August 22nd, he withdrew his appeal.

ballot vote was then taken on a motion to expel petitioner from the association as recommended by the committee. This resulted in 29 yes, 14 no, 1 blank. August 2nd petitioner appealed to the International President from this action of the lodge, claiming among other things that the action of the lodge on August 2nd, after his vindication on July 19th, was a violation of the constitution, and also that the vote for his expulsion was not the required "two-thirds (⅔) vote of those voting." November 13th, the International President sent a letter to the president and secretary of the lodge, in which he made formal findings, conclusions and decision. He upheld the conviction of petitioner, but decided that expulsion was too severe a penalty and then modified the penalty to a fine of $500 to be paid the lodge, and a "complete and appropriate apology" in writing from petitioner to Truax, copy thereof to be sent to the president. January 30, 1951, petitioner received a letter from the General Secretary-Treasurer of the International to the effect that on his appeal of the decision of the International President to the Executive Council that body had unanimously sustained the decision. "Accordingly, President Hayes' decision of November 13, fining you $500.00, becomes the decision of the Executive Council, and our records have been so indicated." February 23, 1951, in reply to a letter from petitioner, asking the course to be followed in appealing the decision of the Executive Council, the General Secretary-Treasurer wrote petitioner calling attention to section 6, article XXV, of the constitution[5] which provides for appeals to a convention of the Grand Lodge and stated that his appeal could not be sent to the convention nor considered by it "until you have carried out the decision of the Executive Council, which means you must pay the fine of $500.00 before you can appeal to the convention." February 11, 1952, the lodge's financial secretary notified petitioner that the lodge would no longer accept dues from him until he had complied with the president's decision by paying the $500 fine and making a complete and appropriate apology to Truax. February 20th, petitioner formally refused to pay the fine or make apology. December 3, 1952, petitioner filed his application for a writ of mandate in the superior court.

Whatever confusion there may have been in this state as to the right of a trade union member to appeal to the courts for redress from his union's action, without first exhausting all remedies provided by its constitution and by-laws, such confusion has been resolved and a definite rule established in the recently decided Holderby v. International Union, etc., Engineers, 45 Cal.2d 843, 291 P.2d 463. There the plaintiff was expelled from the union in complete violation of the union's constitution. In holding that he could not appeal to the courts without first availing himself of the remedies provided in the constitution for a review by the general board of the action taken against him, the court refused to follow cases like Weber v. Marine Cooks' & Stewards' Ass'n, 93 Cal.App.2d 327, 208 P.2d 1009, which had held that "where an organization has violated its own laws and arbitrarily violated a member's property rights the rule of exhaustion of remedies by appeals to a higher body within the organization need not be adhered to before direct resort to a judicial tribunal." 93 Cal.App. 2d at page 338, 208 P.2d at page 1016. It then ruled that the union member must exhaust the union remedies before he may appeal to the courts, no matter what the initial violation of union rules may have been, and that the only exception to the general rule is if there has been a violation of the rules on appeal. "It is only when the organization violates its rules for appellate review or upon a showing that it would be futile to

5. Before any appeal can be taken to the convention or to the membership, at large by referendum, "all orders of the Executive Council in relation thereto, must be fully complied with * * * and in no case shall * * * any * * * member * * * appeal to the civil courts for redress until after having exhausted all rights of appeal under the provisions of this Constitution." Section 10, article K, constitution, likewise requires that a member of a local lodge must exhaust all rights of appeal under the constitution of both the Grand Lodge and the local lodge before appealing to the courts.

invoke them that the further pursuit of internal relief is excused. The violation of its own rules which inflicts the initial wrong furnishes no right for direct resort to the courts." 45 Cal.2d at p. 849, 291 P.2d at page 466. Therefore we are limited to a determination of whether the union rules on appeal were violated in any respect or whether further pursuit of internal relief is excused.

1. Administrative Remedy.

Petitioner followed his administrative remedy through an appeal to the International President and then from his decision to the Executive Council. He did not proceed with an appeal either to the convention of the Grand Lodge or to the membership at large. He was barred from so doing by the requirement that he first fully comply with the orders of the Executive Council.

[1–3] Petitioner contends that the International President and the Executive Council violated the union rules on appeal in deciding that the required two-thirds vote had expelled him and in changing the penalty from expulsion to a fine and apology. As to the finding of the president that there was a two-thirds vote in favor of expulsion, such finding, if erroneous, could not alone justify noncompliance by petitioner with the appeal rules of the organization. Just as a court has the power to decide wrongly as well as rightly, the president on appeal likewise has such power and a wrong decision is not the violation of the organization's rules on appeal which under the Holderby case justifies the member in refusing to further follow the union's rules on appeal. The constitution provides (art. V, § 1) that the president shall decide all constitutional questions subject, however, to the right of appeal.[6] However, the imposition of an apology requirement would appear to be in a different category. Article XXV, section 1, the section which petitioner was charged with violating, provides a penalty of fine or expulsion, or both. That section is in the Grand Lodge Constitution. In the local lodge constitution (art. K, § 7) it is provided that the membership may substitute another punishment for that recommended by the trial committee. It is questionable whether this gives the membership the right to substitute any penalty other than that included in the phrase "fine or expulsion or both" in the penalty section of the Grand Lodge Constitution. However, we can find no authorization to the president, upon appeal, to change the penalty voted by the lodge. It would appear that his authority is either to affirm or reject the action of the lodge, and in the event he affirms its action in finding a member guilty but, as here, feels that the penalty is too great, he may reverse the penalty but the determination of the new penalty is for the lodge and not for him. It may be that had the president merely reduced the penalty to a $500 fine, petitioner could not complain of a departure from the rules so obviously in his favor, as a fine is included in the penalties provided by the constitution. But the requirement of an apology is an entirely different matter. Nowhere is there a provision for such a penalty and it is completely outside the penalties prescribed. This action then constituted not only a violation of the organization's rules for appellate procedure but it brings the case under the second situation stated in the Holderby case, namely, "that it would be futile to invoke" the further appellate rules. They provide that to go further with his appeal petitioner must comply with all orders of the Executive Council. Thus to gain redress petitioner must pay a fine which the president and the Executive Council had no right to impose and to make an apology which neither had the right to require. While the fine money

6. Nor do we think that the president violated any rules in prescribing a fine *prior to approval* thereof by the Executive Council. Section 8, article K, provides that no fine in excess of $50 "shall be imposed upon any member * * * unless the same is first approved by the Executive Council." Having in mind that under the appellate procedure an appeal is first to the president and thereafter to the Executive Council, and that this provision is in the constitution of the lodge and not in that of the Grand Lodge, it is obvious that it does not apply to a decision on appeal.

could be refunded if the convention were to reverse the Executive Council's decision, there is no way in which the apology could be wiped out. The effect of these requirements was to prevent petitioner from proceeding further and gave him the right to appeal to the courts for relief.

Appellants contend that the action of the Executive Council, in effect, eliminated the president's requirement of an apology. The General Secretary-Treasurer on January 30, 1951, notified petitioner: "Inasmuch as you failed to supplement your letter of November 16, the Executive Council, at its recent meeting, carefully appraised all of the facts as presented in the correspondence dealing with your case and, after due deliberation, *by unanimous action, voted to sustain the International President's decision.* Accordingly, President Hayes' decision of November 13, fining you $500.-00, becomes the decision of the Executive Council * * *" (Emphasis added.) On February 23rd he notified petitioner that an appeal to the convention, if made, could not be "processed" "until you have carried out the decision of the Executive Council, which means you must pay the fine of $500.00 before you can appeal to the convention." On February 11, 1952, the financial secretary of the lodge notified petitioner that the lodge could not accept dues from him until he paid the $500 fine *and made a complete and appropriate apology,* sending copy to the International President. "This is in accordance with the decision" of the president "and sustained by the Executive Council * * *" It is difficult to understand how the Executive Council "voted to sustain the International President's decision" if it deleted therefrom the apology requirement. Certainly the lodge interpreted the action of the Executive Council as requiring the apology as well as the fine. At the trial counsel for appellants stated: "* * * it is true that in order to comply with the decision of the International President that the Plaintiff would have to pay $500 and that we don't dispute that at all, and *it also appears that he would have to make an apology.*" (Emphasis added.) In any event, as a result of the appeal brought by petitioner, he finds himself ousted from his union because of nonpayment of dues, which he would pay but it will not receive, and denied his right of further appeal because he will not do something which the appellate bodies had no right to require him to do. It should be remembered that being ousted or expelled from a union is a matter of much greater consequence than expulsion from a fraternal organization. In the former case, in most instances it means a loss of a member's job, and therefore, his means of making a living. Especially is this so when employers of the type of labor provided by members of this organization only hire through the union hiring hall. At the very least, his no longer belonging to the union would be a serious handicap in the labor market.

The facts bring this case under the exception to the general rule of exhaustion of administrative remedy. We are therefore required to consider whether the acts of the lodge violated the constitution of either the Grand Lodge or the local lodge.

2. Lodge Violations.

[4, 5] There is no provision in either constitution for rescinding the action of the membership in voting on the recommendations of a trial committee.[7] Appellants support such action, however, by contending that the procedure was in accordance with Robert's Rules of Order and that the constitutions make those rules applicable. Article G, section 2 of the local lodge constitution provides: "The Rules of Order governing parliamentary procedure shall be printed in the copies of the Constitution of the Grand Lodge, and no other rules shall apply." In these rules there is nothing upon the subject with which we are here concerned. Article II, section 11 of the Grand Lodge Constitution makes Robert's Rules of Order the parliamentary law of both the Grand Lodge and the local lodge, "except in cases otherwise provided for

7. Truax having appealed to the president from the action taken on July 19th, it is very doubtful if the membership under any theory could modify or rescind the action which was then on appeal.

by this Constitution." If there is any conflict between Robert's Rules and the provisions of either constitution the latter must necessarily prevail. See Harris v. National Union, etc., Cooks & Stewards, 98 Cal.App.2d 733, 736, 221 P.2d 136. The lodge constitution requires that voting on the recommendations of the trial committee be by secret ballot. It would seem to conflict with this requirement to permit a vote to rescind such action to be taken in a less formal way. Here it was taken by a standing vote. At the very least this violated the spirit of the constitution. Moreover, Robert's Rules provide (§ 10, subd. 5, p. 50, Robert's Rules of Order Revised Seventy-fifth Anniversary Edition): "At any future session, the resolution, or other main motion, may be rescinded *in the same way if it had been adopted:* * * *" (Emphasis added.) The action taken here violated that provision. We hold that attempting to rescind an action required to be taken by a secret vote, by a standing vote, is a violation of the constitution and of the rules and was therefore void.

[6] The action of rescission was taken in petitioner's absence. Ellis v. American Federation of Labor, 48 Cal.App.2d 440, at pages 443–444, 120 P.2d 79, at page 80, holds: "It is settled, however, in this state and elsewhere that a member of an unincorporated association may not be suspended or expelled, nor a subordinate body suspended or its charter revoked, without charges, notice and a hearing, even though the rules of the association make no provision therefor." While petitioner had notice of the proceedings up to the action exonerating him on July 19th, the action purported to be taken on August 2nd was taken without notice and in his absence. The above mentioned rule would apply to such action. Such action violated "those rudimentary rights which will give him a reasonable opportunity to defend against the charges made. * * * The union's procedure, however, must be such as will afford the accused member substantial justice, and the requirements of a fair trial will be imposed even though the rules of the union fail to provide therefor." Cason v. Glass Bottle Blowers Ass'n, 37 Cal.2d 134, 143, 231 P.2d 6, 11, 21 A.L.R.2d 1387.

[7] Moreover, the vote on the question of expulsion did not produce the required "two thirds (⅔) vote of those voting." There were 29 yes votes, 14 noes and 1 blank, cast, or a total of 44 votes. The casting of a blank ballot is voting. To constitute a two-thirds vote of those voting it was necessary to get 30 votes. As only 29 affirmative votes were cast the measure failed and the attempted expulsion cannot stand.[8]

3. President's Interpretation.

[8] Appellants contend that the president's interpretation of the constitutions as giving him the power to impose the fine and apology, in holding the rescinding action of the lodge as proper, and in determining that the blank ballot should not be counted in determining the votes cast, is binding upon the courts. This contention is based upon the rule set forth in DeMille v. American Federation of Radio Artists, 31 Cal.2d 139, 147, 187 P.2d 769, 775, 175 A.L.R. 382: "The practical and reasonable construction of the Constitution and by-laws of a voluntary organization by its governing board is binding on the membership and will be recognized by the courts." But the construction placed upon such actions by the president in this case cannot be held to be reasonable under the circumstances. "A clearly erroneous administrative construction of a definite and unambiguous provision of the constitution cannot operate to change its meaning." Harris v. National Union, etc., Cooks & Stewards, supra, 98 Cal.App.2d 733, 737, 221 P.2d 136, 139; see also Mandracio v. Bartenders

8. While the trial court found that the action of petitioner in charging Truax in the civil action with directing and ordering Nelson to assault him violated article XXV, section 1, "falsely or maliciously attacking the character, impugning the motives or questioning the integrity of any officer of the Grand Lodge" (Truax was such an officer) we deem it unnecessary to consider this finding for the reason that by the action of the membership on July 19th in rejecting the trial committee's finding, the matter has become academic.

Union, Local 41, 41 Cal.2d 81, 85, 256 P.2d 927; Riviello v. Journeymen Barbers, etc., Union, 109 Cal.App.2d 123, 128–129, 240 P.2d 361.

We are not impressed by the fact that the president stated in effect that his conclusion would not have been different if he were considering Truax' appeal from the first action of the lodge rather than petitioner's appeal from its second action. It is only the latter situation with which we have to deal.

4. Damages: (a) *Jurisdiction.*

[9, 10] In determining the question of whether the exclusive jurisdiction to grant damages in a case of this kind lies in the Labor Relations Board, it is first necessary to determine the character of the pleadings and issues in this case. The petition alleged a breach of contract between the union and plaintiff, one of its members.[9] It took the form of a petition for writ of mandate because damages alone would not be adequate to restore to petitioner the things of value he had lost by reason of the breach. No charge of "unfair labor practices" appears in the petition. The answer to the petition denied its allegations and challenged the jurisdiction of the court, but said nothing about unfair labor practices. The evidence adduced at the trial showed that plaintiff, because of his loss of membership, was unable to obtain employment and was thereby damaged. However, this damage was not charged nor treated as the result of an unfair labor practice but as a result of the breach of contract. Thus the question of unfair labor practice was not raised nor was any finding on the subject requested of, or made by, the court.

So far as plaintiff's improper expulsion from the union is concerned, there could be no question of unfair labor practice.

[11] The Taft-Hartley Act prescribes in part: "(b) It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: Provided, *That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;* * * *.", 29 U.S.C.A. § 158; emphasis added. In construing this section the courts have held that the courts have jurisdiction to restore union membership to a member improperly deprived thereof by his union. As said in Mahoney v. Sailors' Union of the Pacific, 1954, 45 Wash.2d 453, 275 P.2d 440, 442, improper expulsion by the union does not constitute an "unfair labor practice" which under the act takes jurisdiction away from the courts. See also Real v. Curran, 285 App.Div. 552, 138 N.Y.S.2d 809.

[12] So far as the award of damages is concerned, it was awarded not for an unfair labor practice, but for breach of contract and as incidental to the restoration to plaintiff of his right of membership. The contention that the Labor Relations Board has sole jurisdiction of the question of damages in a case of this kind was made and answered in Taylor v. Marine Cooks & Stewards Ass'n, 117 Cal.App.2d 556, 564, 256 P.2d 595, 601: "Appellants argue that these disputes are solely cognizable by the National Labor Relations Board under the Taft-Hartley Act. 29 U.S.C.A. § 158(b)(2). The damages suffered by respondents were an incident of the wrongful act of appellant union in taking disciplinary action against them in a manner which was violative of their rights under the constitution of the union. Nowhere in the Taft-Hartley Act is the N. L. R. B. given jurisdiction or authority to review the legality of any disciplinary action taken by a union against one of its members or to order a member's reinstatement in the union or to award damages resulting from his wrongful expulsion. These powers are left in the courts of law where they have always resided. We find nothing in the Taft-Hartley Act to deprive a court of the power to do complete justice between a wrongfully disciplined member and his union by allowing such damages as he may have suffered as

9. See Harris v. National Union, etc., Cooks & Stewards, supra, 98 Cal.App.2d at page 736, 221 P.2d at page 138: "The constitution of the union constitutes a contract with the members * * *."

an incident to the judgment restoring him to the rights within the union of which he had been illegally deprived."

There are many cases holding it to be an unfair labor practice for a union in any way to cause an employer to fail to employ an expelled member (whether the expulsion be proper or improper), and that the National Labor Relations Act authorizes the Labor Relations Board to compensate the member for loss of earnings if lost through the procedures followed by the union whereby employers were caused to discriminate against such members. Real v. Curran, supra, 138 N.Y.S.2d 809.[10] But in all those cases the charge was made that the acts of the union constituted unfair labor practices and such charge was an issue in each case. As we have pointed out it was not an issue here. In Weber v. Anheuser-Busch, Inc., supra, 348 U.S. 468, 75 S.Ct. 480, 99 L.Ed. 546, where the issue was whether the unions were guilty of unfair labor practices the court must have had this very distinction in mind for after referring to the "delicate problem of the interplay between state and federal jurisdiction touching labor relations", 348 U.S. at page 474, 75 S.Ct. at page 484, and after stating, 348 U.S. at page 480, 75 S.Ct. at page 488 "the Labor Management Relations Act 'leaves much to the states, though Congress has refrained from telling us how much' ", quoting from Garner v. Teamsters, etc., Union, 346 U.S. 485, 488, 74 S.Ct. 161, 98 L.Ed. 228, it prefaced its conclusion that the state court did not have jurisdiction of the unfair labor practices charged, as follows: "* * * *where the moving party itself alleges unfair labor practices* * *" 348 U.S. at page 481, 75 S.Ct. at page 488; emphasis added. In United Const. Workers, Affiliated with United Mine Workers of America v. Laburnum Const. Corp., 347 U.S. 656, 74 S.Ct. 833, 98 L.Ed. 1025, the court held that the National Labor Relations Act did not give such exclusive jurisdiction to the National Labor Relations Board as to deprive a Virginia state court of jurisdiction to try a common law tort action brought by a construction company against a union even though the United States Supreme Court assumed the conduct constituted an unfair labor practice under the act.[11]

In Real v. Curran, supra, 138 N.Y.S.2d 809, where a member allegedly was illegally expelled from his union, the court held that the Labor Relations Board could only act where there was an unfair labor practice, that improperly expelling the member did not constitute such practice and hence the board had no power to restore his union membership. Therefore it held that there was nothing in the Labor Relations Act which would affect the law which had long existed in New York that a wrongfully expelled member of a labor union was entitled to restoration by the state courts to union membership and "in a proper case, damages for consequent loss of wages." At p. 811. "It is, therefore, concluded that the provisions of the Labor Management Relations Act, 1947, do not exclude the State courts from their traditional jurisdiction to restore to membership a wrongfully expelled member of the union." At p. 814.

In International Union, etc., v. Hinz, 6 Cir., 1955, 218 F.2d 664 the plaintiff sued the union in the state court of Michigan for damages (not for reinstatement in the union) charging that his union membership had been wrongfully terminated, and asking both compensatory and exemplary damages for loss of wages, etc. The union filed a complaint in the U. S. District Court praying for an injunction against the prosecution of said suit in the state court. In upholding the action of the District Court

10. Among other cases are: Born v. Laube, 9 Cir., 213 F.2d 407, certiorari denied Oct. 18, 1954, 348 U.S. 855, 75 S.Ct. 80, 99 L.Ed. 674; Radio Officers' Union of Commercial Telegraphers Union, A. F. L. v. National Labor Relations Board, 347 U.S. 17, 74 S.Ct. 323, 98 L. Ed 455; Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 75 S.Ct. 480, 99 L.Ed. 546; Mahoney v. Sailors' Union of the Pacific, supra, 275 P.2d 440; Sterling v. Local 438, etc., 1955, 207 Md. 132, 113 A.2d 389.

11. It is significant that there, as here, the trial court made no finding that the acts in question did constitute unfair labor practices.

in dismissing this complaint, the reviewing court held: "Appellee's work did not cease as a consequence of a current labor dispute nor because of an unfair labor practice." At page 665. "The Board has no jurisdiction in disputes between a union and its members nor authority over the internal operation of a union." At page 665. See also Amalgamated Clothing Workers of America v. Richman Bros. Co., 6 Cir., 211 F.2d 449, and International Union of Electrical, Radio and Machine Workers, C. I. O. v. Underwood Corp., 2 Cir., 219 F.2d 100.

In Holderby v. International Union, etc., Engineers, supra, 45 Cal.2d 843, 291 P.2d 463, the plaintiff filed an action in which he sought and obtained reinstatement as a member in good standing in the union and damages resulting from his alleged unlawful exclusion therefrom. While the Supreme Court reversed the judgment on the ground of the plaintiff's failure to exhaust his administrative remedy, it is interesting to note that the court nowhere intimates that it did not have jurisdiction of the subject matter of the action. Likewise in Weber v. Marine Cooks' & Stewards' Ass'n, 123 Cal.App.2d 328, 266 P.2d 801, the plaintiff sued for reinstatement in his union after an alleged wrongful expulsion and for damages in the loss of wages and for mental suffering (just as plaintiff did here). The trial court granted a motion for nonsuit on the ground of laches alone. The reviewing court reversed the judgment and sent the case back for trial. It evidently had no doubt concerning its jurisdiction.

The language of William J. Isaacson in his article, "Labor Relations Law: Federal versus State Jurisdiction," appearing in the May, 1956, American Bar Association Journal (vol. 42, No. 5, p. 415) is applicable here. After calling attention to the fact that there is a conflict between the courts, both state and federal, which have considered the question here involved, and that the United States Supreme Court has not passed upon it, and then referring to Real v. Curran, supra, 138 N.Y.S.2d 809, and Mahoney v. Sailors' Union of the Pacific, supra, 275 P.2d 440, the article then states: "Although even these state court decisions may lead to possible conflict between the federal labor board and state courts they do not present potentialities of conflicts in kind or degree which require a hands off directive to the states. A state court decision requiring restoration of membership requires consideration of and judgment upon matters wholly outside the scope of the National Labor Relations Board's determination with reference to employer discrimination after union ouster from membership. The state court proceedings deal with arbitrariness and misconduct vis-a-vis the individual union members and the union; the Board proceeding, looking principally to the nexus between union action and employer discrimination, examines the ouster from membership in entirely different terms."

Damages: (b) *Award.*

[13] Appellants contend that there is no evidence to support the award of $6,800 damages for loss of wages.[12] Petitioner testified that his earnings were nearly always $100 per week at least, and frequently between that figure and $200. At the time of his expulsion from the union he was employed as a marine machinist by the General Electric Company. About four days thereafter he was injured on the job, incapacitated approximately three weeks. The ordinary practice was for employers to telephone the union hall for men, and the union members would be dispatched to the work. Thereafter he applied to the union for an assignment to a job as he had done prior thereto. He was refused dispatch by the union dispatcher. He testified he sought work directly from the employers but without success. Although there was some testimony to the effect that the union might dispatch a nonmember to a job if he had a letter from the employer requesting him, the dispatcher testified that plaintiff would not have been dispatched even if he had

12. They apparently do not claim the evidence is insufficient to support the award of $2,500 for mental distress.

such letter. There was ample evidence to support the award.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; CARTER, J., dissenting.



142 Cal.App.2d 344

R. W. BIAS, Jr., Plaintiff, Cross-Defendant and Respondent,

v.

Cynthia BIAS, Defendant, Cross-Complainant and Appellant.

Civ. 16760.

District Court of Appeal, First District, Division 2, California.

June 18, 1956.

Action for divorce. From an order of the Superior Court in and for the City & County of San Francisco, Orla St. Clair, J., modifying a final decree of divorce, the wife appeals. The District Court of Appeal, Kaufman, J., held that the evidence did not establish an abuse of discretion by the trial judge in reducing the amount of child support payable by the husband in view of his financial circumstances.

Order affirmed.

1. Divorce ⇐309

Where support provisions are made an integral and inseverable part of a division of the property in a final decree of divorce and the court has approved the agreement, they cannot thereafter be modified without the consent of the parties.

2. Divorce ⇐309

A provision for child support integrated in a divorce decree, may not be reduced, but for the welfare of the child, the court has the power to increase the amount.

3. Divorce ⇐312.6(3)

On appeal from an order modifying a final decree of divorce reducing amount for children's support provided for in a property settlement agreement incorporated in the decree, while the Appellate Court was not bound by the interpretations of the agreement and the interlocutory decree made by the trial court in the absence of conflicting extrinsic evidence, the Appellate Court would assume that the proper interpretation was made on the basis of documents before it, where the appellant did not see fit to produce those documents in their entirety before the Appellate Court.

4. Appeal and Error ⇐715(1)

Evidence relied upon at trial but which is not brought up in the record on appeal cannot be considered in connection with a claim of error.

5. Divorce ⇐296, 309, 312.6(6)

The amount of allowance for the maintenance of minor children of a divorced couple rests in the sound discretion of the trial judge and where he is not bound by the terms of a property settlement agreement, he may modify the support order downward upon a proper showing, and in the absence of an abuse of discretion, such an award will not be set aside on appeal.

6. Divorce ⇐309

Evidence did not establish an abuse of discretion by the trial court in view of the husband's financial circumstances in reducing the amount of child support payable by the husband from $200 per month for each of two children as set out in the interlocutory decree to $150 per month for a 16 year old girl and $75 per month for a 11 year old boy.

Keil & Connolly, Edward D. Keil, San Francisco, for appellant.

Young, Rabinowitz & Chouteau, San Francisco, for respondent.

KAUFMAN, Justice.

This is an appeal from an order of the Superior Court in and for the City and County of San Francisco modifying a final decree of divorce. The order reduced the amount of child support payable by the husband from $200 per month for each of the two children as set by the interlocutory

decree, to $150 per month for the sixteen year old girl, and $75 per month for the eleven year old boy.

The parties herein had secured an interlocutory decree of divorce on June 29, 1951. Joint custody of the children was awarded to the parents, R. W. Bias, Jr., respondent herein, and Cynthia Bias, appellant. Although nowhere in the record on appeal is the property settlement agreement set forth, appellant in her brief quotes the following paragraph from the interlocutory agreement referring thereto:

"6. The property settlement agreement entered into by the parties hereto on the 27th day of June, 1951 making provision for the complete and final adjustment of all of the property rights of the parties hereto, is hereby approved by the Court and each party is ordered by the Court to specifically perform each and every agreement therein contained. The original of said agreement is attached hereto and made a part hereof as though set out in this decree in full."

The following excerpt from the property settlement agreement is also set forth in appellant's brief:

"6. As and for the care, maintenance, education and support of the children, subject to determination by the Court, Husband shall pay Wife the sum of $200 per month for each child, a total of $400 per month, beginning on the 1st day of July, 1951 and to be paid on the 1st day of each and every month thereafter until each respective child shall have reached the age of 21 years, married or died.

"It is understood between the parties that the amount fixed for the support of the children is based upon the present income of Husband and in the event of a substantial change in the amount of Husband's income or of the needs of the children, the Court having jurisdiction may, in its discretion, upon a proper showing, modify or alter the amount of support.

"In order to provide Wife with current information as to Husband's income, Husband agrees to furnish Wife not later than April 1 of each year a complete photostatic copy of his Federal Income Tax Return for the previous year."

At the hearing of the husband's motion for modification, the trial judge and counsel made some reference to the property settlement agreement, and the trial court asked, "Is it integrated? Is it amendable?" The attorney for respondent answered that he did not know if the agreement would be of sufficient dignity so as not to be amendable under recent Supreme Court decisions as far as the alimony provisions were concerned, but stated that the child allowance was clearly subject to the court's control. Later, counsel for appellant contended that the husband must sustain the burden of proof in accordance with the terms of the agreement that he has suffered a substantial change in income or earning capacity, but the court stated that he believed the limitation provided in the agreement did not bind the court either way, that it was merely instructive. No further information is disclosed by the record on appeal as to the contents of the property settlement agreement or the interlocutory decree.

Appellant contends that the provision in the divorce decree relating to the support of the children was not subject to modification downward in the absence of a showing that there had been a decrease in respondent's income or a decrease in the needs of the children. It is argued that provisions in property settlement agreements for the support of children cannot be modified except under one of these three conditions: (1) consent of the parties thereto; (2) where the welfare of the child requires an *increase* in support payments; (3) under the terms of the agreement itself. Here the terms of the agreement required a substantial change in the income of respondent, and this would necessarily mean that respondent's income would have to decrease if the support order was to be reduced, since there was no showing that the children's needs had decreased. Appellant states (without transcript reference) that the income of respondent at the time of the interlocutory decree was $18,000 per year, whereas at the time of the hearing it had increased to a gross income

of $33,000 per year. There is no evidence in the record before this court as to what the respondent's income was in 1951.

Appellant also states that the stock brokerage firm of Shuman-Agnew & Co., of which respondent is a member, had greatly increased its net worth since 1951, and therefore respondent's capital interest of 11½% had substantially increased. The record shows, however, that at the time of the hearing of respondent's motion, his sole asset consisted of $57,500 capital in the aforesaid company. He cannot withdraw funds from this amount without the consent of the partners, and they will not consent to such a withdrawal. Respondent testified that he had to make capital contributions of $3,500 in the first two quarters of 1954 to complete the firm's goal of capitalization. Capital contributions in 1953 were $2,000. The company was entering a new phase of its business, and the amount required of each partner had been increased. Beginning in November 1954, respondent would have to begin putting in another $57,000, to be paid over a period of time. This respondent must do if he wishes to continue in this business, his only source of income.

Respondent herein has remarried and is supporting his present wife and her daughter by a former marriage. This child's school expenses are paid by her father. Schedules attached to respondent's affidavit show that after deduction of business expenses, taxes, alimony and child support, for the first half of 1954, he had remaining $418.20 on which to live, which figure was nearly $100 per month lower than that shown in a similar schedule for 1953. Present estimated living expenses of respondent and his present wife and daughter, total $900 per month. This includes apartment rent of $180 per month.

An exhibit attached to respondent's affidavit gives an estimate of appellant's present income as $1,000 per month. This includes, alimony, $200 per month, child support, $400, salary from her job, $200, and income from stocks $200. At the hearing appellant testified that her income from stocks was approximately $200 per month. She lived with the children in the family home which she received in the property settlement, and which had an estimated value of about $27,000. At the time of the hearing she was no longer employed.

Respondent presented the court with a proposed schedule which would make it possible for him to meet his obligations without going into debt. The court evidently accepted his figures of $75 per month support for the boy and $150 for the girl. In this schedule was included an item of $2,000 to be spent during the year on vacation trips and entertainment of the children. He had during 1953 spent $2,274 on the children for these purposes, in addition to the $400 per month support payment. In the period since the divorce, the record shows that respondent had been compelled to sell out all his stock holdings in order to meet his obligations. He now has no remaining assets which can be converted into cash.

Appellant herein relies on the case of Puckett v. Puckett, 21 Cal.2d 833, 136 P.2d 1, as authority for her position that the decree herein could not be modified downward except in accordance with the provisions of the paragraphs of the property settlement agreement which she has set forth in her brief. The Puckett case, however, clearly establishes that the agreement must be construed as a whole (citing numerous cases) in order to determine the meaning of the provisions relating to alimony and child support and to ascertain whether they are in fact merely support provisions or whether they are essentially part of a property settlement.

[1, 2] Where support provisions are made an integral and inseverable part of a division of the property, and the court has approved the agreement, they cannot be thereafter modified without the consent of the parties. Dexter v. Dexter, 42 Cal.2d 36, 265 P.2d 873; Fox v. Fox, 42 Cal.2d 49, 265 P.2d 881; Flynn v. Flynn, 42 Cal. 2d 55, 265 P.2d 865. A provision for child support thus integrated, may not be reduced, but for the welfare of the child, the court has the power to increase the amount. Puckett v. Puckett, supra.

proceeds from community property of the decedent and said predeceased husband. The court accordingly determined that under Probate Code section 228 the heirs of the predeceased husband were entitled to distribution of one-half of the property so determined to be community property.

The burden is on the heirs of a predeceased spouse seeking to inherit through the estate of the surviving spouse under Probate Code section 228 to establish that the property was the community property of the spouses and, where the identical property is not found in the estate of the surviving spouse, to prove that specific property in that estate is the proceeds of such community property. In re Estate of Simonton, 183 Cal. 53, 60, 190 P. 442; In re Estate of Harris, 9 Cal.2d 649, 662, 72 P.2d 873; In re Estate of Rattray, 13 Cal. 2d 702, 705–706, 91 P.2d 1042; In re Estate of Abdale, 28 Cal.2d 587, 593, 170 P.2d 918; In re Estate of Adams, 132 Cal.App.2d 190, 196, 282 P.2d 190.

Decedent's husband died in 1939 leaving a gross estate appraised at $160,946.38. This was alleged by the widow in the probate of that estate to be community property. In 1941 the widow received under the decree of distribution property of the appraised value of $148,578.88. The widow's estate was appraised at $424,581.76. She died in 1954, approximately 15 years after her husband's death.

[1] In the estate of the husband there was distributed to the widow 2,500 shares of common stock of The Chase National Bank appraised at $80,625 and 1,000 shares of the capital stock of The First Boston Corporation appraised at $16,250. Included in the present estate were 2,500 shares of common stock of The Chase National Bank appraised at $115,677.25 and 1,000 shares of the capital stock of The First Boston Corporation appraised at $43,916.67. There was also some other stock appraised as of no value in the present estate which apparently came from the husband's estate, but since this has no value we are justified in disregarding it.

[2] As to the 2,500 shares of The Chase National Bank and the 1,000 shares of The Boston Corporation we are satisfied that the court was entitled to find that this was the same stock received by the widow from the estate of her husband. Finding the same number of shares of the same two corporations in both estates the court could reasonably conclude, in the absence of other proof, that they were the same shares of stock.

As to the balance of the two estates the situation is very different. No other property similar to any distributed in the predeceased husband's estate is found in the estate of his widow (with the exception of the worthless stock above noted). Deducting the sum of the amounts at which the Chase and Boston stock was appraised in the husband's estate ($96,875) from the total appraised value of the property received by the widow from her husband's estate ($148,578.88) we find that exclusive of the shares of those two corporations the widow received money and property of the appraised value of $51,703.88.

Making the same deduction in the present estate and subtracting the sum of the appraised values of the same shares of stock ($159,593.92) from the total appraised value of the present estate ($424,581.76) we find that the decedent left, exclusive of said shares of stock, an estate valued at $264,987.84.

The burden was thus placed upon respondents to prove that money and property of the value of $51,703.88 received by the decedent from her husband's estate was the source from which, by investment and reinvestment or otherwise, the decedent had accumulated property and money of the value of $264,987.84, an increase in 13 years of more than five-fold.

The only evidence at all touching this question was given by an attorney who had acted as attorney for the decedent. To show its insubstantiality we quote the pertinent parts of that evidence:

The decedent had "(n)o independent earnings from any source other than her estate, so far as I was aware. * * * I am quite sure she was not employed, your Honor. If she was, I certainly was not aware of it.

husband, but did not support finding that rest of the assets in her estate with the exception of certain fees received as executrix of her husband's estate were proceeds from community property of widow and her husband.

Decree affirmed in part, and reversed in part.

1. Husband and Wife ⇐276(8)

Where certain corporate stock appraised as of no value in widow's estate apparently came from her husband's estate, it would in view of its lack of value, be disregarded as evidence in determining whether certain property in widow's estate was distributable as community property of her husband and herself. West's Ann. Prob.Code, § 228.

2. Husband and Wife ⇐276(8)

In probate proceeding, evidence sustained finding that certain stock found in widow's estate was the same stock received by widow from the estate of her husband and therefore community property of widow and her husband and distributable to extent of one-half thereof to heirs of husband, but did not support finding that rest of the assets in her estate with the exception of certain fees received as executrix of her husband's estate were proceeds from community property of widow and her husband. West's Ann.Prob.Code, § 228.

3. Husband and Wife ⇐276(8)

In probate proceeding, whatever negative probative value widow's failure to inform her attorney that she owned separate property might have had toward establishing fact that property in her estate was community property of herself and her husband was destroyed by evidence that she informed her attorney that she was the separate owner of a certain amount of government bonds. West's Ann.Prob.Code, § 228.

4. Evidence ⇐264

A memorandum by widow's husband that his wife owned a certain amount in government bonds was an admission of evidentiary value against his successors in interest that she did own separate rather than community property in that amount. West's Ann.Code Civ.Proc., § 1853.

5. Husband and Wife ⇐276(8)

In probate proceeding, wherein heirs of deceased husband sought to trace his community property into the estate of his wife, burden was on such heirs to prove property in her estate was community property. West's Ann.Prob.Code, § 228.

6. Husband and Wife ⇐276(8)

Where an estate is substantially the same in value and the surviving spouse died shortly after the predeceased spouse without being gainfully employed, a court may find from those facts that the property is the proceeds of the property received from the predeceased spouse, but such rule is not applicable where there is a great disparity of the value of the two estates, and 15 years elapsed between the death of the husband and that of the widow.

7. Husband and Wife ⇐274(1)

A family allowance received by widow from the estate of her husband was separate and not community property. West's Ann.Prob.Code, § 228.

Elkins & Wright, San Francisco, for appellants.

Peart, Baraty & Hassard, Joseph S. Rogers, San Francisco, for respondents Edna May Golding, Evalyn Rose Pars and Lillian Danforth.

Peter S. Sommer, Ronald P. Klein, San Francisco, for respondents Crocker First Nat. Bank of San Francisco and Nat Schmulowitz, as executors under last will and testament of Grace R. Anderson.

DOOLING, Justice.

This appeal by the heirs of the decedent, Grace R. Anderson, is taken from so much of the order and decree of the probate court as determined that one-third of the residue of her estate, as to which she died intestate, was all, with the exception of the proportionate share of $4,239, which she received as executrix' fees in the probate of her predeceased husband's estate, the

proceeds from community property of the decedent and said predeceased husband. The court accordingly determined that under Probate Code section 228 the heirs of the predeceased husband were entitled to distribution of one-half of the property so determined to be community property.

The burden is on the heirs of a predeceased spouse seeking to inherit through the estate of the surviving spouse under Probate Code section 228 to establish that the property was the community property of the spouses and, where the identical property is not found in the estate of the surviving spouse, to prove that specific property in that estate is the proceeds of such community property. In re Estate of Simonton, 183 Cal. 53, 60, 190 P. 442; In re Estate of Harris, 9 Cal.2d 649, 662, 72 P.2d 873; In re Estate of Rattray, 13 Cal. 2d 702, 705–706, 91 P.2d 1042; In re Estate of Abdale, 28 Cal.2d 587, 593, 170 P.2d 918; In re Estate of Adams, 132 Cal.App.2d 190, 196, 282 P.2d 190.

Decedent's husband died in 1939 leaving a gross estate appraised at $160,946.38. This was alleged by the widow in the probate of that estate to be community property. In 1941 the widow received under the decree of distribution property of the appraised value of $148,578.88. The widow's estate was appraised at $424,581.76. She died in 1954, approximately 15 years after her husband's death.

[1] In the estate of the husband there was distributed to the widow 2,500 shares of common stock of The Chase National Bank appraised at $80,625 and 1,000 shares of the capital stock of The First Boston Corporation appraised at $16,250. Included in the present estate were 2,500 shares of common stock of The Chase National Bank appraised at $115,677.25 and 1,000 shares of the capital stock of The First Boston Corporation appraised at $43,916.67. There was also some other stock appraised as of no value in the present estate which apparently came from the husband's estate, but since this has no value we are justified in disregarding it.

[2] As to the 2,500 shares of The Chase National Bank and the 1,000 shares of The Boston Corporation we are satisfied that the court was entitled to find that this was the same stock received by the widow from the estate of her husband. Finding the same number of shares of the same two corporations in both estates the court could reasonably conclude, in the absence of other proof, that they were the same shares of stock.

As to the balance of the two estates the situation is very different. No other property similar to any distributed in the predeceased husband's estate is found in the estate of his widow (with the exception of the worthless stock above noted). Deducting the sum of the amounts at which the Chase and Boston stock was appraised in the husband's estate ($96,875) from the total appraised value of the property received by the widow from her husband's estate ($148,578.88) we find that exclusive of the shares of those two corporations the widow received money and property of the appraised value of $51,703.88.

Making the same deduction in the present estate and subtracting the sum of the appraised values of the same shares of stock ($159,593.92) from the total appraised value of the present estate ($424,581.76) we find that the decedent left, exclusive of said shares of stock, an estate valued at $264,987.84.

The burden was thus placed upon respondents to prove that money and property of the value of $51,703.88 received by the decedent from her husband's estate was the source from which, by investment and reinvestment or otherwise, the decedent had accumulated property and money of the value of $264,987.84, an increase in 13 years of more than five-fold.

The only evidence at all touching this question was given by an attorney who had acted as attorney for the decedent. To show its insubstantiality we quote the pertinent parts of that evidence:

The decedent had "(n)o independent earnings from any source other than her estate, so far as I was aware. * * * I am quite sure she was not employed, your Honor. If she was, I certainly was not aware of it.

"Q. You were her attorney during the entire period? A. I was.

"Q. You never heard of any inheritance by her * * *? A. No, I never heard of any inheritance. I learned—I learned of an acquisition of property, but how that was acquired I didn't know * * *. I refer to some information that was disclosed in the course of the determination of the federal tax liability in Mr. Anderson's estate. * * *

"The information which I acquired * * * was in connection with an audit of the federal estate tax return filed in the Estate of George Lincoln Anderson. * * * I called to Mrs. Anderson's attention * * * the information that was in Mr. Anderson's memorandum. * * * I will read the exact wording of my letter:

"'In another memorandum appearing on the date of 6–16–36 Mr. Anderson reported property in the amount of $53,250 as belonging to you * * * presumably Government bonds.'

"Now, the answer to that letter sent me by Mrs. Anderson * * * under date of January 14, 1941, contains this statement:

"'The bonds belonged to me, that Mr. Anderson used to obtain some loans to buy stocks, Chase National, Amerex, and First of Boston * * * and I now am and have been for over two years the owner of $58,000 in Government bonds.'"

[3, 4] There was a motion to strike this as a self-serving declaration, which was denied. We do not treat this as substantive evidence that decedent owned $58,000 in bonds, but it is significant for the following reason: The attorney's evidence was produced in an attempt to prove that Mrs. Anderson had no separate property. It was only, at best, of such probative value as the failure of a client to inform her attorney that she owned separate property might tend to prove, because she mentioned no such property to her attorney, that she in fact owned none. Whether such evidence would be sufficient to support a finding we do not decide, but the fact that she did inform her attorney that she owned separarte property destroyed whatever negative probative value her failure to inform her attorney of such fact might otherwise have. Furthermore the predeceased husband's memorandum that she owned $53,250 in government bonds was an admission of evidentiary value against his successors in interest that she did own separate property in that amount. Code Civ.Proc., § 1853.

[5, 6] The burden was on respondents to trace the community property of the husband into the estate of his wife. Except as to the Chase and Boston stock they failed to do so by any substantial evidence. Where the estate is substantially the same in value and the surviving spouse has died shortly after the predeceased spouse without being gainfully employed the court may find from those facts that the property is the proceeds of the property received from the predeceased spouse. In re Estate of Adams, supra, 132 Cal.App.2d 190, 205, 282 P.2d 190. The rule is not fairly applicable to this case because of the great disparity of the value of the two estates and the fact that 15 years elapsed between the death of the husband and that of the wife.

[7] One minor point remains. The decedent received $6,000 family allowance from the estate of her husband. This was her separate property. In re Estate of Simonton, supra, 183 Cal. 53, 59, 190 P. 442.

The executors ask us to order distribution in accordance with our conclusions. If respondents have no further evidence to offer the probate court should make such distribution.

The portion of the order and decree appealed from is affirmed as to the stock of The Chase National Bank and The Boston Corporation and as to the $4,239 executrix' fee; otherwise it is reversed.

NOURSE, P. J., and KAUFMAN, J., concur.

142 Cal.App.2d 126 Cite as 298 P.2d 109

PLEASANT VALLEY LIMA BEAN GROWERS AND WAREHOUSE ASSOCIATION, a corporation, Plaintiff, Cross-Defendants, and Respondent,

v.

CAL–FARM INSURANCE COMPANY, a corporation, Defendant, Cross-Complainant and Appellant.

Civ. 21258.

District Court of Appeal, Second District, Division 3, California.

June 8, 1956.

Rehearing Denied July 3, 1956.

Hearing Denied Aug. 1, 1956.

Action for declaratory judgment to determine plaintiff's rights under defendant's automobile liability policy, wherein the defendant cross-complained seeking a determination of the rights of all parties concerned arising both from its automobile liability policy and a public liability policy secured by plaintiff from another insurance company, and a third person was permitted to intervene seeking a determination that he was an insured under terms of automobile liability policy issued by defendant. The Superior Court of Ventura County, Walter J. Fourt, J., entered a judgment adverse to defendant, and the defendant appealed. The District Court of Appeal, Shinn, P. J., held that omnibus clause in automobile liability policy extending protection as additional insured to any person while using vehicle and any person or organization legally responsible for use thereof, provided that such use was with named insured's permission, did not intend that extended coverage should be limited only to other users of insured vehicle whose negligence would be imputed to named insured under permissive use statute.

Affirmed.

1. Insurance ⇐435.20

Clause in automobile liability policy specifically excluding coverage for bodily injury to, sickness, disease or death of any employee of the insured, while engaged in the employment, other than domestic of the insured, or in domestic employment if benefits therefor are either payable or required to be provided under any workmen's compensation law, properly interpreted, operated to exclude coverage only in cases where injured party was employee of the particular insured, whether named insured or additional insured under omnibus clause, who was seeking protection under the policy, and, hence, fact that injured person was employee of named insured did not extinguish liability of insurer under omnibus clause for negligence of additional insureds.

2. Insurance ⇐146(3)

Any ambiguities or uncertainties that automobile liability policy might contain are to be construed against insurer.

3. Insurance ⇐146(3)

Doubt will be resolved against insurer where language of policy is ambiguous, whether doubt relates to extent or fact of coverage, whether to peril insured against, to amount of liability, or to persons protected, and language will be understood in its most inclusive sense for benefit of insured.

4. Insurance ⇐146(3)

Where language of policy is capable of two constructions, it should be construed in insured's favor.

5. Insurance ⇐146(3)

An insurance policy should be so construed, if possible, as to secure indemnity to insured for losses to which policy relates, rather than to narrow policy protection.

6. Insurance ⇐146(3)

It is unnecessary to show that construction against insurer is more logical than construction against insured, but it suffices to show that construction in favor of insured is as reasonable as the other.

7. Insurance ⇐435.1

Exclusion clause in automobile liability policy must be read as a whole.

8. Insurance ⇐435.9

Omnibus clause in automobile liability policy extending protection as additional insured to any person while using insured vehicle and any person or organization legally responsible for use thereof, provided that such use was with named insured's permission, did not intend that extended coverage should be limited only to other

users of insured vehicle whose negligence would be imputed to named insured under permissive use statute. West's Ann.Vehicle Code, § 402.

9. Insurance ⇐435.8

The exclusion clause and omnibus clause in automobile liability policy must be read together, and the exclusion clause must be given effect as against some unexpressed understanding on insurer's part as to scope of omnibus clause.

10. Insurance ⇐146(3)

An exception to the coverage provided for in general terms must be clearly and unmistakably expressed in the policy.

11. Insurance ⇐512½

Where injury to truck driver was allegedly caused by negligence of warehouse owner's employee while assisting in unloading lima beans from truck into warehouse pit, and truck owner had automobile liability policy with omnibus clause and warehouse owner had public liability policy covering warehouse operations at time of the accident, obligation of insurer under automobile liability policy to defend personal injury action against warehouse owner and employee as additional insureds and to pay judgment therein was primary to obligation of insurer under the public liability policy.

Moss, Lyon & Dunn, Los Angeles, for appellant.

Hunter & Liljestrom, Los Angeles, for respondent.

SHINN, Presiding Justice.

This is an appeal by defendant Cal-Farm from a declaratory judgment determining its obligations under an automobile liability insurance policy issued by it to one Brucker. The judgment requires defendant to defend, on behalf of plaintiff and Croker, an employe of plaintiff, an action for personal injuries brought against plaintiff and Croker by one Nungaray, an employe of Brucker; it further requires defendant to pay, within the limits of its policy, any final judgment in favor of Nungaray which might result from such action; and it further holds that defendant's obligations under its policy are primary to the obligations of United States Fidelity & Guaranty Company, which issued a comprehensive-general automobile liability insurance policy to plaintiff.

The rather involved factual situation presented here arose in the following manner. On March 12, 1953, plaintiff purchased from United States Fidelity & Guaranty Company (hereinafter referred to as United) a liability insurance policy whose pertinent provisions will be set forth. The policy provided for limits of liability for bodily injury of $100,000 for each person and $300,000 for each accident. It required United "to pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person and caused by accident." It obligated United to defend any suit against plaintiff alleging such injury, sickness or disease, etc., and provided that: "If the Insured has other insurance against a loss covered by this policy the Company shall not be liable under this policy for a greater proporation of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance under this policy with respect to loss arising out of the use of any non-owned automobile shall be excess insurance over any other valid and collectible insurance available to the Insured, either as an Insured under a policy applicable with respect to such automobile or otherwise."

On April 10, 1953, defendant issued an automobile liability insurance policy to Brucker. This policy likewise provided for limits of liability for bodily injury of $100,000 for each person and $300,000 for each accident. It required defendant "to pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person, caused by accident and arising out of the ownership, maintenance or

use of the automobile." (The use of the automobile according to the policy "includes loading and unloading thereof.") Defendant agreed to defend any suit against Brucker alleging such injury, sickness or disease, etc., and contained an "omnibus clause" extending insurance protection as follows: "With respect to the insurance afforded for liability, the unqualified word insured includes the named insured and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission." The policy contained an "other insurance" clause similar to the clause quoted above from plaintiff's policy, provided, however, that the policy would be excess insurance as to other insurance covering substitute automobiles, newly acquired automobiles and privately owned automobiles. In addition, defendant's policy specifically excluded coverage for "bodily injury to, sickness, disease or death of any employee of the insured, while engaged in the employment, other than domestic of the insured, or in domestic employment if benefits therefor are either payable or required to be provided under any workmen's compensation law; nor to any obligation for which the insured or any company, as his insurer, may be held liable under any workmen's compensation law * * *."

On November 9, 1953, both policies were in full force and effect. On that date, one Nungaray, an employe of Brucker, was driving a 2½ ton G.M.C. truck owned by Brucker and scheduled in Brucker's policy with defendant. Nungaray drove the truck, which was loaded with lima beans, to plaintiff's warehouse in Oxnard in order to unload the beans in plaintiff's warehouse pits. The United policy covered plaintiff's warehouse operations.

What happened at plaintiff's warehouse that day was stipulated to at the trial of this action. Nungaray drove the truck to the rear of the warehouse and backed it onto a platform so that the front of the truck could be elevated enough to allow the beans to slide out from the rear of the truck into a bin. Nungaray was directed to the platform by one Croker, plaintiff's employe. Before this, Croker had placed two wooden blocks in front of two stationary blocks attached to the platform, so that the truck's rear wheels would rest against the wooden blocks and allow the front of the truck to be elevated in such a manner that the overhanging rear end of the truck would be directly over the warehouse pit and allow the beans to flow into the pit. The wooden blocks were used to prevent the rear end of the truck from extending beyond the bean pit. After Nungaray had backed the truck onto the platform, the truck was in such a position that its rear dual wheels rested against the two wooden blocks. Nungaray turned off the motor and descended from the truck. Croker then operated separate machinery located inside the door of the warehouse and raised the front end of the platform about thirty degrees, which permitted the beans to slide into the pit. As a few beans remained in the bottom of the bed of the truck, Nungaray obtained a broom from the warehouse, and stationed himself at the rear of the truck, and with one leg over a pipe railing at the edge of the bean pit, reached into the bed of the truck to sweep out the remaining beans. While he was in this position, the truck moved backwards, and the rear dual wheels of the truck moved up over the wooden blocks placed by Croker, over the concrete platform, and pinned Nungaray between the rear of the truck and a concrete wall, causing severe injuries.

Within one year of the accident, Nungaray filed an action for damages in the Ventura County Superior Court, naming as defendants Pleasant Valley (plaintiff herein) and its employe Croker. In his complaint Nungaray alleged that "the defendants" (Pleasant Valley and Croker) were negligent in the following particulars, to wit: In constructing and placing the wooden blocks, in failing to remove the wooden blocks prior to the unloading operation, and in failing to warn Nungaray that the wooden blocks were likely to cause the truck to back up when in an elevated position. The prayer was for over $78,000.

Upon service of the Nungaray complaint, United took over the defense of that action

on behalf of Pleasant Valley and Croker, the defense of Croker being a courtesy defense only, he not being an insured under the United policy. Counsel for United tendered their defense of the Nungaray action to defendant herein, but Cal-Farm refused to defend, denying any coverage under its policy with Brucker to either party. Thereupon Pleasant Valley brought this declaratory relief action to determine its rights under defendant's policy with Brucker; defendant cross-complained, seeking a determination of the rights of all parties concerned arising from both the Brucker policy and Pleasant Valley's United policy. Croker was permitted to file a complaint in intervention, seeking a determination that he is an insured under the terms of the Brucker policy. Trial was had on a stipulation of facts, and resulted in the judgment set forth above.

Two questions are presented on this appeal. Does the coverage of the policy of automobile liability insurance issued by defendant to Brucker extend to plaintiff and Croker, i. e., are they, or is either of them, an insured under the terms of that policy? If this be so, are defendant's obligations under that policy primary to the obligations of United under its policy of liability insurance issued to plaintiff? We have concluded that both of these questions were correctly decided by the trial court.

The "omnibus clause" in Brucker's policy with defendant extended protection to "any person while using the automobile and any person or organization legally responsible for the use thereof," provided that such use was by Brucker himself or with Brucker's permission. The policy defined "use" of Brucker's truck to include loading and unloading. It is a reasonable inference that Croker had Brucker's consent to carry out the operations incidental to unloading the lima beans from the truck, and it is obvious that the unloading operation constituted a use of the truck within the policy provision. Pleasant Valley, Croker's employer, is liable under the doctrine of respondeat superior for Croker's negligent acts committed within the scope of his employment, hence plaintiff is clearly, with respect to the truck, an organization "responsible for the use thereof."

[1] Cal-Farm maintains that coverage does not extend to plaintiff and Croker under the omnibus clause, but before considering the interpretation of that clause which is advocated, we shall discuss the separate contention that any liability of Brucker or Pleasant Valley for bodily injury to Nungaray, Brucker's employe, is expressly excluded from coverage under its policy by the above quoted exclusion clause. It is Cal-Farm's position that the clause "bodily injury to, sickness, disease or death of an employee of the insured" must be read "bodily injury to, sickness, disease or death of any employee of only the *named* insured"; hence, since Nungaray was Brucker's employe acting within the scope of his employment at the time of the accident, insurance coverage under the "omnibus clause" would be excluded as to Pleasant Valley and Croker, notwithstanding the fact Nungaray was not an employe of Pleasant Valley or Croker. Croker and Pleasant Valley contend that the exclusion clause of the policy must not be read restrictively, that the term "insured" in that clause is not limited to the insured named in the policy but extends, due to the "omnibus clause", to the other persons who qualify as additional insureds, and that the exclusion clause, properly interpreted, operates to exclude coverage only in cases where the injured party is the employe of the *particular* insured (whether named insured or additional insured) who is seeking protection under the policy. Thus, on this hypothesis, since Nungaray was not employed by either Pleasant Valley or Croker, Cal-Farm's obligations under its policy are not extinguished by reason of the fact that Nungaray was an employe of Brucker, the named insured. We agree with the latter interpretation.

[2–6] These opposing contentions call for an interpretation of the exclusion clause. The question is apparently one of first impression in this state, and our attention has been directed to cases from various other jurisdictions which support one or the other of the above interpreta-

tions of Cal-Farm's exclusion clause. We feel, however, that it is not necessary to rely on the authority of any of those cases in determining the question, as it can be decided by an examination of the exclusion clause itself under general principles of insurance law. In the first place, since the Brucker policy was drafted by Cal-Farm, any ambiguities or uncertainties the policy might contain are to be construed against the insurer. Arenson v. National Automobile & Casualty Ins. Co., 45 Cal.2d 81, 83, 286 P.2d 816. "If the insurer uses language which is uncertain any reasonable doubt will be resolved against it; if the doubt relates to extent or fact of coverage, whether as to peril insured against [citing cases], the amount of liability [citing cases], *or the person or persons protected* [citing cases], the language will be understood in its most inclusive sense, for the benefit of the insured." Continental Cas. Co. v. Phoenix Const. Co., 46 Cal.2d 423, 296 P.2d 801, 809. (Emphasis added.) Where the language of the policy is reasonably capable of two constructions, it should be construed in the insured's favor. Linnastruth v. Mutual Benefit, etc., Ass'n, 22 Cal.2d 216, 137 P.2d 833. And a policy of insurance should be so construed, if at all possible, as to secure indemnity to the insured for losses to which the policy relates, rather than to narrow policy protection. Pendell v. Westland Life Ins. Co., 95 Cal.App.2d 766, 214 P.2d 392; Ritchie v. Anchor Casualty Co., 135 Cal.App.2d 245, 286 P.2d 1000. Furthermore, it is unnecessary to show that the construction against the insurer is more logical than the construction against the insured; it suffices to show that the construction against the insured is as reasonable as the other. Norton v. Farmers Automobile Inter-Ins. Exch., 40 Cal.App.2d 556, 105 P.2d 136.

Reverting to Cal-Farm's contention that the exclusion clause applies only to Brucker, the *named* insured, we find Cal-Farm contending that the trial court held, and the effect of the judgment is, that the exclusion clause does not apply to Brucker, but that it does apply to other insureds. This was not the holding of the trial court, nor is it the contention of plaintiff that the exclusion clause does not apply to Brucker and his employes as well as to Pleasant Valley and Croker. Moreover, as we shall develop, if it were true that the clause applies to Brucker and not to Pleasant Valley, the result would be to broaden rather than narrow the coverage.

Plaintiff, as we say, agrees that Brucker was not covered with respect to liability for injury to his employe, Nungaray. His liability would be under workmen's compensation laws and clearly is one that was expressly excluded, and although Brucker is the only one having that liability, Cal-Farm argues that since he was not covered with respect to injuries to his employes, coverage would also be excluded as to any person who might come within the extended coverage of "insured," if any employe of Brucker should be injured while in the course of his employment, even though such additional insured were responsible for the injury. We do not attribute any such meaning to the exclusion clause. Following the blanket exclusion of "any employee of the insured," we find the following language: "* * * or in domestic employment if benefits therefor are either payable or required to be provided under any workmen's compensation law." The clause further excludes "any obligation for which the insured * * * may be held liable under any workmen's compensation law."

Cal-Farm insists that the court's interpretation of this clause is unreasonable because it would afford Pleasant Valley greater protection than is afforded Brucker, and from that premise argues against that interpretation. It is true, of course, that under the trial court's interpretation, and the facts of the case, Pleasant Valley is covered as to Nungaray and Brucker is not, but this does not mean that the exclusion clause has been construed so as to favor one more than the other. If Croker instead of Nungaray had been injured in the accident through the negligence of Brucker, the positions of the parties with respect to coverage would have been the same, although the parties would be reversed. Pleasant Valley would have been liable for workmen's compensation and would

not have been covered, while Brucker would have had coverage under the Cal-Farm policy. Moreover, if the trial court's interpretation were rejected, and Cal-Farm's adopted, so as to make the exclusion clause applicable only to Brucker, because of his workmen's compensation liability, the result would be that if Pleasant Valley's employe had been injured and entitled to workmen's compensation, Pleasant Valley nevertheless would be covered by Cal-Farm's policy.

[7] The exclusion clause must be read as a whole and we think leads inescapably to the conclusion that it means only that the coverage, whether of the named or the additional insured, does not apply to any one who has liability under workmen's compensation laws. As Pleasant Valley and Croker are additional insureds under defendant's policy, and as there is nothing in the record to show that either Croker or Pleasant Valley is obligated to Nungaray under workmen's compensation law, with respect to the accident, it is clear that Pleasant Valley and Croker are not excluded from policy protection as to an action brought by Nungaray against them for personal injuries.

[8, 9] We consider now the argument of Cal-Farm with respect to the scope of the "omnibus" clause, namely, that the purpose was to extend coverage only to other users of Brucker's vehicles whose negligence would be imputable to Brucker under the permissive use statute, Vehicle Code, § 402, and that there was no intention to extend coverage to one whose negligence would not impose liability upon Brucker. Under this clause Pleasant Valley and Croker were covered, without qualification. Cal-Farm argues that the court's interpretation is unreasonable because it gives policy protection to Pleasant Valley and none to Brucker for Nungaray's injuries; the parties could not have intended that Pleasant Valley, alone, should have coverage in any situation, when Brucker was paying for his own protection and not that of Pleasant Valley. It is not true, however, that the protection extends only to Pleasant Valley. Brucker has workmen's compensation liability and the right of recoupment of compensation paid from any recovery by Nungaray against Pleasant Valley and Croker. Labor Code, §§ 3852–3863. It cannot be said that it is of no advantage to Brucker to have payment of the judgment, if any, insured by Cal-Farm. But the facts of the case bring it precisely within the omnibus clause, as it is written. If the clause means less than it says, the exception or limitation must be found in the exclusion clause. There cannot be read into the policy a provision that an additional insured is not covered unless Brucker also is covered to the same extent, when the exclusion clause contains the only exception to the specific coverage of the omnibus clause. The two clauses must be read together, and the exclusion clause must be given effect as against some unexpressed understanding on the part of Cal-Farm as to the scope of the omnibus clause.

[10] Under cardinal rules of insurance law an exception to the coverage provided for in general terms must be clearly and unmistakably expressed. Pendell v. Westland Life Ins. Co., supra, 95 Cal.App.2d 766, 770, 214 P.2d 392. Although we do not entertain any doubt with respect to the expressed undertakings of Cal-Farm under the policy, we would have to resolve any ambiguity or uncertainty as to the scope of the coverage in favor of the insured. But aside from this rule of interpretation, we are of the opinion that the trial court correctly held that the Cal-Farm policy covers plaintiff and Croker with respect to any liability for the injury suffered by Nungaray.

[11] It remains to be determined whether defendant's obligation to defend the Nungaray action and to pay judgment therein is primary to the obligation of United, plaintiff's insurer, or whether defendant is justified in arguing that both insurance companies must bear these expenses pro rata as concurring insurers. We are of the view that defendant's liability is primary to United, and that United has liability secondary to that of defendant.

Defendant contends that United is jointly liable to defend the Nungaray action and pay judgment therein for the reason that Nungaray's complaint alleges the *separate, concurring* negligence of Pleasant Valley,

as well as the negligence of Croker which is imputable to Pleasant Valley under the doctrine of respondeat superior. We do not so view that complaint. The three separate acts of negligence set forth in Nungaray's complaint are there attributed to "the defendants" (Pleasant Valley and Croker) without distinguishing between them. It was alleged that Croker was Pleasant Valley's agent, and that he was at all times acting within the scope of his authority. The three acts of negligence, stripped to their essentials, are that the defendants in that action negligently *placed* the wooden blocks against the permanent blocks in back of the truck, negligently *failed to remove* the wooden blocks, and negligently *failed to warn* Nungaray that the wooden blocks were unlikely to hold the truck. All these were acts which Pleasant Valley could only perform through its agents and employes, and it was stipulated at the trial that the wooden blocks had been placed by Croker. The complaint in the Nungaray action and the stipulation of facts in this action are silent as to any acts or omissions on the part of Pleasant Valley other than those of Croker. The complaint alleges that Nungaray drove the truck onto the platform at Croker's direction, and that Croker was in charge of the elevating machinery. Reading the Nungaray complaint as a whole, we are of the opinion that Pleasant Valley's negligence is therein predicated upon the negligence of Croker, and that it does not allege separate, concurring negligence on Pleasant Valley's part.

Turning to the policies of insurance themselves, we find that both contain "other insurance" clauses. United's "other insurance" clause provides that its liability shall be proportionate to other valid and collectible insurance, save that in the case of loss arising out of the use of a non-owned automobile, its insurance shall be *excess* insurance only. As the truck involved in the accident was not owned by Pleasant Valley, United's insured, United's policy is excess insurance as to Pleasant Valley, and Cal-Farm's duty to defend Pleasant Valley and pay judgment in the Nungaray action is primary to the obligation of United. Cal-Farm's "other insurance" clause likewise provides that its liability shall be proportionate to other valid and collectible insurance, save that in circumstances not applicable here, its coverage shall be *excess* coverage. Since we have already determined that Croker is an additional insured under the Cal-Farm policy, and since Croker is not insured under United's policy, Cal-Farm's obligation to defend him and pay judgment against him in the Nungaray action is also primary, for there is no other valid and collectible insurance covering him which could be prorated with the Cal-Farm insurance. Also, since United's coverage of Pleasant Valley is excess with respect to non-owned vehicles, there is no basis for apportionment with Cal-Farm's coverage of Pleasant Valley. The facts in the instant case are readily distinguishable from those in Air Transport Mfg. Co. v. Employers' Liability, etc., Corp., 91 Cal.App.2d 129, 204 P.2d 647, relied on by defendant, and that case is not authority for the proposition that Cal-Farm and United are jointly liable to defend Pleasant Valley in the Nungaray action and pay judgment therein.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

Hearing denied; TRAYNOR, J., dissenting.



142 Cal.App.2d 396

Joseph MALLECK, Petitioner,

v.

SUPERIOR COURT of the State of California IN AND FOR the CITY AND COUNTY OF SAN FRANCISCO, Respondent.

Civ. 17248.

District Court of Appeal, First District, Division 2, California.

June 19, 1956.

Rehearing Denied July 19, 1956.

Hearing Denied Aug. 16, 1956.

Proceeding upon petition for writ of prohibition. The District Court of Appeal, Kaufman, J., held that the record failed to establish probable cause to believe that peti-

tioner had committed assault with a deadly weapon as charged in an information.

Peremptory writ issued.

1. Prohibition ⇐5(4)

If defendant was committed on criminal charge without reasonable or probable cause, writ of prohibition was proper remedy. West's Ann.Pen.Code, § 999a.

2. Indictment and Information ⇐137(4)

Standard of "reasonable or probable cause" sufficient to sustain an indictment as against motion, is not same as that required for conviction. West's Ann.Pen.Code, § 995.

See publication Words and Phrases, for other judicial constructions and definitions of "Reasonable or Probable Cause".

3. Indictment and Information ⇐137(4)

"Reasonable or probable cause" within statute relating to the setting aside of indictment or information means such state of facts as would lead a man of ordinary caution or prudence conscientiously to entertain a strong suspicion of the guilt of the accused, and such cause may exist although there may be some room for doubt. West's Ann.Pen.Code, § 995.

4. Prohibition ⇐27

Record of proceeding for writ of prohibition failed to establish probable cause to believe that petitioner had committed assault with deadly weapon as charged in information. West's Ann.Pen.Code, §§ 245, 999a.

Edward L. Cragen, San Francisco, for petitioner.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

KAUFMAN, Justice.

This is a petition for writ of prohibition.

[1] The petitioner who has been charged in an information with violation of Penal Code, section 245 (assault with a deadly weapon) seeks the writ on the ground that he was committed without reasonable or probable cause. If this contention is correct, a writ of prohibition is a proper remedy. Penal Code, sec. 999a.

The petitioner first argues that no evidence was introduced at the preliminary examination to establish that a crime had been committed. Nathan A. Thornton, the alleged victim of the assault, testified that while on duty as a sentry at the Marine Supply Forwarding Depot at San Francisco he was "shot at three times." He testified he "heard the report of the rifle and then the zing of the bullet as it came past me", he "heard another report of a bullet fired and the bullet zing passed me", and "another shot was fired and a bullet zinged past."

[2, 3] Petitioner states "there have been no cases holding an assault can be established by circumstantial evidence without a witness to the assault who can identify the defendant as the perpetrator or without a wound from which the assault can be inferred." For this proposition he cites cases where either one or the other was present. No cases have been found where a conviction for an assault has been upheld where there either was no witness identifying the perpetrator or a wound, but no cases have been found where a conviction was reversed on this ground. Even if the judgment of conviction would be reversed if the only evidence introduced at the trial was that introduced at the preliminary examination, the standard under Penal Code, section 995 of "reasonable or probable cause" is not the same as that required for conviction. "'Reasonable or probable cause' means such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion of the guilt of the accused. [People v. Kilvington, 104 Cal. 86, 37 P. 799; People v. Smith, 141 Cal.App.2d 399, 296 P.2d 913.] 'Reasonable or probable cause' may exist although there may be some room for doubt." People v. Nagle, 1944, 25 Cal.2d 216, 222, 153 P.2d 344, 347. The testimony at the preliminary examination seems sufficient to make it probable that Thornton was assaulted with a deadly weapon.

However, there is the question as to what evidence, if any, was produced to connect the petitioner with the crime. The petitioner is a night watchman at the Ace Auto Wrecking Yard which adjoins the Depot on the east. The Southern Pacific has a right of way and raised tracks immediately to the east of the Depot and the Wrecking Yard is immediately beyond that. Thornton was asked whether he could tell where the shot came from and answered "Well, from somewhere along the railroad tracks, as near as I could tell." The third shot he said came "From approximately the same general area, I suppose." Thomas A. Morris, a San Francisco police officer, testified that on the same evening, while investigating the incident, he climbed on the railroad tracks. "And on arriving at the top I flashed my flashlight around to see if I could spot anything or anybody and I heard a shot and I heard the wind of a bullet." "After the shot I fell to the ground and Sergeant Sweeting, he came up behind me and he went down on his knee and I, with the flashlight in my hand, I raised it over my head about a minute and a half, maybe two minutes when I spotted a man in the Ace Auto Wrecking Yard."

"Q. Did you get a good look at the man? A. I didn't get a good look, enough to identify him, while I was approximately 125, maybe 100 feet away from him.

"Q. Was anything or anybody with the man that you saw? A. There was two dogs.

"Q. Was there a response when you said 'Stop shooting'? A. Was there a response—I don't recall at the time.

"Q. Was there any more shooting? A. No, sir."

Morris also testified that he could not tell where the shot which he heard came from.

Thornton said the shots sounded like they came from a .22. Inspector Frank J. Van Dervort of the San Francisco Police Department testified that he found in the shack petitioner used in the Auto Wrecking Yard an empty cardboard carton marked "Remington Hi Speed Klean Bore .22 Long 50 Rim Fire Cartridges" and two empty cartridge cases with "High speed" imprinted on the casing. The petitioner denied any knowledge of either. Petitioner also denied having a gun or firing a gun. This is all the evidence introduced at the preliminary examination which might be said to connect the petitioner with the assaults.

[4] Even assuming that the man whom Officer Morris saw on the night of the 15th was petitioner, this evidence is insufficient to establish reasonable and probable cause that the petitioner committed the crimes. The petitioner was a night watchman at the Ace Auto Wrecking Yard. The Yard was adjacent to the Supply Depot and his job required him to be in the vicinty of the crime. It is only natural that he would be out and stirring if he heard shots fired in the vicinty. There was no evidence introduced that petitioner had a gun or access to a gun. Assuming that Corporal Thornton accurately surmised from which direction the bullets came, there was no evidence that the only way to get to the tracks was through the Ace Auto Wrecking Yard. There was at least one other metal salvage yard each of the Depot and to the north of the Ace Auto Wrecking Yard from which the shot might have come.

The only thing which distinguishes the petitioner from many other possible suspects is that he was in the vicinity of the crime when it was committed and had within his possession cartridge casings which may possibly have been used in the commission of the crime. The latter may have come into his possession for any number of reasons and there is nothing to show the bullets were recently fired from the casings. From the evidence at the preliminary examination, it is still as probable that the petitioner did not commit the crime as that he did. The term "probable" has been defined as meaning, having more evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt. Ex parte Heacock, 8 Cal. App. 420, 97 P. 77.

Applying the law to the facts adduced at the preliminary hearing it is clear that there is no reasonable or probable cause to believe that the petitioner has committed the crime charged. Speculation and conjecture

would have to be indulged in to connect petitioner with the crime.

In view of the foregoing, let a peremptory writ of prohibition issue as prayed.

NOURSE, P. J., and DOOLING, J., concur.



142 Cal.App.2d 400

The PEOPLE of the State of California, Plaintiff and Appellant,

v.

BOCK LEUNG CHEW, Defendant and Respondent.

Cr. 3178.

District Court of Appeal, First District, Division 2, California.

June 19, 1956.

Rehearing Denied July 3, 1956.

Hearing Denied July 18, 1956.

An information was filed against the defendant for possession of narcotics. The Superior Court, City and County of San Francisco, Orla St. Clair, J., granted defendant's motion to set aside the information on the ground that all the evidence against him was obtained by illegal search and seizure and the people appealed. The District Court of Appeal, Dooling, J., held where police officers detected the odor of a substance, the possession of which constituted a felony, apparently coming from an apartment, they were justified in believing that a felony was being committed in their presence and they could make an immediate entry into and search the apartment without first procuring a warrant.

Order reversed.

1. Criminal Law ⇐394

Searches and Seizures ⇐3(10)

Where question of legality of an arrest or of a search and seizure is raised at a preliminary hearing, defendant makes a prima facie case when he establishes that an arrest was made without a warrant or that private premises were entered or a search made without a search warrant and the burden is then on the prosecution to show proper justification.

2. Searches and Seizures ⇐3(1)

Where police officers detected the odor of a substance, the possession of which constituted a felony, apparently coming from an apartment, police officers were justified in believing that a felony was being committed in their presence and they could make an immediate entry into and search the apartment without first procuring a warrant. West's Ann.Health & Safety Code, § 11500; West's Ann.Pen.Code, § 995.

3. Arrest ⇐63(3)

An offense is committed in the presence of a police officer within rule authorizing an arrest without a warrant when the officer receives knowledge of the commission of the offense in his presence through his sense of smell.

4. Poisons ⇐4

Where officer entered, and seized narcotics in, apartment of defendant after detecting the odor of a narcotic in the hall, the presence of the defendant was not necessary to constitute possession of a narcotic so long as the defendant had knowledge of the presence of the narcotic as embraced within the concept of physical control with intent to exercise such control.

5. Arrest ⇐71

A search is not unlawful because it precedes rather than follows the arrest.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for appellant.

Benjamin M. Davis, San Francisco, for respondent.

DOOLING, Justice.

Defendant was charged with possessing a preparation of yen shee in violation of Health and Safety Code, § 11500. His motion to set the information aside, Pen.Code, § 995, was granted on the ground that all of

the evidence against him was obtained by an illegal search and seizure in violation of his constitutional rights. The People appeal.

At the preliminary hearing Police Officer McKinley testified that on the evening of April 5, 1955, at about 9:15 p. m. he and another police officer happened to be in an apartment building located at 823 Grant Avenue. They had never been in the building before and there was nothing suspicious about the place. On their way to another apartment in this building they walked by the door of Apartment 5. One of the officers testified, "We walked by the door and smelled—and it smelled of opium."

The officers were admitted to the apartment by respondent's wife who was the only person present therein at the time. Respondent's wife did not speak English and did not understand the officers when they talked to her.

Upon entering a room of the apartment the officers became aware of a very strong smell of opium. They searched the premises and under the kitchen cupboard found what later was identified as yen shee in a coffee can. A chemist for the Bureau of Narcotics Enforcement testified that yen shee is the residue from smoking opium. Between 9:15 and 11:00 p. m. they saw no one enter or leave the premises and during that period of time they searched the apartment. At 11 p. m. the officers called an interpreter so that they could talk with respondent's wife.

The officers had neither a search warrant nor a warrant for anyone's arrest in Apartment 5.

Respondent's name and identification was obtained from telephone bills found in his apartment. He was arrested the following day about 4:30 p. m. at the Palace Hotel where he worked in the pantry. At that time respondent told the arresting officers that he found the yen shee outside his window when he moved into the apartment. He took it into his apartment and had tried smoking it once but was unable to "roll a pill" and had given it up. He stated that his wife had nothing to do with it and that the contraband belonged to him.

[1] Where the question of the legality of an arrest or of a search and seizure is raised at the preliminary hearing the defendant makes a prima facie case when he establishes that an arrest was made without a warrant or that private premises were entered or a search made without a search warrant. The burden is then on the prosecution to show proper justification. Badillo v. Superior Court, 46 Cal.2d 269, 294 P.2d 23.

Police Officer McKinley testified: "We walked by the door [of respondent's apartment] and smelled—and it smelled of opium."

[2] Respondent argues that this testimony must be construed to mean that only the door itself smelled of opium. We feel that this is too narrow a construction. The language used may be reasonably construed to mean that as the officers passed the door they detected the odor of opium. The basic question presented is: When officers detect the odor of a substance the possession of which is made a felony, apparently coming from an apartment, does this justify their making an immediate entrance into and search of the apartment without first procuring a warrant. Since the possession of opium is a felony officers who detect the odor of opium are entitled to believe that the felony of possessing opium is being committed in their presence. We can see no logical distinction in this respect between something apparent to the sense of smell, and the same thing apparent to the sense of sight or to the sense of hearing. It is true that, with four justices dissenting, the Supreme Court of the United States, in Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436, held that federal officers who smelled the fumes of burning opium coming from a residence were not justified in entering the residence without a warrant. With all due respect to the justices of that court who joined in this holding, we cannot follow their reasoning and agree rather with the four justices who dissented. In doing so we follow the suggestion made by our own Supreme Court in People v. Cahan, 44 Cal.2d 434, at pages 450–451, 282 P.2d 905, at page 915, in which that court said:

"In developing a rule of evidence applicable in the state courts, this court is not bound by the decisions that have applied the federal rule, and if it appears that those decisions have developed needless refinements and distinctions, this court need not follow them. Similarly, if the federal cases indicate needless limitations on the right to conduct reasonable searches and seizures or to secure warrants, this court is free to reject them."

[3–5] The weight of authority, with which we are in agreement, is with the view that the offense is committed in the presence of an officer "when the officer receives knowledge of the commission of an offense in his presence through any of his senses", 6 C.J.S., Arrest, § 5, p. 581, and this includes the sense of smell. See cases collected in note 52, 6 C.J.S., p. 582. The crime of possession of a narcotic does not require the immediate presence of the defendant so long as he has "knowledge of the presence of the object as embraced within the concept of 'physical control with the intent to exercise such control,' which constitutes the 'possession' denounced by the statute." People v. Gory, 28 Cal.2d 450, 455–456, 170 P.2d 433, 436. Thus, if respondent, as he later admitted, had physical control of the yen shee with knowledge of its *narcotic* character, the crime of possession was being committed in the presence of the officers although respondent was not there at the time. Respondent's arrest, in view of his absence from the apartment, was made with reasonable promptness thereafter. The search is not unlawful because it precedes rather than follows the arrest. People v. Simon, 45 Cal.2d 645, 290 P.2d 531.

The testimony of the chemist that yen shee is the residue from smoking opium sufficiently establishes its narcotic character.

The order appealed from is reversed.

NOURSE, P. J., and KAUFMAN, J., concur.

142 Cal.App.2d 317

S. ROBERTS, Appellant,

v.

The WESTERN PACIFIC RAILROAD COMPANY, Respondent.

Civ. 16758.

District Court of Appeal, First District, Division 1, California.

June 18, 1956.

Rehearing Denied July 18, 1956.

Hearing Denied Aug. 16, 1956.

Action against railroad to recover damages for wrongful discharge in violation of seniority rights under collective bargaining agreement and without a hearing. The Superior Court, City and County of San Francisco, Clarence W. Morris, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Peters, P. J., held that plaintiff had lost his seniority rights under collective bargaining agreement when, upon being displaced by a senior employee, he filed furlough papers instead of exercising right to displace junior employees, and that failure to grant him a hearing before dismissal, following re-employment, was not prejudicial to plaintiff, since such hearing necessarily would have resulted in his dismissal for lack of seniority.

Judgment affirmed.

1. Appeal and Error ⇐544(3)

On appeal on clerk's transcript alone, reviewing court could consider only the judgment roll, consisting of the pleadings, findings, conclusions and judgment, and exhibits were not part of the record on appeal.

2. Labor Relations ⇐262

Whatever rights discharged railroad employee had to continued employment must be predicated upon collective bargaining agreement between employer and union covering the craft in which discharged employee had been employed.

3. Master and Servant ⇐20

In absence of statute or contract, an indefinite employment is terminable at will by employer, with or without cause.

4. Labor Relations ⇐258

Any ambiguity in provision of collective bargaining agreement between railroad and union for protecting seniority when an employee was displaced by a senior employee was clarified when railroad and union agreed to an interpretation of such provision as requiring that a displaced employee with seniority rights entitling him to a regular position must assert displacement rights over any junior employee within 10 days from date of displacement in order to retain seniority. Railway Labor Act, 45 U.S.C.A. § 151 et seq.

5. Labor Relations ⇐258

Where railroad employee, having seniority rights entitling him to a regular position over other junior employees, was displaced by a senior employee, displaced employee lost his seniority rights when he failed to exercise such displacement rights within 10 days, as required by collective bargaining agreement as interpreted by employer and union, and instead filed furlough papers. Railway Labor Act, 45 U.S.C.A. § 151 et seq.

6. Labor Relations ⇐258

Where railroad and union agreed to an interpretation of provision of collective bargaining agreement for protection of seniority rights of an employee displaced by a senior employee, such interpretation agreed to by union and railroad was binding on members of union. Railway Labor Act, 45 U.S.C.A. § 151 et seq.

7. Labor Relations ⇐218

Under Railway Labor Act, a union, as bargaining agent, had the exclusive power with employer to fix terms of employment and to change such terms by agreeing with employer to changes, modifications or interpretations of collective bargaining agreement. Railway Labor Act, 45 U.S.C.A. § 151 et seq.

8. Labor Relations ⇐258

Under provisions of collective bargaining agreement between railroad and union relating to furloughing of displaced employees who did not possess sufficient seniority to displace a junior employee, an employee having sufficient seniority to displace a junior employee had no right to be furloughed when displaced by a senior employee, and his attempt to file furlough papers was invalid and ineffective, and when he later applied for and was assigned to an open position, he became a new employee so far as seniority was concerned. Railway Labor Act, 45 U.S.C.A. § 151 et seq.

9. Labor Relations ⇐260

Where railroad employee, displaced by senior employee, was later re-employed on basis of seniority rights which had been acquired under collective bargaining agreement prior to displacement, but lost by failure to exercise pursuant to agreement right to displace junior employees when he himself was displaced, employer, upon discovery of such material mutual mistake as to seniority rights, had the legal right to correct such mistake by discharging such employee. Railway Labor Act, 45 U.S.C.A. § 151 et seq.

10. Labor Relations ⇐260

Provision of collective bargaining agreement between railroad and union that an employee, who had been in the service for more than 90 days or whose application for employment had been approved, should not be disciplined or dismissed without an investigation and hearing applied to all cases of removal of employees, including those removed for lack of seniority, and not merely to cases involving discipline of employees, who, having seniority, were charged with misconduct. Railway Labor Act, 45 U.S.C.A. § 151 et seq.

11. Labor Relations ⇐260

The purpose of provision in collective bargaining agreement between railroad and union that an employee, who had been in the service for more than 90 days or whose application for employment had been approved, should not be disciplined or dismissed without an investigation and hearing was to prevent an employee from being arbitrarily dismissed until just cause was determined to exist, and such cause would include lack of seniority as well as misconduct. Railway Labor Act, 45 U.S.C.A. § 151 et seq.

12. Labor Relations ⇐260

Under collective bargaining agreement between railroad and union, a former em-

ployee, who was mistakenly re-employed on basis of seniority rights which he had lost by failure to exercise right to displace junior employees, when he himself had been displaced by senior employee, was entitled to a hearing before being discharged for lack of seniority. Railway Labor Act, 45 U.S.C.A. § 151 et seq.

13. Labor Relations ⇐264, 778

Though former railroad employee, mistakenly re-employed on basis of seniority rights which he had lost, was entitled to a hearing before dismissal for lack of seniority, failure to grant him such hearing was not prejudicial to employee, since it necessarily would have resulted in his dismissal, and he suffered no actual damage by reason of dismissal without hearing and was not entitled to nominal damages as a matter of right. Railway Labor Act, 45 U.S.C.A. § 151 et seq.

S. Roberts, San Francisco, in pro. per.

E. L. Van Dellen, San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff, S. Roberts, *in propria persona*, brought this action against the Western Pacific Railroad Company for damages, claiming that the company, as employer, had unlawfully deprived him of certain contract seniority employment rights. From a judgment for defendant, plaintiff appeals.

[1] This appeal is on the clerk's transcript alone. Plaintiff attempted to prosecute the appeal on a settled statement, but the statement was never perfected. Plaintiff has filed what he calls an "election of record" purporting to elect to prosecute the appeal on the "clerk's transcript alone with all the original exhibits." Of course, on a clerk's transcript appeal exhibits are not part of the record on appeal. The only record this court may consider is the judgment roll, consisting of the pleadings, findings conclusions and judgment. Hunt v. Plavsa, 103 Cal.App.2d 222, 229 P.2d 482.

The theory of the complaint was that plaintiff was hired by defendant on June 12, 1945, under the terms of a collective bargaining agreement between defendant and the appropriate Union; that under such agreement plaintiff gained certain seniority rights up to September 13, 1949; that on December 13, 1949, the defendant wrongfully dismissed plaintiff without a hearing although such hearing was required under the terms of the collective bargaining agreement. Damages of $35,000 were prayed for. The answer admitted the employment of plaintiff and the establishment of his seniority rights from June 13, 1945, to September 13, 1949, admitted the existence of the collective bargaining agreement and incorporated it into the answer, and admitted that this agreement, as modified and interpreted, was in effect at all times here pertinent. Defendant denied, however, that it had breached the agreement.

The trial court found that plaintiff was employed by defendant on June 13, 1945, in a craft covered by a collective bargaining agreement, and worked for defendant until September 13, 1949, under that agreement; that plaintiff's seniority rights under that agreement dated from June 13, 1945; that the agreement contained provisions for seniority, the methods such was to be maintained, exercised and lost; that Rule 40(a) of the agreement provided the method of protecting seniority when an employee was displaced or "bumped" by a senior employee; that such provision, in part, provided:

"Employees displaced, whose seniority rights entitle them to a regular position, shall assert such rights within 10 days. Employees who do not possess sufficient seniority to displace a junior employee shall be considered as furloughed"; that on March 26, 1946, the Union and defendant agreed to an interpretation of this rule, which interpretation, in part, provided:

"This rule requires that an employee displaced must assert displacement rights over any junior employees within ten days from date of displacement in order to retain seniority"; that in August of 1949, plaintiff was displaced by a senior employee and on August 4, 1949, defendant's agent advised plaintiff by letter that he must exercise his seniority rights in accordance with Rule 40(a); that on this date plaintiff's seniority

rights entitled him to a regular position over certain junior employees, but instead of exercising such rights, plaintiff on August 10, 1949, filed furlough papers under Rule 40(b) of the agreement; that plaintiff subsequently accepted temporary work as a furloughed employee; that on August 21, 1949, defendant listed certain open positions and plaintiff applied for one of these, listing his seniority date as June 13, 1945; that on August 29, 1949, plaintiff was assigned one of these positions on the basis of his seniority date being June 13, 1945; that on August 29, 1949, the Union protested plaintiff's appointment on the ground that when plaintiff was displaced he had seniority sufficient to displace certain junior employees, but under Rule 40(a) and its interpretation he had not exercised those rights and had lost his seniority, and should be discharged; that the defendant "determined that such request was in accordance with the facts," and in a letter dated September 7, 1949, advised plaintiff that he had lost his seniority, and was discharged; that plaintiff then engaged in litigation against defendant which occupied most of his time from September 14, 1949 to June 20, 1952, when the complaint in the present action was filed; that during the times plaintiff was not engaged in such litigation "he was able to, and did, secure employment which paid him substantially as well as his employment by defendant had."

The court concluded that the only rights of plaintiff to continued employment were based upon the agreement as modified and interpreted by defendant and the Union; that plaintiff had failed to comply with Rule 40(a) of the agreement and thereby had lost his seniority; that when plaintiff lost his seniority he lost any right to continued employment; that defendant did not violate plaintiff's rights in removing him from service.

Based on these findings and conclusion, judgment was entered in favor of defendant and plaintiff appeals.

[2–7] Whatever rights plaintiff has to continued employment must be predicated upon the collective bargaining agreement. This is so, because in the absence of a statute or contract, an indefinite employment is terminable at will by the employer, with or without cause. Austin v. Southern Pacific Co., 50 Cal.App.2d 292, 123 P.2d 39; sec. 2922, Labor Code. Both parties to this appeal attempt to interpret Rule 40(a), appellant contending that the right conferred upon him by that rule to "bump" junior employees was a mere privilege, and that a failure to exercise such privilege did not result in a loss of seniority, respondent contending to the contrary. Even if the rule were ambiguous, such ambiguity was clarified by the Union and the defendant when they entered into an agreed interpretation of the rule in 1946. By that interpretation it was agreed that a displaced employee with seniority "must assert displacement rights over any junior employees within ten days from date of displacement in order to retain seniority." It is too clear to require further discussion that, if this interpretation of the rule was binding on plaintiff, by failing to exercise his displacement rights as provided in the rule, plaintiff lost, i. e., no longer "retained" his seniority rights. It is equally clear that the interpretation agreed to by the Union and the employer is binding on the members of the Union, including plaintiff. It is well settled law that a union, as bargaining agent, under the terms of the Railway Labor Act, 45 U.S.C.A. § 151 et seq., has the exclusive power with the employer to fix the terms of the employment, and to change those terms by agreeing with the employer to changes, modifications or interpretations of the agreement. Elgin, J. & E. Ry. Co. v. Burley, 325 U.S. 711, 65 S.Ct. 1282, 89 L.Ed. 1886; Elder v. New York Cent. R. Co., 6 Cir., 152 F.2d 361; Donovan v. Travers, 285 Mass. 167, 188 N.E. 705; Louisville & N. R. Co. v. Wells, 289 Ky. 700, 160 S.W.2d 16.

Thus, as a matter of law, plaintiff lost his seniority rights when he failed to comply with Rule 40(a) as interpreted. The real question presented is, what was the effect of the loss of such rights?

The answer to this question is to be found in the provisions of the collective bargaining agreement. Rule 27 provides: "Seniority begins at the time the employee's pay starts

* * * Employees leaving the service *voluntarily,* if re-employed, shall be considered as *new* employees." (Italics added.)

Rule 40(a) provides, in part: "Employees *who do not possess sufficient seniority* to displace a junior employee *shall be considered as furloughed.*" (Italics added.)

Rule 40(b): "Employees desiring to protect their seniority rights and to avail themselves of this rule, must within 5 days from the date actually reduced to the furloughed list, file their names and address * * *."

[8, 9] It is quite apparent that under these rules an employee with seniority, such as appellant, had no right to be furloughed. The only persons given a right to be furloughed are those "who do *not* possess sufficient seniority to displace a junior employee." (Rule 40(a).) Plaintiff did possess such seniority. His right was to displace a junior employee. The attempt to file furlough papers was invalid, and was totally ineffective. This being so, we have an employee who left the service of the employer, did not protect his seniority rights, and therefore, when re-employed, under Rule 27, became a "new" employee so far as seniority is concerned. Although he was re-employed by respondent, such re-employment was based on a material mistake of the parties—a belief that the employee possessed seniority. Once this mutual mistake was discovered, the employer had the legal right to correct it by firing the employee.

This much is clear. The only debatable question involved on this appeal does not involve the interpretation of the agreement, but involves the question of the legal effect of not granting a hearing to appellant, assuming no hearing was granted. Section 45 provides: "An employee who has been in the service for more than 90 days or whose application for employment has been formally approved, shall not be disciplined or dismissed" without an investigation and hearing. It is contended that it was error to fail to find on this issue.

[10, 11] Respondent, in its briefs, admits that no hearing was afforded appellant, but contends that Rule 45 is only applicable to the discipline of an employee, who, having seniority, is charged with misconduct, and has no application to an employee who is removed for lack of seniority. This is an unwarranted interpretation of Rule 45. The rule is made applicable not only to cases of misconduct, but to all cases of removal of employees, including those with seniority. Respondent would apply the rule only to an employee charged with wrongdoing, but would not apply it to an employee who was removed arbitrarily, without cause. The obvious purpose of the rule was to prevent an employee from being arbitrarily dismissed until "just cause" was determined to exist. "Cause" not only includes misconduct, but also lack of seniority.

[12] Thus, under the agreement, before appellant could be properly discharged he was entitled to a hearing. Even though, because he allowed his seniority to lapse, he is a new employee under Rule 27, supra, at least he was one whose "application has been formally approved," and entitled to a hearing.

The first question presented is whether the clerk's transcript shows that no hearing was had. The finding is that respondent "having determined that such request [of the Union to dismiss appellant] was in accordance with the facts" dismissed appellant. In view of the presumptions involved in a clerk's transcript appeal it can be argued that such finding amounts to a finding that a hearing was in fact granted appellant, although respondent agrees in its briefs that no such hearing was granted. In view of the concession by respondent we are not inclined to distort the finding into one to the effect that a hearing was had. Therefore, we are presented with the question as to the legal effect of failing to grant appellant a hearing, in violation of the agreement.

[13] The failure to grant appellant a hearing could not possibly have been prejudicial. Under the terms of the collective bargaining agreement, as a matter of law, when the Union requested appellant's dismissal, there was nothing the respondent could do but dismiss appellant. Appellant, as a matter of law, had lost his seniority rights by failing to exercise his power of

displacement. As a matter of law, he was not entitled to the job to which he had been assigned. Even though he was entitled, under the agreement, to a hearing before he was discharged, such hearing necessarily would have resulted in his dismissal. It had to, or respondent would have violated its agreement with the Union. Therefore, appellant suffered no actual damages by reason of his dismissal, and was not entitled to nominal damages as a matter of right. Strait v. Wilkins, 23 Cal.App. 774, 139 P. 911.

The judgment is affirmed.

BRAY and FRED B. WOOD, JJ., concur.



142 Cal.App.2d 377

Lucille N. FULLER and William Minor Fuller, Plaintiffs and Appellants,

v.

Bob Quentin CHAMBERS, California Electric Supply Co., a corporation, Defendants and Respondents.

Civ. 16791.

District Court of Appeal, First District, Division 2, California.

June 19, 1956.

Hearing Denied Aug. 16, 1956.

Action against host motorist for automobile passenger's alleged wrongful death when automobile overturned while host motorist was attempting to pass another vehicle on a curve at an allegedly excessive speed. The Superior Court, San Mateo County, A. R. Cotton, J., entered judgment of nonsuit after plaintiffs rested, and plaintiffs appealed. The District Court of Appeal held that evidence was sufficient to preclude grant of nonsuit.

Judgment reversed.

1. Negligence ⇐136(2)

In action based on wilful misconduct, nonsuit may be granted only when, disregarding conflicting evidence, giving to plaintiff's evidence all favorable consideration to which it can legally be entitled, and indulging in every legitimate favorable inference which may be drawn from it, there must result a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given.

2. Negligence ⇐136(2)

Usually, existence of wilful misconduct, like that of negligence, is a question of fact.

3. Negligence ⇐11

"Wilful misconduct" implies at least the intentional doing of something either with a knowledge that serious injury is a probable, as distinguished from a possible, result or the intentional doing of an act with a wanton and reckless disregard of its possible result.

See publication Words and Phrases, for other judicial constructions and definitions of "Wilful Misconduct".

4. Automobiles ⇐181(1)

Motorist who knowingly flirts with danger and, without necessity or emergency compelling him to do so, takes a chance on killing or injuring himself or others riding with him is guilty of wilful misconduct.

5. Negligence ⇐11

For purpose of establishing wilful misconduct, the intentional, knowing, or wanton character of the behavior may be implied from the surrounding circumstances.

6. Automobiles ⇐181(7)

Generally, motorist's wilful misconduct cannot be inferred from excessive speed alone, but speed might be so excessive and danger of injury to automobile passengers so probable that such extreme speed alone might be held to constitute wilful misconduct.

7. Automobiles ⇐158

Excessive speed is an important factual element to be considered in determining whether motorist is guilty of wilful misconduct, and, under special circumstances which must indicate to driver the proba-

bility of an accident, speed may constitute wilful misconduct.

8. Automobiles ⇐245(24)

In action against host motorist for wrongful death of automobile passenger who was killed when automobile in which he was riding overturned while host motorist was attempting to pass another automobile on curve at allegedly excessive speed, evidence was sufficient to preclude grant of nonsuit.

9. Trial ⇐142

Where evidence would have been sufficient to support verdict for plaintiffs, fact that different inference could reasonably have been drawn would not justify taking case from jury.

10. Trial ⇐142

Solving of possible conflicting inferences from the evidence was matter resting in jury's discretion.

Gregory S. Stout, San Francisco, for appellants.

Norman S. Menifee, Redwood City, for respondents.

PER CURIAM.

This is an appeal from a judgment of nonsuit entered after plaintiffs rested in an action for the wrongful death of their son who was killed when a car in which he was riding as a guest overturned. The driver of the car was defendant Chambers, allegedly acting in the course of his employment by defendant California Electric Supply Company. Defendant in singular will hereafter refer to defendant Chambers. The nonsuit was based on failure to prove wilful misconduct. No intoxication has been alleged.

Plaintiffs produced the eyewitness Chance, a truckdriver, who at the time of the accident was driving his Ford and trailer north on California State Highway 41 between Hub and Easton, at a place where said highway after following Elm Avenue in northerly direction turns east, follows Elkhorn Avenue east for some 220 feet and then turns north again; the east turn is indicated by a "curve" sign south of the curve. To the side of the curve is a culvert protected by a railing. It was about 6 o'clock on December 21, 1953 and dark. Chance had seen behind him the lights of a car which was gaining on him. Before entering the curve he braked and diminished his speed from 43 to 35 miles. While he was entering the curve the car passed him, driving in the southbound lane, at a speed which he estimated at double his own or 70 miles. Some 15 feet in front of the witness the car failed to negotiate the turn and, going crossways, hit the culvert and overturned, spinning sideways like a "yo-yo" and landing on its top. The occupants were spilled around. When the witness reached defendant he smelled alcohol on his breath. He did not see alcohol around. There was no other traffic near.

[1, 2] To an action based on wilful misconduct the general rule applies that a nonsuit may be granted only when, disregarding conflicting evidence, giving to plaintiff's evidence all the favorable consideration to which it can legally be entitled, and indulging in every legitimate favorable inference which may be drawn from it, there must result a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff, if such a verdict were given. Marchi v. Virone, 42 Cal.App.2d 124, 108 P.2d 469; Hallman v. Richards, 123 Cal.App.2d 274, 278, 266 P.2d 812. The existence of wilful misconduct, like that of negligence, is usually a question of fact. Fisher v. Zimmerman, 23 Cal.App.2d 696, 701, 73 P.2d 1243.

[3, 4] In the recent case Emery v. Emery, 45 Cal.2d 421, 426–427, 289 P.2d 218, 221, the Supreme Court repeats the general rules of what constitutes wilful misconduct: "'Willful misconduct depends upon the facts of a particular case, and necessarily involves deliberate, intentional, or wanton conduct in doing or omitting to perform acts, with knowledge or appreciation of the fact, on the part of the culpable person, that danger is likely to result therefrom. (Citation.)' * * * '"Willful misconduct implies at least the intentional doing of something either with a knowl-

edge that serious injury is a *probable* (as distinguished from a possible) result, or the intentional doing of an act with a wanton and reckless disregard of its *possible* result.'' (Citation.) * * * '"To us it seems clear that one who, while driving an automobile, knowingly flirts with danger and, without necessity or emergency compelling him, 'takes a chance' on killing or injuring himself or others, who may be so unfortunate as to be riding with him, is guilty of willful misconduct."''"

[5] The intentional, knowing or wanton character of the behavior may be implied from the surrounding circumstances. Hastings v. Serleto, 61 Cal.App.2d 672, 681, 143 P.2d 956; Hallman v. Richards, 123 Cal.App.2d 274, 279, 266 P.2d 812.

In this case there was evidence of driving through a marked curve at night at a speed of 70 miles an hour and passing in said curve a trailer by driving in the lane intended for traffic in the opposite direction, all done after the consumption of alcohol.

[6, 7] As a rule wilful misconduct cannot be inferred from excessive speed alone, although the speed might be so excessive and the danger of injury to a passenger so probable that such extreme speed alone might be held to constitute wilful misconduct, Fisher v. Zimmerman, supra, 23 Cal. App.2d at pages 701–702, 73 P.2d at page 1246. There is no doubt that excessive speed is an important factual element to be considered, Santman v. Smith, 106 Cal. App.2d 254, 258, 234 P.2d 1036 and that under special circumstances which must indicate to the driver the probability of an accident speed may constitute wilful misconduct. Hallman v. Richards, supra, 123 Cal.App.2d 274, 279, 266 P.2d 812. Here the speed, 15 miles over the State maximum, is evidently excessive and there are several such special circumstances, the strong curve, the disregard of the warning sign, compare Hollingum v. Moore, 102 Cal.App.2d 509, 512, 227 P.2d 845, the going into the lane for opposite traffic in the dark in said curve in passing a large vehicle. The fact that defendant had consumed alcohol is also a circumstance to be considered as bearing on whether 70 miles per hour in the stated situation should be considered to imply probability of danger to a guest, even if intoxication is not in itself alleged as a ground of the action. Haliman v. Richards, supra, 123 Cal.App. 2d at pages 280 and 282, 266 P.2d at pages 815 and 816. The possibility that the warning sign may have been obscured by the trailer is an inference adverse to plaintiffs the drawing of which might be considered by the trier of facts, but which is to be disregarded in deciding a motion for a nonsuit.

[8–10] We cannot say that under the above analysis of the evidence a verdict for plaintiffs would not have been supported. The jury could reasonably have inferred from the above evidence that defendant acted with a wanton and reckless disregard of the apparent danger of his action, knowingly flirting with said danger and just taking the chance. That also a different inference could reasonably have been drawn evidently does not justify the taking of the case from the jury, in whose discretion the solving of possible conflicting inferences rests. Halstead v. Paul, 129 Cal. App.2d 339, 341, 277 P.2d 43. The judgment of nonsuit must be reversed.

When the court had indicated that it intended to grant the motion for a nonsuit plaintiffs' attorney tried to address the court with reference to other available evidence, especially as to defendants' consumption of alcohol, but was not permitted to do so. Plaintiffs then moved to set aside the judgment of nonsuit on said grounds. Their motion was denied and they have appealed from the order of denial also. We need not decide whether said motion to vacate is of such a kind that the order denying it is appealable because after our holding that the judgment of nonsuit was erroneous, the appeal of the denial of the motion to vacate is moot and must at any rate be dismissed on that ground.

The appeal from the order denying a motion to set aside the order of nonsuit is dismissed; the judgment is reversed.

Petition of HERBERT ALLER BUSINESS REPRESENTATIVE OF LOCAL 659, I. A. T. S. E., for an Order Directing Arbitration and Appointment of an Arbitrator.

LOCAL 659, I. A. T. S. E., a California corporation, substituted for Herbert Aller, Business Representative of Local 659, I. A. T. S. E., Petitioner and Appellant,

v.

COLOR CORPORATION OF AMERICA, Defendant and Respondent.*

Civ. 21580.

District Court of Appeal, Second District, Division 2, California.

June 18, 1956.

Rehearing Denied July 6, 1956.

Hearing Granted Aug. 16, 1956.

Proceeding on petition by union for an order directing company to proceed with arbitration of a dispute. The Superior Court, Los Angeles County, Arnold Praeger, J., dismissed the petition and the union appealed. The District Court of Appeal, Ashburn, J., held that where union and company had a collective bargaining agreement which provided for arbitration of disputes and also provided employer would not be liable for dismissals arising from causes beyond its control, and after company closed a department and dismissed its entire working force a dispute arose as to whether company was liable for dismissal pay, repeated refusal of union to submit to arbitration upon such matter, coupled with an attempt to coerce payment of wages by having criminal action brought against company for failure to pay wages, constituted a waiver of union's right under its agreement with company to have the matter submitted to arbitration, and such conduct estopped it from insisting on such right.

Order affirmed.

Labor Relations ⇐418

Where union and company had a collective bargaining agreement which provided for arbitration of disputes and also provided employer would not be liable for dismissals arising from causes beyond its control, and after company closed a department and dismissed its entire working force a dispute arose as to whether company was liable for dismissal pay, repeated refusal of union to submit to arbitration upon such matter, coupled with an attempt to coerce payment of wages by having criminal action brought against company for failure to pay wages, constituted a waiver of union's rights under its agreement with company to have the matter submitted to arbitration, and such conduct estopped it from insisting on such right. West's Ann.Code Civ.Proc. § 1282; West's Ann.Labor Code. § 222.

Joseph W. Fairfield and Ethelyn F. Black, Los Angeles, for appellant.

Irving A. Bernstein, Beverly Hills, for respondent.

ASHBURN, Justice.

Local 659 of International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (I.A.T.S.E.), appeals from an order dismissing a petition filed under § 1282, Code of Civil Procedure, which sought an order directing respondent Color Corporation of America to proceed with an arbitration. The proceeding was initiated by Herbert Aller as business representative of said Local and of the International I.A.T.S.E., petition being filed on June 17, 1955. The Local was substituted as petitioner in place of Aller.

Color Corporation of America, a corporation, was engaged in a photographic processing business. It had about 154 union employees, three of whom (Krog, Ragin and Moore) were members of said Local 659, one was a member of Studio Transportation Drivers Local 399 of the International Brotherhood of Teamsters, and each of the others belonged to one of Locals 683, 789, 165 of the I.A.T.S.E. Respondent Color Corporation had a collective bargaining agreement with each of said local unions and the agreements contained identical provisions for dismissal pay and for arbitration of disputes. They provided that the employer would not be liable for dismissal pay if the employee was dismissed "for any

* Opinion vacated 302 P.2d 294.

other cause or causes beyond the control of the producer." During the year 1954 respondent company closed its film processing laboratory and dismissed its entire working force, including said 154 union members. Thereupon a dispute arose between the company and the unions as to whether the former was liable for dismissal pay to the employees so laid off; each union, including 659, demanded that its members be paid, and the company contended that under the terms of the contracts it was not liable because the dismissal was for causes beyond its control. Respondent and all of said unions, except Local 659, promptly proceeded with an arbitration pursuant to the existing agreements.

The grievance procedure provides for three separate steps. The first is an attempt at settlement by the representative of the Local in conference with the studio representative of the employer. If this fails, step two calls for presentation of a written statement of grievance by the I.A.T.S.E. Grievance Committee to the producers. Thereupon another Grievance Committee (composed of the representatives of the union and the employer) endeavors to adjust the dispute in conference with the parties thereto. If this fails, step three calls for designation of an arbitrator and proceeding with an arbitration.

Throughout stages one and two of this grievance procedure respondent's representatives and others requested and demanded that Local 659 join in the pending arbitration as all other unions had done. These efforts began about August 5, 1954, and continued through September, but Local 659 refused to arbitrate. The arbitration with the other unions progressed into step two. Meantime, on or about August 19, 1954, Aller, as business representative of Local 659, filed a complaint with the Labor Commissioner alleging violation of § 222 Labor Code, which makes it a misdemeanor to wilfully or unlawfully withhold from any employee any wage established in or through any collective bargaining agreement. The deputy commissioner demanded payment of the wages claimed by Aller to be due, made a final demand on September 16, and on the 27th advised respondent that: "Mr. Allen [Aller] of the IATSE, 659, has now requested that we proceed with a criminal complaint. Therefore, we shall refer this to the City Attorney for that purpose." Respondent's vice-president Stone, by letter dated September 22nd, but apparently written on the 28th, advised the commissioner of the receipt of the letter just quoted and that the matter was one for arbitration, not for criminal procedure. It concluded as follows: "By this action and by the action of IATSE Local 659, you are requiring us to defend our position in court in the face of the fact that our bargaining agreement provides otherwise. We intend to hold both you and Local 659 fully responsible for all consequences resulting from this ill-advised action." Copy was sent to Aller and to George Flaherty as international representative of I.A.T.S.E. Thereupon Aller wrote to said vice-president a letter of September 29 reading as follows: "Our dispute with you is not a matter of interpretation but one of non-payment and we are prepared to show that you have wilfully refused to make such payment and that you were not compelled to go out of business, as you claimed you were in the defense raised in the arbitration proceeding. Even that is not a good defense in the current hearing with the other unions, but since they have elected to take the other course, that is their problem. The best way to settle this matter is to let everyone testify under oath and I would certainly expect you to be very willing to accept this judicial process of settling disputes. After all, when one is under oath, the truth and only the truth will prevail." Be it noted that the writer himself refers to an election to pursue arbitration or court proceeding (criminal). Prior to receipt of this letter Mr. Stone had made repeated demands upon Aller and the Local that they abide by the terms of the contract and arbitrate the dispute, and each time he met with refusal. His affidavit of July 9, 1955, says: "After receiving that letter, and in *every* subsequent conversation, I informed Mr. Aller that the Company considered his tactics in this whole matter to be reprehensible, that the Company chose

to consider those tactics and his unequivocal refusal to arbitrate as a repudiation and breach of the contract, and that the Company would no longer consent to an arbitration." In his affidavit of June 30, 1955, Mr. Bernstein, attorney for respondent, stated that no communication had been received by the company from the Labor Commissioner or the City Attorney since the letter of September 27th, and "[p]resumably, that matter is still pending, and it is not possible to determine what the total expenses of that proceeding will be." For aught that appears it is still pending.

Not until March 1, 1955, did Aller or Local 659 consent to or demand an immediate arbitration. Aller then advised respondent, as stated in his own affidavit, "that a decision having been reached in the proceeding instituted by Local 683, Local 659 now desired to proceed with the arbitration and requested that an arbitrator be appointed." This of course implies a ruling by the arbitrator favorable to the unions. Respondent naturally refused to enter into such a belated arbitration and thereafter continued to refuse. It is plain beyond a peradventure of doubt that Local 659 employed the proceeding before the commissioner and the implied and expressed threats of criminal prosecution as a means of coercing payment by respondent of wages which the latter claimed were not due and were a matter upon which the union had agreed to arbitrate.

The trial judge found that respondent was not in default but that petitioner had defaulted in proceeding with arbitration under the agreement, and concluded that petitioner had waived its right to enforce arbitration and that the proceeding should be dismissed. Accordingly the order of dismissal which forms the subject of this appeal was made.

There can be no serious contention that petitioner did not refuse to arbitrate or that it did not repeatedly do so until after the arbitration with the other unions had been concluded. These refusals, coupled with the concurrent attempt to coerce payment by respondent of wages which were plainly a subject matter for arbitration, amply support the finding of waiver and the dismissal of the belated petition which had been filed on June 17, 1955.

The precedents sustain the ruling. Those cited *infra* deal principally with the institution of a civil action in preference to an arbitration, but there is no difference in principle between pursuit of a civil or a criminal proceeding in violation of an arbitration agreement. In Case v. Kadota Fig Ass'n, 35 Cal.2d 596, 220 P.2d 912, 917, it appears that the pertinent contract provided: " 'Should the parties be unable to agree upon any matter involving computation or allocation of costs under this agreement, they shall select an accountant to make such determination.' " 35 Cal.2d at page 604, 220 P.2d at page 918. The court said, concerning this phase of the case: "For these reasons, by resorting to litigation, Case-Swayne waived any right it might have had to require the selection of an accountant to make a determination of any matter involving the 'computation or allocation of the costs' under its agreement with Yosemite." 35 Cal.2d at page 606, 220 P.2d at page 918. To the same general effect are Jones v. Pollock, 34 Cal.2d 863, 867, 215 P.2d 733; Jordan v. Friedman, 72 Cal.App.2d 726, 727, 165 P.2d 728; Pneucrete Corp. v. United States Fidelity & Guaranty Co., 7 Cal.App.2d 733, 46 P.2d 1000; Minton v. Mitchell, 89 Cal.App. 361, 370, 265 P. 271. Knutson v. Lasher, 219 Minn. 594, 18 N.W.2d 688, 693: In this case both parties were held to have waived their right to arbitrate. As to the defendants it is said: "By withdrawing from the arbitration proceedings and refusing to proceed further thereunder, defendants waived and abandoned the right to arbitrate." As to plaintiffs: "Instead of proceeding before the arbitrators and taking an award, as he had a right to do, plaintiff brought and prosecuted this action to enforce a mechanic's lien. The bringing of the action was an election to abandon and waive his right to arbitration and to have a judicial remedy instead—a remedy of an entirely different kind from an award by the arbitrators. * * * It makes no difference whether the action is one for the recovery of a money judgment only * * * or one for the enforcement of a mechanic's lien * * *.

In either event, the bringing of the action waives the right to arbitration." Galion Iron Works & Mfg. Co. v. J. D. Adams Mfg. Co., 7 Cir., 128 F.2d 411, 413: "Assuming the binding effect of the agreement to arbitrate, plaintiff did not see fit originally to avail itself of that remedy. Rather it brought suit. A right to arbitration arising out of mutual agreement, like any other contractual right, may be waived, amended or altered. * * * Commencement of a suit in court rather than reliance upon arbitration, with answer by opposing party upon the merits, is a waiver of the right to arbitrate by both parties. * * * The plaintiff brought suit to recover unpaid royalties which defendant claimed it did not owe. It had a clear right to have the dispute arbitrated. This right was abandoned by suit * * *. Plaintiff could have sought arbitration but it exercised its option of bringing suit. By its election, it waived its right to arbitration." Young v. Crescent Development Co., 240 N.Y. 244, 148 N.E. 510, 511: There was a question whether the dispute came within the arbitration clause—"But, passing this, we come to the second and more important question which has been outlined, and I think that the answer to that question must be that the respondents by filing mechanics' liens set out on a course so inconsistent with arbitration that they must be regarded as having decisively elected to waive and abandon their right to that course. We are all agreed that, if respondents by filing these liens abandoned their rights to arbitration of the claims covered thereby, such waiver would also bar their right to arbitration of the claim for damages for breach of contract." (See also, Annotations in 117 A.L.R. 304, 305; 161 A.L.R. 1426, 1428.)

Assuming arguendo that a right to arbitrate may under some circumstances be revived after a waiver, cf. La Nacional Platanera v. North American Fruit & S. S. Corp., 5 Cir., 84 F.2d 881, 882; contra 3 Am.Jur. § 57, p. 888, this is not such a case. The attempts at collection pursued by appellant were little short of attempted extortion, which depends upon method of collection rather than the merit of the claim to payment. People v. Beggs, 178 Cal. 79, 85, 172 P. 152; Shasta Water Co. v. Croke, 128 Cal.App.2d 760, 764, 276 P.2d 88; Lindenbaum v. State Bar, 26 Cal.2d 565, 573, 160 P.2d 9. Appellant waited until after a decision in the arbitration which it should have embraced initially, and until after respondent had incurred an expense of $315 for reporter's fees and transcripts of the arbitration hearing, as well as attorney fees in a substantial amount. Appellant is estopped to insist that this now be done over because it has changed its mind. Appellant has made a conclusive election. Cf. Steiner v. Rowley, 35 Cal.2d 713, 720, 221 P.2d 9.

Order affirmed.

MOORE, P. J., and FOX, J., concur.



142 Cal.App.2d 407

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Mary GRASSO, Defendant and Appellant.

Cr. 3194.

District Court of Appeal, First District, Division 2, California.

June 19, 1956.

Murder prosecution. The Superior Court, County of Santa Clara, William F. James, J., entered a judgment of conviction of murder in the first degree, and the defendant appealed. The District Court of Appeal, Kaufman, J., held that defendant failed to establish prejudicial errors in the instructions.

Affirmed.

1. Homicide ⇦157(1)

Prior acts and conduct of decedent and defendant in murder case are competent evidence to show malice and state of mind on part of defendant.

2. Criminal Law ⇐777

In murder prosecution, instructions concerning admissibility of evidence as to prior acts and conduct of decedent and defendant correctly stated applicable general principle of law and was sufficient in absence of defendant's request for more specific instructions.

3. Criminal Law ⇐825(1)

Where trial court correctly instructed on the general principle of law applicable, it was defendant's duty to request more specific instructions if she felt they were necessary to her theory of the case.

4. Criminal Law ⇐673(1)

Where evidence has been introduced that confession was made by person mentally incompetent, jury should be permitted to consider such evidence under proper instruction.

5. Criminal Law ⇐1172(1)

In murder prosecution against wife of decedent, his son by prior marriage and another, where instruction concerning testimony given by psychiatrist as to mental condition of decedent's son who did the actual shooting was confined entirely to evidence concerned with son's mental condition as testified to by psychiatrist, instruction, even if erroneous, could not be held prejudicial to wife.

6. Criminal Law ⇐825(4), 1038(3)

Where instruction given was a correct instruction on confessions and admissions, if defendant wished to have more complete instruction given, she should have requested it, and in absence of request she could not complain.

7. Criminal Law ⇐517(1)

Jury must reject confession completely if they find it was not freely and voluntarily made.

8. Criminal Law ⇐824(1)

In criminal cases the court must of its own motion, even in absence of request, instruct jury charging them fully and fairly upon the applicable law.

9. Criminal Law ⇐525

Any evidence tending to establish that defendant was not in full possession of her faculties at time she confessed her guilt would not affect the admissibilty in evidence of the confession itself, but would be evidence to be considered by jury in determining weight or effect to be given to confession.

10. Homicide ⇐253(1)

Evidence supported conviction of murder in the first degree.

Joseph J. Polverino, San Jose, Henry Mariani, San Jose, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., N. J. Menard, Dist. Atty., of Santa Clara County, San Francisco, for respondent.

KAUFMAN, Justice.

Appellant, Mary Grasso, appeals from a judgment of conviction after jury verdict of murder in the first degree. The jury found that she was not armed at the time of commission of the offense, and recommended life imprisonment.

Mary Grasso and two co-defendants, Julio Grasso and Patricia Perry, were charged with the murder of Mary's husband, Joseph Grasso, on January 12, 1955. Appellant pleaded "not guilty". Her motion for a separate trial was denied.

Joseph Grasso was killed at approximately 1:55 a. m. on the morning of January 12, 1955, in the bar of the Club Capri, a combination restaurant and bar in Madrone, California, owned by him and his wife, appellant Mary Grasso. Julio Grasso, a son of Joseph by a prior marriage, killed him by shooting him in the back of the head five times with a thirty-eight caliber pistol. Julio was living with the couple at the time in quarters in the rear of the building. Also living there were the two young sons of Joseph and Mary, as well as Patricia Perry, a twenty-three year old girl who received food, lodging and clothing in return for her services as a waitress in the bar and restaurant.

Joseph Grasso was in his sixties, while Mary, his third wife, was about thirty-three years of age. The marriage was a stormy

one. In 1943 Joseph had taken five shots at Mary, and she on several occasions had openly stated in the presence of other persons that she wished he was dead. It appears also that Mary had been going out with a certain Don Casillas for some time prior to the shooting.

At about 5:00 p. m. on January 11, Mary came weeping into the kitchen of the restaurant after a quarrel with Joseph. According to a statement given by Julio to the District Attorney after the shooting, and concurred in by Patricia Perry and Mary Grasso, Julio and Patricia were talking in the kitchen at the time Mary entered. When Mary told them why she was crying, Patricia said they should get rid of the old man, and asked Mary if she wanted to, to which she replied, "Yes". Patricia then said that they had someone there who would do it for a little money, that money talks. Julio said he would do it. It was decided that it would be done that night. Various possible alibis were then discussed. Julio left for a party at a friend's house. Upon his return at about one a. m., he returned to the bar. Joseph Grasso was there and there were two customers. He sat down at the lunch counter with a cup of coffee. Mary Grasso, Patricia Perry and Don Cassillas were there drinking coffee. The two customers left and Don Cassillas left shortly before the killing.

Julio went into the bar at about 1:55 a. m. with his revolver. His father was closing up for the night. While Joseph was taking the money out of the cash register, Julio shot him five times in the back of the head. Appellant and Patricia then came into the room, and after they reloaded the pistol in case Joseph was not dead, they took the money from the cash box and placed it together with the empty shells and the pistol in a bag which they hid in the attic. The idea was to make it appear that there had been a robbery in the course of which Joseph had been shot.

Appellant then called the Sheriff's office in San Jose reporting a robbery and the shooting. Julio and Patricia told the officers that Julio had been slugged by the robbers as he was trying to lock the front door of the bar, and that they then robbed and shot Joseph while Julio was unconscious. Julio said that as he awoke, the two women were just coming into the room, and he saw his father lying behind the bar. During the early morning hours when deputy sheriffs and doctors were conducting an investigation, appellant was resting, having been given sedatives.

Appellant and Patricia were taken in to the Morgan Hill Police station at about 2:00 p. m. on the afternoon of January 12th by Inspectors Goudy and Hooton of the Santa Clara Sheriff's Office, where statements were taken from them. Both stated that they had been in bed when they heard the shots, that as they rushed in they saw Julio just getting up off the floor where he had been slugged by the robbers, that Joseph must have been shot by the robbers. The women were then brought back to the Club Capri and Julio was brought into San Jose for questioning. Julio first told his original story about the robbery, but when he was caught in a lie about the ownership of a pistol, he then told a story of having sold the pistol to a stranger whom he did not know. Meanwhile, another deputy sheriff was searching the Club Capri. He found the bag containing the gun and the money. When Julio was told of this and asked if he would tell the truth, he said he would wait until the gun was brought in. While they were waiting Julio told the officers that he knew he couldn't get away with it, and described how it had actually happened. He said that he wasn't sorry as Joseph was better off.

After the deputy arrived with the gun, Julio admitted that he had used it to kill Joseph. He said that when he returned home from the party he found appellant crying after an argument with Joseph and that she then offered him $3,000 to get rid of Joseph. Patricia was present during the discussion. He said he agreed because he thought if he had the money he could become reconciled with his wife from whom he was then estranged. He said appellant had previously mentioned to him about having someone else kill Joseph, but this was the first time she had talked to him about doing it.

Appellant was then informed that Julio had confessed. She exclaimed, "Oh, my God, why did he do it."

Later that evening, at about 8:30 p. m., Patricia Perry was again interrogated. Patricia generally agreed to the truth of Julio's story, but insisted that she had only been kidding with him when she proposed that he kill his father. She said she was sleepy and would give them a statement in the morning.

At about 9:15 p. m. appellant was questioned. She stated that they had been discussing the killing of Joseph at about 6:00 p. m. on the evening of January 11th, and that Julio was willing to do it if he were paid. When Julio returned later that evening, she said they planned the murder. She said Julio could have the money in the safe which she thought was a little over a thousand dollars, and that she would give him more later if he needed it. He then shot Joseph, and she and Patricia came into the room, reloaded the gun, and hid the gun and money in the attic. She denied that Julio was to get $3,000, or that Patricia was to get anything, that Patricia had helped because Joseph had treated them all so badly. She then related what a terrible life she had had with him, telling of various incidents of his violence and cruelty. She admitted telling many people that she had wished he was dead.

Still later that same evening, the inspectors took Julio and Patricia to a hotel in San Jose, and again took statements from them in the hotel room which were taken down by a stenographic reporter. Patricia again admitted the conversation with Julio about killing his father for money, but said she thought he was kidding, so she kidded along with him. She told Mary Grasso later about the conversation, but didn't realize that she took it seriously. When Julio returned that night, the subject was discussed again, and appellant told Julio he could have what money was in the safe. Julio then went into the bar and shot his father, and when she and Mary heard the shots they went in and cleaned out the cash register, and hid the money and gun. Patricia still maintained that she didn't think Julio was going to kill Joseph, and that she still didn't think he had done it.

Another statement was taken from Julio which was quite similar to the story he told earlier that evening. He said that they had discussed possible alibis after his return from the party that night, and had decided on the one of the faked robbery.

On the following day, January 13th, a final statement was taken at the District Attorney's Office in San Jose. These conversations were all taken down by a court reporter. Julio again admitted killing his father, related a conversation in which Patricia had asked appellant if she wanted to get rid of the old man, to which appellant had answered "Yes". He stated that Patricia told Mary that there was someone there who would do it for a little money, and Julio had said that it was he. He then said that they "just talked it out there" and that he then went to his friend's house. He admitted that they had decided to do it that night, and that alibis were discussed.

Patricia stated that the matters related by Julio were correct. She admitted being willing to help with the plan because of the manner in which Joseph treated appellant and the family.

Appellant was then asked if she had heard the statements of Julio and Patricia. She replied that she had and said that none of their statements were incorrect. She was asked if it was true that when she had come into the kitchen that Patricia had said something to her about getting rid of the old man, and that there was somebody to do it and that money talks, and again, if she had not said "who" and that Julio said "I am the one." She said those statements were correct. Appellant then went on to tell in detail of the violence and cruelty of Joseph in the past, and particularly during the last two years.

Other witnesses testified to occasions when Patricia or appellant had talked of getting rid of Joseph or of killing him, others told of appellant's romance with Don Cassillas. A Mrs. Rogers testified that a month before the murder appellant had said she would give a thousand dollars for

someone to kill Joseph, and Patricia said she would do it for nothing. This witness said that they wanted her to start a fight with Joseph, so he could be killed and they could claim self-defense. A deputy matron who was guarding Patricia during the trial heard appellant say, "Well, I guess I did the family a favor when I got rid of him." When the witness protested to appellant, she said, "Well, it's the truth."

Appellant at the trial denied that she had conspired with Julio and Patricia to murder Joseph. She claimed she had not taken their discussion seriously. She said she had lied in giving the statement to the officers at Morgan Hill, but that she had done it to protect Julio.

She denied having made the statements wherein she admitted having conspired to murder her husband or claimed that she could not remember having made them. She denied having made the statements testified to by Mrs. Rogers, and denied having made the remarks testified to by the deputy matron.

Appellant herein does not contend that the evidence is insufficient to support the conviction, but bases her appeal entirely upon alleged errors in instructions. The court told the jury that there had been evidence received of the prior acts and conduct of decedent and his relations with the defendants at other times, and then instructed them "that these matters were received solely for what weight they may have, if any, to indicate the state of mind of the various parties involved. They do not * * * afford any legal excuse or justification for the killing of Joe Grasso. There is no contention made here by any of the defendants, * * * that the killing of Joe Grasso was either excusable homicide or justifiable homicide. In an unlawful killing of a human being, the law has no concern whether the victim be a saint or a sinner."

Appellant says that evidence was introduced by the prosecution to show that Joseph Grasso was quarrelsome, combative and blood-thirsty. This evidence came in through the statements of defendants introduced by respondent. In addition, more evidence of Joseph's character for cruelty, violence and vile language came in through the testimony of Julio Grasso at the trial. Julio's theory at the trial negatived the theory that appellant had agreed to pay him to kill his father. He testified that he had been drinking heavily and that he quarrelled that night with his father after he argued with him about money, and his father called Julio and his wife vile names. He also stated that he paid no attention to the conversation of his mother and Patricia about killing his father, as that was just talk, that he had heard conversations since he was five years old in which people said that his father ought to be dead. Since the record shows that the parties constantly spoke of killing, appellant says the jury should have been allowed to consider the prior acts and conduct of the parties to show that that was merely the way they talked and lived. The instruction given, it is claimed, limited the consideration of such prior conduct to showing a reason for malice or ill will on the part of defendants.

[1–3] Appellant admits that prior acts and conduct of a decedent and a defendant in a murder case are competent evidence to show malice and state of mind on the part of defendant. People v. DeMoss, 4 Cal.2d 469, 474, 50 P.2d 1031. The instruction as given states correct principles of law applicable to the case.

Appellant argues that the jury should have been permitted to consider the acts and conduct of Joseph Grasso in relation to the influence and atmosphere in which appellant was involved throughout her married life and her state of mind at the time she made statements concerning his death. She admits that the instruction would appear to allow the jury to consider the decedent's conduct for all purposes, even to show how they commonly acted toward one another, but contends that the reference to the fact that such conduct could not justify the homicide where there was no contention that it was excusable or justifiable, limited it to showing malice and ill will. Appellant's argument appears to concede that the instruction is legally correct, but that it should have expanded on the specific states of mind that could have been induced in

appellant by decedent's conduct. Since the court correctly instructed on the general principle of law applicable, it was appellant's duty to request more specific instructions if she felt they were necessary to her theory of the case. People v. Bender, 27 Cal.2d 164, 163 P.2d 8.

[4, 5] It is alleged that error was committed in an instruction concerned with the testimony given by a psychiatrist as to Julio Grasso's mental condition. The testimony of Dr. Pinto had been introduced to prove that Julio was not capable of making a reliable statement concerning the death of Joseph Grasso, because of his mental inadequacy. On cross-examination the doctor even stated that it was his opinion that Julio was insane. The judge instructed that Dr. Pinto's testimony was not received for the purpose of showing whether Julio was sane or insane at the time of the homicide, but could be considered "solely for whatever value you may give it with respect to the mental ability of Julio Grasso to form or entertain an intent, or to premeditate any crime charged against him herein. Otherwise you must follow my instruction that Julio Grasso is conclusively presumed to be sane." The court undoubtedly by this instruction excluded from the jury's consideration the uncontradicted evidence of Julio's poor mental condition in their determinations as to the weight of his statements and confessions. The jury at one time returned for further instruction asking that Julio's last statement to the District Attorney be re-read to them.

It has been held that when evidence has been introduced that a confession was made by a person mentally incompetent, the jury should be permitted to consider such evidence under proper instructions. People v. Goold, 215 Cal. 763, 765, 12 P.2d 958; People v. Lehew, 209 Cal. 336, 342, 287 P. 337; People v. Boyington, 3 Cal.App.2d 655, 658, 39 P.2d 867. The Attorney General does not defend the instruction but points out that Julio's admissions and confessions were not admissible against appellant, and the jury were so instructed. Regardless then, of error in the instruction affecting Julio, it was not prejudicial to Mary Grasso, the only appellant herein. To this appellant replies that a subsequent instruction told the jury that a statement or confession made by one defendant in the presence and hearing of another defendant and not disputed by him when given a reasonable opportunity to do so, is to be considered as applying to the cases of all such defendants. It would seem that what weight the jury would give to the statement made by Julio in Mary's presence, because of their knowledge of his mental condition, would not be significant in judging her conduct in relation to such statement. The criterion is her conduct in acknowledging the statement made as the truth, regardless of the capacity of the person making it. Appellant raises the question of her own mental adequacy at the time she gave her statements calling attention to the testimony that she was under the influence of sedatives. However, the instruction above criticized was confined entirely to evidence concerned with Julio's mental condition as testified to by Dr. Pinto. This instruction cannot, therefore, be held prejudicial to appellant.

The final instruction attacked by appellant is one relating to confessions and admissions. It reads as follows:

> "Now, notwithstanding much that you have listened to here, and contrary to some rather widely spread notions, the law does not require that a defendant, at or before the time he makes a confession or admission or statement, be informed on his rights, or have his attorney present, or be free from arrest or restraint.
>
> "It merely requires that any confession he may make, be made freely and voluntarily.
>
> "It must not be obtained by any kind or degree of violence, or abuse or threat; or upon any implied or direct promise of immunity, or leniency, reward or other benefit, or by any coaxing, cajoling or menacing conduct.
>
> "A confession made while under arrest and being in custody, and when he is not represented by counsel, and when he hasn't been told that what he says may be used against him, may still be free and voluntary. These

circumstances do not of themselves render the confession involuntary.

"Of course, you are the sole judges of the effect and weight of all evidence here produced, and it is for you to judge the character of such a confession, and the weight to be given."

[6] The instruction given is a correct instruction on confessions and admissions. No principle of law has been incorrectly stated. Undoubtedly a more complete instruction could have been given. Apparently appellant requested no instructions upon the subject. If appellant wished to have a more complete instruction given, she should have requested it. In the absence of a request she cannot complain. People v. Bender, 27 Cal.2d 164, 174, 163 P.2d 8; People v. Andary, 120 Cal.App.2d 675, 261 P.2d 791.

[7, 8] It is true that the jury must reject a confession completely if they find that it was not freely and voluntarily made. People v. Rucker, 11 Cal.App.2d 609, 612, 54 P.2d 508. Appellant argues that the jury was not here told that it must completely reject the confession if it made that finding. They were told that they were the sole judges as to the character of the confession, but it is argued that they might find it involuntary and under this instruction still believe that they would give some weight to it. In criminal cases the court must of its own motion, even in the absence of a request, instruct the jury charging them fully and fairly upon the applicable law. People v. Putnam, 20 Cal.2d 885, 890, 129 P.2d 367. In the present case an instruction in regard to confessions is of considerable importance, since they furnish the most convincing evidence in this case of appellant's guilt. There is abundant evidence in the record of statements made at various times in the past by appellant expressing a wish that her husband was dead or that someone would kill him, but without the confessions these statements might be viewed by the jury as just so much talk when considered in connection with the atmosphere in which the parties lived. There is, of course, one very damaging admission made by appellant to the deputy matron at the jail, at a time when appellant was fully aware that she was on trial for murder. True, she denied having made it.

Appellant cites People v. Baker, 42 Cal.2d 550, 576, 268 P.2d 705, a case which was reversed because only partial instructions were given, and as given were erroneous. In the present case, the instruction was not erroneous, and while a fuller instruction might have been given, no amplification of the instruction was sought by appellant. In the case of People v. Black, 73 Cal.App. 13, 238 P. 374, cited by appellant, the appellant therein offered a correct instruction on confessions which was refused by the trial court, and the court further advised the jury that the question of whether a confession was free and voluntary was for the court to decide, and that that question had been disposed of. It has been held that a defendant who has not made a request for an instruction in regard to the right of the jury to redetermine the question of the voluntary character of a confession and reject it as evidence if their finding is adverse, cannot complain of prejudicial error in that regard. People v. Fowler, 178 Cal. 657, 662, 174 P. 892; 8 Cal.Jur. 311–312, § 363.

Appellant cites as evidence that her confessions were involuntary, testimony that she was under sedatives at the time the statements were taken, that as a result she was upset and "groggy", that the interrogators were telling her what she had done and that "she didn't know what was going on." Her doctor testified that he had left sedatives for her to take when he was called by her in the early morning hours of January 12th, and Patricia Perry testified that appellant had taken two more of these pills later in the day. There was no testimony offered by appellant to show that the prosecution had used any type of threats, inducement or compulsion. Appellant does state that she testified that her statements were not free and voluntary. While that appears to be merely a conclusion, the transcript reference cited shows that that statement was made by Patricia Perry in regard to her own confessions, and was not made by appellant. Therefore, if there was any affirmative evidence of

involuntariness, it must be based on her physical and mental condition resulting from strain and from the sedatives.

[9] However, in a recent case, People v. Cobb, 45 Cal.2d 158, 287 P.2d 752, 754, wherein it was contended that the court committed prejudicial error in admitting a defendant's confession in evidence, the court stated: "The evidence discloses that there was no force or violence used on defendant Ault, and that there were no promises of reward or immunity from punishment, and that he spoke voluntarily. At the beginning of the interrogation Ault was asked how he felt and he answered that he felt better. Thus, *even though Ault may have been under the influence of a drug, may have received blood transfusions and may have been in poor physical condition,* the confession was admissible, and these factors merely went to the weight to be attached to it." (Emphasis ours.) And in People v. Rucker, 11 Cal.App.2d 609, 612, 54 P.2d 508, 510, a case in which the court had instructed the jury of their power to disregard the confession if they found it to be made by a person mentally incompetent, it was said, "Moreover, any evidence tending to establish that the defendant was not in full possession of his faculties at the time he confessed his guilt would not affect the admissibility in evidence of the confession itself, but would be evidence to be considered by the jury in determining the weight or effect to be given to it." And, see, People v. Harrison, 41 Cal.2d 216, 258 P.2d 1016; People v. Amaya, 40 Cal.2d 70, 71–77, 251 P.2d 324; People v. Lehew, 209 Cal. 336, 340–341, 287 P. 337; People v. Miller, 135 Cal. 69, 71–72, 67 P. 12; People v. Duncan, 72 Cal.App.2d 247, 251–253, 164 P.2d 313.

[10] Upon a review of the entire record we find no prejudicial errors. The jury was fully and fairly instructed and the evidence is ample to sustain the conviction. On this state of the record we must affirm the judgment.

Judgment affirmed.

NOURSE, P. J., and DOOLING, J., concur.

Charles P. BRATNOBER, Plaintiff, Cross-Defendant and Respondent,

v.

Geraldine R. BRATNOBER, Defendant, Cross-Complainant and Appellant.*

No. 16506.

District Court of Appeal, First District, Division 1, California.

June 18, 1956.

Rehearing Denied July 18, 1956.

Hearing Granted Aug. 16, 1956.

Proceedings on husband's application for modification of support provisions of divorce decree. The Superior Court, City and County of San Francisco, Orla St. Clair, J., entered the order challenged by the wife's appeal. The District Court of Appeal, Fred B. Wood, J., held that husband's undisclosed expectation of an increase in income at time he agreed to rates of payment specified in decree and subsequent failure of fruition of those expectations did not constitute such a change in circumstances as would furnish legal basis for modification of support provisions of divorce decree.

Reversed.

1. Divorce ⇐309

Amount of support awarded in divorce decree cannot be reduced without showing that there has been change in circumstances since entry of decree.

2. Divorce ⇐309

Husband's undisclosed expectation of an increase in income at time he agreed to rates of payment specified in decree and subsequent failure of fruition of those expectations did not constitute such a change in circumstances as would furnish legal basis for modification of support provisions of divorce decree.

3. Divorce ⇐312.1

Where minute order disposed of all of issues in proceeding for modification of support provisions of divorce decree and contained a sufficient statement of ultimate facts, it was regarded as an appealable order.

* Opinion vacated 309 P.2d 441.

4. Divorce ⇐312.3

Where minute order did not expressly direct that written order be prepared, signed and filed, date of its entry marked commencement of time within which to appeal, concerning issues which it determined in proceeding for modification of support provisions of divorce decree; and findings concerning ultimate and probative facts set forth in subsequent written order had no limiting effect; but such written order was not regarded as a nullity, where its terms specifically amended final decree of divorce by striking out certain clauses and inserting others, to express in that form changes specified in minute order. West's Ann. Rules on Appeal, rule 2(b) (2).

Livingston & Feldman, Isabella H. Grant, San Francisco, for appellant.

Mervyn Schneider, Anthony E. O'Brien, San Francisco, for respondent.

FRED B. WOOD, Justice.

The question upon this appeal from an order modifying a divorce decree by reducing the amount to be paid monthly for the support of the wife and minor children, is whether the husband's undisclosed expectation of an increase in income at the time he agreed to the rates of payment specified in the decree and the subsequent failure of fruition of those expectations, constituted a change in circumstances in the sense of furnishing a legal basis for the modification.

The modifying order contains these findings: "* * * there has been a change in circumstances surrounding the financial condition of the plaintiff and cross-defendant since the entry of said interlocutory judgment of divorce in this: that the provisions of said interlocutory judgment for the support and maintenance of defendant and cross-complainant and the minor children of the parties was based upon an oral agreement by the plaintiff and cross-defendant at the time of the trial of the above entitled action, to pay the sums provided in said judgment, and that said oral agreement was thereupon made the basis for said judgment; that no evidence as to the financial condition of the plaintiff and cross-defendant, nor of his earnings or earning capacity, nor of the needs of the defendant and cross-complainant and the minor children of the parties was adduced at the trial of the above entitled action, as appears from the stipulation of the parties hereto relative to the testimony of Edward L. Barry, one of the attorneys for the defendant and cross-complainant; that plaintiff and cross-defendant made said agreement with the hope and expectation and understanding that his earnings and monthly income would be substantially increased immediately after the entry of said interlocutory judgment, either in the position in which he was then employed or in another position which he was expecting to take shortly after the entry of said interlocutory judgment; that neither of these expectations were realized, and that as a result plaintiff and cross-defendant has not been able to make the payments required for support and maintenance from his earnings and income; that he was obliged to borrow money in order to make the payments under said judgment up to and including February 26, 1954; that the net income of the plaintiff and cross-defendant from all sources is $338.62 per month; that he has no property, goods or income of any kind which he may use to comply with the orders of this court with respect to support and maintenance of the defendant and cross-complainant and said minor children other than his earnings as aforesaid, and that plaintiff and cross-defendant is presently unable to comply with the terms of said final judgment with respect to the payments therein ordered for the support and maintenance of the defendant and cross-complainant and the minor children of the parties."

The evidence shows that respondent's take-home pay at the time he agreed to the rates of payment was $338.62 per month and that it is still the same less $2.00 because of increased social security deductions.

Respondent contends there is evidence that at the time of the agreement he disclosed his intentions. We do not find any in the record. Respondent's affidavit in support of his motion to modify is silent

on that subject. An affidavit by the attorney who represented appellant in the divorce proceeding states that the support payment fixed by the decree "was not conditioned upon any increase in earnings. Nothing was said about the provisions of the decree being based upon anything which was to take place in the future. Nothing was discussed or considered which involved any question as to future payments." At the hearing below respondent was asked by his counsel: "Wasn't it a fact that the possibility of your raise—of a raise in your position—wasn't that discussed between us, including counsel for your wife?" An objection was interposed and there ensued a discussion between court and counsel, at the conclusion of which respondent's counsel said to him: "Did you answer my last question, whether or not the expectancy of a raise on your salary was discussed by you and the attorneys for your wife." Respondent answered, "Yes"; literally, that he had already answered the question. A little later the court inquired: "Did you expect a raise, regardless of what you said to anybody," to which he replied, "Yes."

Moreover, the finding that there has been a change in circumstances is limited to the probative facts recited, those which follow the expression "in this: that," the unrealized expectations which respondent harbored at the time of the agreement and the interlocutory decree, with no mention in these findings of any disclosure of those expectations to appellant, her counsel, or the court. See Garrison v. Edward Brown & Sons, 25 Cal.2d 473, 478, 154 P.2d 377; In re Estate of Kerr, 127 Cal.App.2d 521, 523, 274 P.2d 234.

The agreement in question was oral and was made in chambers during a conference between the parties, their counsel, and the trial judge. Respondent states in his brief (appellant in her reply brief concurs) that the following took place at that conference: "Before any testimony was taken, the parties and counsel, in the Chambers of the trial judge, had a discussion as to the amount that should be paid for the support of Geraldine and the children in the event that a divorce was granted. Geraldine wanted a total of $400 or $500 per month. Charles' 'take home' pay was represented to be between $300 and $350 per month.' The parties finally agreed upon the figure of $250 per month, of which $100 per month was to be paid for each of the minor children and $50 per month for Geraldine."

Whatever the situation might have been if respondent had disclosed his expectations at that conference (concerning which we express no opinion), the divorce court's action in basing the support provisions of the interlocutory decree upon the oral agreement in the absence of any such disclosure (in the light, also, of the representation that respondent's "take home" pay was "between $300 and $350 per month," as in fact it was) can not possibly have been predicated upon any expected increase of income. The frustration of respondent's secret hopes and expectations can hardly operate as a change of the financial circumstances upon which that order was based.

[1, 2] It is an established principle that the amount of support awarded in a divorce decree can not be reduced without a showing that there has been a change in circumstances since the entry of the decree. Ralphs v. Ralphs, 86 Cal.App.2d 324, 325, 194 P.2d 592, and cases there cited. It seems axiomatic that there is no such showing when predicated merely upon the failure of realization of an expectation that his income would increase, which the husband and father harbored but did not disclose when he agreed to the amount of the award and the award is based in part at least upon his agreement. Although there appears to be no reported decision in this state directly upon this point and the law of contracts is not directly applicable, the principle underlying the rule that the undisclosed intentions of a party to a contract do not furnish a basis for its modification, Brant v. California Dairies, Inc., 4 Cal.2d 128, 133, 48 P.2d 13; Bell v. Minor, 88 Cal.App.2d 879, 882, 199 P.2d 718, does seem applicable. In Alabama it has been held that any "anticipated increase in income on the part of the husband at that time [the time of the divorce decree], which may not have materialized, cannot be considered" as a ground for reducing

alimony payments. Aiken v. Aiken, 221 Ala. 67, 127 So. 819, 820; followed in Colton v. Colton, 252 Ala. 442, 41 So.2d 398, 399, where the amount awarded by the decree was predicated upon an agreement of the parties; in neither case does it appear that the husband's anticipations were disclosed by him at the time of the decree.

Such cases as Pencovic v. Pencovic, 45 Cal.2d 97, 287 P.2d 501, and Woolams v. Woolams, 115 Cal.App.2d 1, 251 P.2d 392, do not lend aid to respondent's argument. In each, *the court,* when making an award, took into consideration factors which bore upon the ability of a husband or father to pay. That alone sufficiently distinguishes them from a case, such as this, in which the husband and father did not disclose to the court for its consideration the expectation of increased income which he now claims motivated him when he agreed to the amounts awarded.

Respondent further contends that the fact that he was obliged to borrow some $3,200 from his mother in order to make the overdue payments up to February 26, 1954 (which he did make just before giving notice of his motion to modify the decree), itself is evidence of a change of circumstances sufficient to serve as a basis for the modification. As we read the modifying order, this loan transaction was not treated by the trial court as a change in respondent's financial circumstances. It is true that the order states that respondent was obliged to borrow money to make the payments mentioned but this recital comes after the finding that the change in his financial circumstances consisted of his making the agreement in the expectation that his income would be substantially increased and the failure to realize that expectation. The order then goes on to say "that as a result * * * [respondent] * * * has not been able to make the payments required * * *; that he was obliged to borrow money in order to make the payments * * *," and so on. This we do not interpret as a finding that his being "obliged to borrow" brought about a change of circumstances. It was merely the result of the frustration of his secret hopes, his undisclosed expectations.

We would add that our examination of the record convinces us that at the hearing in the superior court respondent tried the case upon the theory that the frustration of his expectation of increased compensation was the change in circumstances. His affidavit which accompanied his notice of motion was to that effect. It did say that he was obliged to borrow money in order to make payment under the judgment but listed this as one of the results of the change in circumstances. Similarly upon the trial his testimony was directed to his unrealized expectations. Toward the end of his testimony he was asked where he got the money which he did pay to appellant under the judgment and he replied that he borrowed it, borrowed it from his mother. We derive neither from that nor from any other part of the record a suggestion that in the trial court respondent claimed that this loan transaction effected a change in his financial condition. For aught that appears in the record he neither claimed nor tendered evidence that borrowing the money and paying it to appellant reduced his assets or diminished or impaired his earning capacity. In short, it merely marked the substitution of one creditor for another (his mother for his former wife), to the extent of the $3,200 thus borrowed and paid over from one to the other.

Respondent invokes Becker v. Becker, 64 Cal.App.2d 239, 148 P.2d 381, and Shulman v. Shulman, 125 Cal.App.2d 120, 269 P.2d 923, as holding that the incurrence of financial obligations to third parties is a proper subject for consideration on a motion to modify an alimony award. That is true but in each of those cases there were additional factors. In neither of them was there a showing as to what the court had before it concerning the financial needs of the wife or the financial ability of the husband when it made the former award. In the Shulman case the wife subsequently transferred her home to her sister without consideration, an act which could warrant an inference of lessened financial need. The husband in the Shulman case sold a

ring and borrowed $2,000 from a bank upon the security of a mortgage upon his automobile and truck; obviously, a diminution or impairment of assets, not the mere substitution of one unsecured creditor for another. Meanwhile, the husband was confined to a wheel chair and required more money for his living expenses than if not so afflicted. In contrast, in the instant case the borrowing, though it had a bearing upon respondent's ability to pay the amount of the award, did not, as we have seen, show that respondent's financial ability had changed since the rendition of the divorce decree.

[3, 4] It happens that there are two orders here involved, an order entered in the minutes on May 20 and a formal written and signed order filed May 28, 1954, from each of which a timely appeal was taken. We have discussed the written order and its findings as if that order were fully effective in all respects, because the parties have so treated it. We have also discussed the evidence and respondent's theory at the trial irrespective of and unlimited by the findings expressed in the written order because the minute order disposed of all the issues, contained a sufficient statement of the ultimate facts were findings required, "on grounds of change of circumstances and inability of cross-defendant to pay"; see Bradford v. Bradford, 94 Cal.App.2d 921, 924–925, 212 P.2d 59, though it appears that findings were not required, Perez v. Perez, 111 Cal.App.2d 827, 829–830, 245 P.2d 344; Parker v. Parker, 107 Cal.App.2d 215, 217, 236 P.2d 828. Accordingly, we regard the minute order as an appealable order. Because it did not expressly direct that a written order be prepared, signed and filed, see Rule 2(b) (2) of the Rules on Appeal, the date of its entry marked the commencement of the time within which to appeal, concerning the issues which it determined. In such circumstances the findings concerning ultimate and probative facts set forth in the written order have no limiting effect; no more so than when set forth in an opinion or comment of the trial court, as to the latter, see the cases reviewed in Oldis v. La Societe Francaise, 130 Cal.App.2d 461, 471–476, 279 P.2d 184. However, we do not regard the written order as a nullity. It in terms specifically amended the final decree of divorce by striking out certain clauses and inserting others, to express in that form the changes specified in the minute order, a situation quite comparable to that which obtained in Perez v. Perez, supra, 111 Cal.App.2d 827, 829–830, 245 P.2d 344.

The orders appealed from are reversed.

PETERS, P. J., and BRAY, J., concur.



142 Cal.App.2d 237

Vincent C. PEET and Elizabeth D. Peet, Plaintiffs and Appellants,

v.

Joseph G. SCHURTER, Defendant and Respondent.

Civ. 21296.

District Court of Appeal, Second District, Division 3, California.

June 14, 1956.

Rehearing Denied July 11, 1956.

Hearing Denied Aug. 8, 1956.

Suit for a declaration of rights with respect to the use of an irrigation pipe line upon the defendant's land. From a judgment in favor of the defendant in the Superior Court of Los Angeles County, Jesse J. Frampton, J., the plaintiffs appealed. The District Court of Appeal, Parker Wood, J., held that it was a question of fact for the trial court whether plaintiffs bought the land with notice that the right to use the pipe was temporary and that the evidence was not sufficiently clear and convincing to establish an easement by prescription for the use of the irrigation pipe where such use was about two and one-half years.

Judgment affirmed.

1. Waters and Water Courses ⇐244

Whether there was an implied easement to continue use of an irrigation pipe on the defendant's land depended upon the intent of the parties.

2. Easements ⇐15

The purpose of the doctrine of implied easements is to give effect to the actual intent of the parties as shown by all the circumstances.

3. Waters and Water Courses ⇐244

Whether an easement for use of an irrigation pipe on another's land arises by implication depends upon the intent of the parties and the court will take into consideration the circumstances attending the transaction, particular situation of the parties and the state of the thing granted.

4. Easements ⇐15

Intent of the parties to create an easement by implication must clearly appear in order to sustain an easement by implication.

5. Waters and Water Courses ⇐247(1)

In determining whether an easement in use of irrigation pipe on the defendant's land existed by implication, statements made by the grantor to the grantee prior to the consummation of the transaction that the grantees would be permitted to receive water for irrigation through the six-inch main which ran across the defendant's property only until an eight-inch main was extended and when that was done the right to receive water through the six-inch main would cease were admissible in determining the intent of the parties whether an implied easement existed.

6. Appeal and Error ⇐931(1)

On appeal the evidence is to be viewed in the light most favorable to the respondent.

7. Waters and Water Courses ⇐247(1)

In suit for declaration of rights with respect to use of an irrigation pipe upon the defendant's land, whether plaintiffs bought the land with notice that the right to use an irrigation pipe on defendant's land was temporary was a question of fact for the determination of the trial court.

8. Easements ⇐5

A prescriptive right to an easement over the land of another may be acquired only by clear evidence of adverse use openly, notoriously and continuously asserted for the statutory period of five years.

9. Waters and Water Courses ⇐152(8)

Evidence was insufficient to establish a prescriptive right in the plaintiff to use an irrigation pipe line on the defendant's land by adverse use where such adverse use was about two and one-half years.

Vincent C. Peet and Elizabeth D. Peet, appellants, in pro. per.

Joseph G. Schurter, respondent, in pro. per.

PARKER WOOD, Justice.

Plaintiffs sought a declaration of their rights with respect to the use of an irrigation pipe which is upon defendant's land. (The pipe also extends across plaintiffs' land.) Plaintiffs appeal from judgment in favor of defendant.

Prior to 1945 Mr. and Mrs. Downing owned land known as lots 5 and 12—each lot containing 10 acres. Lot 5 was north of and adjacent to lot 12. A water meter was on the northwest corner of lot 5. A 6-inch irrigation pipe extended east from the meter along the north line of lot 5 to the approximate center of that line, and then the pipe extended south, in the approximate center of lot 5, across lot 5 and onto lot 12. That pipeline and lateral pipes attached thereto constituted an irrigation system for both lots. Lot 5 is bounded on the north by Chatsworth Street, and both lots are bounded on the east by Mason Avenue. (When the lots were sold by the Downings, as hereinafter stated, there was no irrigation pipe in the part of Mason Avenue which is east of the lots, but there was an irrigation pipe in Mason Avenue south of the south boundary line of lot 12. In other words, before said sales by the Downings, there was no irrigation pipe in Mason Avenue north of the south boundary of lot 12.)

In 1945 or 1946 the Downings sold lot 12 to Mr. Olms.

In 1946 the Downings sold the south half of lot 5 to Mr. and Mrs. Einboden. In connection with that sale Mr. Einboden and Mr. Downing entered into a written agreement which provided in part as follows: "We, the undersigned hereby agree to the following in connection with the sale and purchase of 5 acres ranch on Mason Avenue, Chatsworth, for which the sale has been placed this day [March 29, 1946] in the Security-First National Bank of Los Angeles: * * * The buyer agrees to allow the owner of the ten acres on the South to use the water from the No. 23484 meter for irrigation of said land, by permitting passage of said irrigation line over said buyer's land as heretofore." The "owner of the ten acres on the South," so referred to, was Mr. Olms. The meter, so referred to, was the meter on the northwest corner of lot 5. The agreement was not recorded.

In April, 1949, the Einbodens sold the south half of lot 5 to the plaintiffs. The deed in said transaction did not contain any reference to said written agreement between Mr. Einboden and Mr. Downing, or any reference to use of the irrigation pipe on the south half of lot 5 by the owner of lot 12.

Mr. Downing testified that during the time he was negotiating with Mr. Einboden for the sale of the south half of lot 5, he told Einboden that until the war was over a water main would not be put on Mason Avenue (east of the two lots), and that until such time as lot 12 discontinued the use of the meter he (Downing) had agreed, upon the sale of lot 12 to Olms, to allow Olms to use the meter to serve his property, and he (Downing) wanted Einboden to sign an agreement to allow water to pass through (the pipe on Einboden's land) and serve lot 12; and that he also told Einboden that he could have a temporary use of the irrigation pipe (which extended from the meter and across Downing's land) until the water became available on Mason Avenue. Mr. Downing also testified that the Department of Water and Power had informed him that eventually it was going to install a water main on Mason Avenue from the "stopping point" near the south boundary of lot 12 up to Chatsworth Street.

In December, 1951, an 8-inch water main was installed on Mason Avenue, east of the two lots, that is, the water main was extended on Mason Avenue from the south boundary of lot 12 to Chatsworth Street.

Mr. Olms divided lot 12 into four parcels and sold the parcels to certain persons, who discontinued use of the irrigation line on lot 5, and who connected irrigation pipes on their parcels with the water main on Mason Avenue.

In 1953 the Downings sold the northwest quarter (2½ acres) of lot 5 to defendant.

The Downings sold the northeast quarter of lot 5 to Dr. Boak. (The date of the sale is not shown.) A separate meter and separate irrigation system, installed on this parcel, were connected with the water main on Chatsworth Street.

It thus appears that all the parcels into which the two lots had been divided (4 parcels on lot 12 and 3 parcels on lot 5), except the parcel owned by plaintiffs, have separate meters and are now connected to water mains on Mason Avenue or Chatsworth Street. Plaintiffs have not installed a meter on their parcel or made a connection with the water main on Mason Avenue.

Plaintiffs (appellants) contend that they are entitled to continue to use the meter and the irrigation pipe which are on defendant's land. They argue that the agreement between Downing and Einboden guaranteed the continued right to use the irrigation pipe which was on defendant's land; that no restriction on the use of the pipe is mentioned in said agreement or in the deed from the Downings to the Einbodens, and by reason of the deed the right of plaintiffs to the continued use of the pipe became an implied easement; that the implied easement was transferred by the deed of the Einbodens to plaintiffs as an "incident appurtenant" to the land so conveyed; that plaintiffs have a prescriptive right to the continued use of the pipe on defendant's land; that Downing and

Einboden are estopped by said agreement and their grant deeds to testify that they orally modified the agreement; that certain findings of fact are against the evidence and the law; and "the conflict of evidence with the facts" show the conclusions to be "unacceptable to reasonable minds."

Some of the findings of the court were: The Downings, upon dividing and selling lots 12 and 5, orally advised each of their grantees that they would be permitted to receive water for irrigation through the 6-inch main which ran across lot 5 and onto lot 12, only until the 8-inch main then laid to the southeast corner of lot 12 was extended northerly in Mason Avenue to its intersection with Chatsworth Street, and that when the 8-inch main was so extended then the right of the grantees to receive water through the 6-inch main would cease, and all of such grantees who acquired parcels fronting on Mason Avenue would be required to disconnect from the 6-inch main and receive water through the 8-inch main. Plaintiffs' property fronts on Mason Avenue. At the time plaintiffs acquired their property they knew of their right to receive water through the 6-inch main only until water was made available by the extension of the 8-inch main along the eastern boundary of lots 12 and 5 along Mason Avenue. Since December, 1951, an 8-inch water main has been in Mason Avenue, extending northerly from the southeast corner of lot 12 to northeast corner of lot 5, and has been available for supplying all demands of plaintiffs for irrigation purposes. Subsequent to December, 1951, defendant has demanded that plaintiffs disconnect the 6-inch main at the boundary between plaintiffs' and defendant's land, and discontinue the use thereof, and has demanded that plaintiffs connect with the 8-inch main in Mason Avenue. Plaintiffs have refused to comply with the demand, and they claim an easement across defendant's land to maintain the 6-inch main and to continue to receive water therefrom.

Some of the conclusions of law were: Plaintiffs have no right or interest in defendant's land or to any portion of the 6-inch water main or water system lying within the boundaries of defendant's land, except that plaintiffs shall have the right to continue to receive water for irrigation purposes through the 6-inch main across defendant's land to and including August 1, 1955. The judgment was in accordance with the conclusions of law.

[1–5] Whether or not there was an implied easement depended upon the intent of the parties. In Fristoe v. Drapeau, 35 Cal.2d 5, at page 8, 215 P.2d 729, at page 732, it was said: "The purpose of the doctrine of implied easements is to give effect to the actual intent of the parties as shown by all the facts and circumstances." It was also said therein at page 9 of 35 Cal.2d, at page 732 of 215 P.2d: "The effect of section 806 [Civil Code] is to establish intent as the criterion, and this is in accord with the rationale of the rules governing easements by implication." In Mosier v. Mead, 45 Cal.2d 629, at pages 632–633, 290 P.2d 495, at page 498, it was said: "Whether an easement arises by implication depends on the intent of the parties, and the court will take into consideration the circumstances attending the transaction, the particular situation of the parties, and the state of the thing granted." In Orr v. Kirk, 100 Cal.App.2d 678, at page 681, 224 P.2d 71, at page 73, it was said that the intent of the parties to create an easement by implication "must clearly appear in order to sustain an easement by implication." In this last cited case, the question was whether the evidence was sufficient to support the findings and judgment that there was no implied easement. The trial court therein permitted testimony that there was no conversation to the effect that plaintiff could or could not use the driveway; and that the use of the driveway was a neighborly accommodation. The judgment therein was affirmed. In Rischall v. Bauchmann, 1946, 132 Conn. 637, at page 645, 46 A.2d 898, at page 902, 165 A.L.R. 559, 565, it was said that, "[I]n determining whether an easement by implication exists, statements by the grantor to the grantee made prior to the consummation of the transaction to the effect that a license and not an easement is to pass by the conveyance are admissible." In

the present case, it was not error to receive testimony as to the intent of the parties.

[6] On appeal the evidence is to be viewed in the light favorable to respondent.

[7] The finding to the effect that the Downings, upon selling the south half of lot 5 to Einbodens, advised the Einbodens that they would be permitted to have temporary use of the water main on the north half of lot 5 is supported by the evidence. There was testimony by Mr. Downing, as above shown, to the effect that he told Einboden, prior to the sale to Einboden, that until the war was over a water meter could not be put on Mason Avenue, and that Einboden could have temporary use of the pipe and meter on Downing's land until water was available on Mason Avenue.

Also, the finding to the effect that when plaintiffs acquired their property they knew that their right to use the pipe on the Downings' land was temporary is supported by the evidence. Mr. Downing testified that when Mr. Peet bought the property he (Downing) told him how to operate the valve and "it was a temporary use until such time as the main was put on Mason Street"; that he (Downing) could not say whether he said that to Mr. Peet before or after Mr. Peet acquired title to the property because he did not know whether he saw Mr. Peet before or after the purchase, but he did know that he discussed the temporary use with him as soon as he (Downing) knew Mr. Peet was there; that Mr. Peet said he had not known anything about it; about 1951, after the main was on Mason Avenue, they (Downing and Peet) discussed Peet's discontinuance of use of the line on Downing's land, and Downing suggested that Peet could install a meter and connect with the line on Mason Avenue; Peet said that if Downing would grant him a year he would then be financially able to swing the deal; they decided to wait a year, and they came to an understanding that Peet would use the line on Saturdays and Sundays, and Downing would use it during the week so there would be less confusion; in 1952, when the year was about over, Mr. Peet said that he was short of funds again and he would not be able to disconnect the line; Downing then said that he would be forced to extend the time; the cost of the meter and line would be about $450; Mr. Peet did not at any time state that he had a right to continue using the line across Downing's land and that he was not going to connect with the line on Mason Avenue.

Mr. Peet testified that before he bought the land he was aware of the location of the irrigation system and that the water main came across the north half of lot 5; that Einboden told him that the system went with the property; he (Peet) knew that in order to service his property from the main on the north half of lot 5 the main would have to be maintained (in repair) on his neighbor's land, and he assumed that it would be to his neighbor's advantage to continue keeping it in good repair; he (Peet) did not recall meeting Downing until after the purchase of the land; in 1951, about two years after Peet had purchased the land, Downing requested him to change the irrigation line to Mason Avenue; Peet replied that, as a neighbor, he would consider it; then they discussed the cost, and when he found that he could not afford it he dismissed it from his mind; he estimated the cost between $800 and $1,000; Downing did not tell him that the right to use the pipe was temporary, but he did intimate, in 1952 when Peet refused to change to Mason Avenue, that the right was temporary.

Defendant Schurter testified that when he purchased the north half of lot 5 Downing told him that Peet had agreed to discontinue the use of the line on defendant's land but he (Peet) was financially unable to connect with the Mason Avenue line; defendant had discussions with Peet about changing to the Mason Avenue line, and Peet said that he would check into the cost of the connection, and he asked defendant for more time to make the change because he was having trouble raising the money; in December, 1953, Peet said that the cost would be $450, and he did not have

the money then; defendant told him that he (Peet) could not use the line any more, and Peet replied that he could do nothing about the line at that time; Mrs. Peet then said they would do nothing until they received notice in writing; on May 14, 1954, defendant delivered a writing to them to the effect that he intended to cut the pipeline on his land and stop the flow of water onto plaintiffs' land.

It was a question of fact for the determination of the trial court as to whether plaintiffs bought the land with notice that right to use the pipe on defendant's land was temporary.

[8, 9] A further contention of appellant, as above stated, is that they have a prescriptive right to use the pipe which is on defendant's land. "A prescriptive right to an easement over the land of another may be acquired only by clear evidence of adverse use, openly, notoriously, and continuously asserted for the statutory period of 5 years." (17 Cal.Jur.2d 117, § 18.) Plaintiffs used the pipeline, which is on the north half of lot 5, from the time they purchased the land in April, 1949, until the filing of their complaint herein on June 4, 1954 (and thereafter), a period of more than five years. According to the findings, which as above stated are supported by the evidence, the use by plaintiffs of that pipeline, until an irrigation pipe was placed in Mason Avenue, in December, 1951, was with the permission of the owner of the north half of lot 5. There was evidence that after the Mason Avenue pipe was installed the owner of the north half of lot 5 gave plaintiffs further permission to use the pipe on the north half of lot 5 for a further period of more than a year. There was no finding, however, with respect to further permission for the time after the Mason Avenue pipe was installed. In any event if there was adverse use by plaintiffs of the pipe, it was after December, 1951, and therefore, at most, the period of such adverse use would be about 2½ years. Plaintiffs did not have a prescriptive right to use the pipeline which is on the north half of lot 5.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



142 Cal.App.2d 246

Herbert L. ATKINSON, Plaintiff and Appellant,

v.

Glenn R. WILCKEN, Defendant and Respondent.

Civ. 5149.

District Court of Appeal, Fourth District, California.

June 14, 1956.

Action for usury. Judgment for defendant in the Superior Court of San Diego County, John Shea, J., and the plaintiff appealed. The District Court of Appeal, Griffin, J., held that the evidence established a joint adventure between the parties, that the giving of a note and third trust deed was but an incidental part of the entire transaction and that testimony in reference to the oral agreement of joint adventure was admissible.

Judgment affirmed.

1. Joint Adventures ⇐1.15

Where plaintiff owned dwelling units subject to trust deeds and sought defendant's assistance to prevent foreclosure and defendant attempted to sell the property and title was placed in defendant's name and plaintiff sold property and note executed by plaintiff was cancelled and defendant reconveyed trust deed and title to property back to plaintiff, evidence established that both parties were to become equal co-owners of the property and that the transaction was one of joint venture and not that of creditor-debtor relationship.

2. Usury ⇐38

Where plaintiff owned dwelling units subject to trust deeds and conveyed the property to defendant who attempted to negotiate a sale thereof and plaintiff subsequently sold the property and note executed by plaintiff to defendant was cancelled and defendant reconveyed the property to plaintiff, giving of a note and trust deed was but an incidental part of the entire joint venture transaction not subject to the claim of usury.

3. Usury ⇐114

In action for usury where plaintiff owned dwelling unit subject to trust deeds and defendant attempted to sell the property and plaintiff conveyed the property to defendant and subsequently the plaintiff sold the property and plaintiff's note to defendant was cancelled and the defendant reconveyed the third trust deed and title to the property was placed back in plaintiff, testimony in reference to the oral agreement of joint adventure for sale of the property was admissible on question of usury.

F. W. Powell, La Mesa, for appellant.

Yale, Wilson, Summers & Yale, San Diego, for respondent.

GRIFFIN, Justice.

Plaintiff and appellant commenced this action for usury. The pretrial conference resulted in a stipulation that plaintiff, on February 18, 1952, entered into certain negotiations with defendant and respondent culminating in the delivery by defendant to plaintiff of the sum of $4,000, and the execution by plaintiff of a promissory note in the sum of $6,000, payable to defendant at $80 per month, including six per cent interest. It was secured by a third trust deed on plaintiff's 5-unit court property. Eleven monthly payments of $80 each were made on the note. On February 6, 1953, plaintiff paid defendant $4,600. It is plaintiff's contention that this constituted a usurious transaction and accordingly sought treble interest as provided by statute. It is also argued that evidence of any oral agreement pertaining to the transaction was not admissible, relying principally upon Martin v. Ajax Construction Co., 124 Cal. App.2d 425, 269 P.2d 132; Thomas v. Hunt Manufacturing Corp., 42 Cal.2d 734, 269 P.2d 12; Brown v. Cardoza, 67 Cal.App.2d 187, 153 P.2d 767; and Moore v. Dealy, 117 Cal.App.2d 89, 254 P.2d 888. It is defendant's claim that the relationship of the parties was that of joint venturers and accordingly the transaction was not usurious.

Plaintiff, who had had some experience as a real estate salesman, owned dwelling units which were subject to a first and second trust deed totaling $9,000. The second trust deed had a "balloon" payment of $4,000 past due and was in the process of foreclosure. Defendant, who had had some real estate experience, was going with plaintiff's daughter. Plaintiff told defendant of his financial distress and wanted defendant to buy the property. He said he was not interested but would help plaintiff save the property and together they would endeavor to sell it.

It appears that plaintiff owned some property in the East and had expected to sell it in time to meet the balloon payment. Defendant borrowed $4,000 from his mother and prepared the necessary papers, which included a promissory note for $6,000, a third trust deed in that amount, and a grant deed of the property to him.

The testimony as to the oral agreement claimed to exist between them in respect to the transaction is in sharp conflict. Plaintiff merely contends that it was a loan of $4,000, for which defendant exacted a promissory note for $6,000. Defendant testified that to avoid the foreclosure proceedings he agreed with plaintiff that he would borrow enough money to meet the balloon payment; that plaintiff would give his note for $6,000 and a third trust deed conditioned that they would be co-owners and both share equally in the net profits from the sale of the property, and that the $4,000 would be returned to him; that in case the sale was not effected he could discount the $6,000 trust deed and repay his mother for the amount loaned. He further testified that plaintiff placed title to the property in his name because the two of them had advertised and shown the prop-

erty on several occasions and since plaintiff was going East in an endeavor to dispose of his Eastern property it would be more convenient in case of an actual sale of the five units.

Defendant did write, or assisted in writing and publishing the advertisements and did show the property on several occasions, performed some termite prevention work and made other arrangements pertaining to repairs.

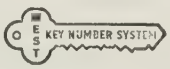
[1] Apparently no sale was effected at the price agreed upon. Thereafter, some offers were received and rejected. Defendant's romance with the daughter was terminated. Defendant claims he received an offer of $17,500 for the property and communicated this fact to plaintiff's daughter. In December, 1952, defendant discovered that plaintiff had negotiated for a sale of the property for $23,500, and he received a request from the title company to submit his demand for his interest in the property. He said he calculated the prospective one-half profit he would have made on the $17,500 had plaintiff accepted the offer and submitted a demand for $4,600 cash. He then testified that plaintiff called him on the telephone and asked a reduction of $200 on that figure because the profit on the impending sale was mostly on paper. Defendant declined and on January 30, 1953, plaintiff approved defendant's demand at the escrow company and payment was accordingly made. The $6,000 note was cancelled and defendant reconveyed the third trust deed and the title to the property was placed back in the plaintiff. On July 13, 1953, plaintiff commenced this action. The trial court found in accordance with defendant's claim and further found that it was intended by the transaction that both plaintiff and defendant were to become equal co-owners of the property and that they agreed that they would attempt to sell such property and divide whatever profit might be derived therefrom, as related by defendant; that the $80 paid on the trust deed for eleven months, pending the sale, was one-half of the net rental returns and that the transaction was one of joint venture and not that of creditor-debtor relationship. While plaintiff's evidence might well support a contrary finding, the evidence, when considered as a whole, does support the court's finding. Martter v. Byers, 75 Cal.App.2d 375, 171 P.2d 101; Hersum v. Latham, 120 Cal.App.2d 325, 260 P.2d 988.

[2] It was held in Ambrose v. Alioto, 65 Cal.App.2d 362, 366, 150 P.2d 502, as it must be held here, that the giving of the note and third trust deed was but an incidental part of the entire transaction.

[3] In Martin v. Ajax Construction Co., supra, relied upon by plaintiff, the evidence of a joint adventure was held insufficient to establish that claim. In the other authorities relied upon by him it appears that the transaction was but a subterfuge to evade the usury law. The testimony in reference to the oral agreement of joint adventure was admissible. Lindsey v. Campbell, 132 Cal.App.2d 746, 282 P.2d 948; Knoll v. Schleussner, 112 Cal.App.2d 876, 247 P.2d 370.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



142 Cal.App.2d 302

Walter SIMAS, Plaintiff and Respondent,

v.

The CITY OF OAKLAND, a municipal corporation, and the City Council of the City of Oakland, Defendants and Appellants.

No. 16698.

District Court of Appeal, First District, Division 1, California.

June 18, 1956.

Hearing Denied Aug. 16, 1956.

Action wherein the Superior Court, Alameda County, Ralph E. Hoyt, J., upheld an ordinance and held a resolution void, and an appeal was taken. The District Court of Appeal, Fred B. Wood, J., held that Oakland charter, § 179, authorizing submission of ordinance to general mu-

nicipal election upon affirmative vote of five of council members, merely supplements the referendum-by-petition procedure authorized by the preceding section of the charter and has no reference to power, conferred by section 164, to pass initiative ordinance in lieu of submitting it to vote of electors and as part of initiative process; and held that council had no power by resolution to submit to referendum vote, at ensuing general municipal election, an initiative ordinance which it had just passed.

Affirmed.

Municipal Corporations ⇨108.1, 108.8, 108.10

Oakland charter, § 179, authorizing submission of ordinance to general municipal election upon affirmative vote of five of council members, merely supplements the referendum-by-petition procedure authorized by the preceding section of the charter and has no reference to power, conferred by section 164, to pass initiative ordinance in lieu of submitting it to vote of electors and as part of initiative process; and council had no power by resolution to submit to referendum vote, at ensuing general municipal election, an initiative ordinance which it had just passed.

John W. Collier, City Atty., Robert E. Nisbet, Deputy City Atty., Oakland, for appellants.

Healy & Walcom, Franklin A. Dill, San Francisco, for respondent.

FRED B. WOOD, Justice.

The sole question is whether or not the Oakland City Council had power by resolution to submit to a referendum vote at the ensuing general municipal election, an initiative ordinance which it had just passed.

The initiative provisions of the charter appear in Article XXI, comprising sections 162–176. Section 164 provides that if the initiative petition is signed by electors equal in number to 15 per cent of the vote cast for all candidates for mayor at the last preceding general municipal election and contains a request that the proposed ordinance be submitted forthwith to the vote of the people at a special election, then either: "(a) The Council shall pass said ordinance without alteration within twenty days after the attachment of the Clerk's Certificate of Sufficiency to the accompanying petition; or, (b) Within twenty-five days after the Clerk shall have attached to the petition accompanying such ordinance his Certificate of Sufficiency, the Council shall proceed to call a special election at which such ordinance, without alteration, shall be submitted to the vote of the electors; unless some General or Special Municipal Election occurs not earlier than thirty (30) days and not later than ninety (90) days after the City Clerk shall have attached such Certificate of Sufficiency, in which latter event said measure shall be voted on at such Special or General Municipal Election."

The initiative petition in question met the specifications of section 164 and on July 15, 1954, the council passed the ordinance pursuant to the power vested in it by subdivision (a) of the section. At that moment, it would seem, the ordinance took effect and became operative as a law of the city.

Thereafter and on the same day the council adopted a resolution which recited that great expense would be saved by submitting this ordinance at the next ensuing general municipal election (to be held in April, 1955) instead of calling and holding a special election, and purported to submit the ordinance "to a 'referendum' vote at the next General Municipal Election in accordance with the provisions of Article XXII" of the charter.

This was clearly in contravention of the provisions of section 164, which conferred *in the alternative* the power to pass or to submit the ordinance forthwith to the electors, and in the latter case at a special election. In the instant case no general or special election occurred between 30 and 90 days after the city clerk certified as to the sufficiency of the initiative petition.

The mandatory and limiting character of the provisions of section 164 is emphasized by section 165 of the same article, which provides that if an initiative petition is

signed by electors equal to 5 per cent of the vote cast for candidates for mayor and contains a request that the ordinance be submitted at a general municipal election, it shall be so submitted at such election occurring after 20 days from the date of the clerk's certification that the petition is sufficient, unless the council passes the ordinance without alteration prior to the time of the calling of such election. Especially so, in view of the following provisions of section 166 of the same article: "No Initiative petition requesting the submission of an ordinance at a Special Municipal Election, and having an insufficient number of signatures to require such Special Election but having the required number for submission of said measure at a General Municipal Election, shall by virtue thereof be sufficient to require the submission of such ordinance at a General Municipal Election. No Initiative petition requesting the submission of an ordinance at a General Municipal Election and having a sufficient number of signatures to have required the submission of said ordinance at a Special Municipal Election, shall, by virtue thereof, be sufficient to require the calling of a Special Municipal Election."

The city invoked the purported sanction of section 179 of the charter for the action which it took, a section which declares: "Any ordinance which the Council is empowered to pass may be submitted by an affirmative vote of five (5) of its members at a General Municipal Election only, subject to the provisions of this Article so far as applicable."

This section is a part of Article XXII, which deals with the referendum. The first section of this article (§ 178) authorizes electors equal in number to 10 per cent of the mayoralty vote to petition for the referendum of certain kinds of ordinances, such as an ordinance passed by the council granting a franchise, permit or privilege to operate a public utility or authorizing the acquisition, transfer or permission to use real property (including lands held in trust by the city) or authorizing the lease or permission to use a portion of any public conduit or tunnel.* No such ordinance goes into effect until the expiration of sixty days "from the date it becomes final," within which period a referendum petition may be filed. If a sufficient petition is timely filed, such an ordinance does not go into effect "until approved by a majority of the voters voting thereon * * *."

The obvious purpose of the following section (§ 179) would seem to be simply that of supplementing this referendum by petition procedure by authorizing the city council upon its own motion to submit to a referendum an ordinance on any subject, not limited to the subjects specified in section 178. This has reference, logically, to the general legislative powers of the council, described by subject matter and conferred, principally, by the provisions of Article IX, sections 49 to 51, of the charter; not a reference to the power conferred by section 164 to pass an initiative ordinance in lieu of submitting it to a vote of the electors and as a part of the initiative process.

The city invokes Whitmore v. Carr, 2 Cal.App.2d 590, 38 P.2d 802, as holding that an ordinance must be adopted prior to a reference thereof to a vote of the electors. From this the city would conclude that the correct procedure under section 179 is for the council to adopt the ordinance and then by resolution submit it to the

* We, of course, are not here concerned with the question whether the Constitution may have reserved to the electors of the city a power of referendum that is broader in scope. (See Hunt v. Mayor and Council of City of Riverside, 31 Cal.2d 619, 191 P.2d 426.)

The initiative power of the electors of the city is not limited, as to subject matter, by the charter.

"The electors of the City shall have power through the initiative and otherwise, as provided by this Charter, to enact appropriate legislation to carry out and enforce any of the above general powers of the City or any of the specified powers of the Council." (§ 50 of the Oakland Charter.)

"The qualified electors of the City shall have power to propose by petition, and to adopt at the polls any ordinance which may be enacted under this Charter." (§ 162 of the Charter.)

voters. That conclusion does not necessarily follow, as we read the decision. There, the council merely drafted an ordinance and read it twice but did not adopt it; then purported by a mere resolution to submit it to the voters for adoption or rejection. That, the court appropriately held was not the exercise of the referendum power sanctioned by section 179. It does not necessarily follow that in so holding, the court in the Whitmore case meant that the council could adopt an ordinance, let it take effect as law, and then at some later time (however short or long the interval) submit it to the voters by a mere resolution. During that interval the provisions of subdivision (10) of section 46 of the charter would seem to come into play: "No ordinance shall be amended or changed except by ordinance." It would seem a simple matter, instead, when enacting an ordinance in the exercise of its general powers, for the council to include in the ordinance a suitable provision for its submission to a referendum vote if five of its members so desire, under the sanction of section 179. We would add that the Whitmore case did not involve the initiative process. It does not appear that the ordinance had been presented to the council by an initiative petition.

The city directs attention to section 172 of the charter which states that "No ordinance approved by the electorate under the provisions of this Article shall be amended or repealed except by vote of the electorate unless such ordinance shall otherwise provide." The city argues that because this inhibition is limited to ordinances "approved by the electorate" there is no inhibition against amendment or repeal by the council of an initiative ordinance passed by it without alteration pursuant to the sanction of subdivision (a) of section 164, in view of the city's claim that otherwise there would be no way to amend or repeal except by means of an initiative petition. This statement is not necessarily correct. There may be an implied power given the council to adopt an ordinance amending or repealing any initiative ordinance if there be included in the amendatory or repealing ordinance a provision making it effective subject to and only upon approval by the voters at an appropriate election, particularly in view of the declaration in section 176 that the "Council shall, by ordinance, make such further regulations as may be necessary to carry out the provisions of this Article [on the initiative power and process] and to adapt the provisions of Article III [governing elections] thereto." However, these questions are not here involved. The council did not adopt an amendatory or repealing ordinance. It merely adopted a resolution purporting to submit to a referendum vote an initiative ordinance it had enacted into law.

We conclude that the trial court correctly held that the ordinance is in effect and the resolution is void.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; TRAYNOR, J., dissenting.



142 Cal.App.2d 183

Michael WILSON et al., Plaintiffs and Appellants,

v.

LOEW'S INCORPORATED, a corporation, et al., Defendants,

Association of Motion Picture Producers, Inc. (sued herein as I Doe Co.) et al., Respondents.

Michael WILSON et al., Plaintiffs and Appellants,

v.

LOEW'S INCORPORATED, a corporation, et al., Defendants.

Clyde Doyle, et al., Respondents.

Civ. 20769, 21100.

District Court of Appeal, Second District, Division 3, California.

June 11, 1956.

Rehearing Denied July 11, 1956.

Hearing Denied Aug. 8, 1956.

Action by writers, actors and other persons engaged in professional activities

in motion picture industry against producers, distributors, members of congressional Un-American Activities Committee and investigator for such committee, for damages and injunction based on producers' and distributors' agreement to refrain from employing persons who had refused on constitutional grounds to testify before the committee. The Superior Court of Los Angeles County, Ellsworth Meyer, J., sustained a demurrer to the amended complaint without leave to amend, and plaintiffs appealed. The District Court of Appeal, Vallée, J., held that the complaint was insufficient in absence of allegations to show that any contract or relationship would have been entered into between any plaintiff and any producer and distributor but for the alleged agreement.

Affirmed.

1. Evidence ⇐52

In considering demurrer to complaint, facts judicially noticed are deemed part of the complaint even when the pleading contains an express allegation to the contrary.

2. Evidence ⇐23(1)
Pleading ⇐216(1)

Court took judicial notice of proceedings and reports of Committee on Un-American Activities, and considered such facts in passing on demurrer to complaint referring to proceedings and reports of such committee. West's Ann.Code Civ. Proc., § 1875, subd. 3.

3. Injunction ⇐118(3)
Torts ⇐26(1)

In action by writers, actors and other persons engaged in professional activities in motion picture industry against motion picture producers and distributors, members of Congressional Un-American Activities Committee and investigator for such committee, for damages and injunction based on enforcement of agreement to refrain from employing persons who refuse on constitutional grounds to answer committee's questions concerning political associations, associations and beliefs, complaint was insufficient notwithstanding allegations that purpose of agreement was to limit political activities of defendants' employees since congressional investigation and agreement were not concerned with "political" beliefs. Act Cong. Aug. 2, 1946, § 121(q), 60 Stat. 828; National Labor Relations Act, §§ 1 et seq., 9(h), as amended by Labor Management Relations Act of 1947, 29 U.S.C.A. §§ 141 et seq., 159(h); Internal Security Act of 1950, § 1 et seq., 50 U.S.C.A. § 781 et seq.; Communist Control Act of 1954, § 1 et seq., 50 U.S.C.A. § 841 et seq.; West's Ann.Gov.Code, § 1027.5.

4. Torts ⇐26(1)

To state a cause of action in tort, facts must be alleged showing that some legally protected interest of plaintiffs has been injured.

5. Torts ⇐26(1)

To state facts sufficient to constitute a cause of action for loss or prevention of employment, it must be averred that at time of alleged tort there was a certain or definite prospect that plaintiffs could obtain it.

6. Torts ⇐12

Before recovery can be had for interference with or loss of a future or prospective contract of business relationship, it must appear that such contract or relationship would otherwise have been entered into.

7. Injunction ⇐118(2)
Torts ⇐26(1)

In action by writers, actors and other persons engaged in professional activities in motion picture industry, for damages and injunction based on producers' and distributors' agreement to refrain from employing persons who refused on constitutional grounds to answer questions of Congressional Committee on Un-American Activities, complaint was insufficient in absence of allegations of fact to show that any contract or relationship would have been entered into between any plaintiff and any defendant or person in the industry but for the agreement. Act Cong. Aug. 2, 1946, § 121(q), 60 Stat. 828; National Labor Relations Act, §§ 1 et seq., 9(h) as amended by Labor Management Relations Act of 1947, 29 U.S.C.A. §§ 141 et seq., 159(h); Internal Security Act of 1950, § 1 et seq., 50 U.S.C.A. § 781 et seq.; Com-

munist Control Act of 1954, § 1 et seq., 50 U.S.C.A. § 841 et seq.; West's Ann.Gov. Code, § 1027.5.

8. Appeal and Error ⇐917(1)

Where plaintiffs amended complaint only perfunctorily after demurrer to original complaint had been sustained with leave to amend, and appealed from sustaining of demurrer to amended complaint, reviewing court must assume that plaintiffs had stated their cases as strongly as possible.

9. Appeal and Error ⇐854(3)

Where plaintiffs declined to avail themselves of leave to amend in the particular which defendants specifically pointed out, plaintiffs must stand upon their pleading as against all grounds on appeal from order sustaining demurrer to amended complaint, and if complaint was objectionable upon any ground, judgment of dismissal must be affirmed.

10. Appeal and Error ⇐916(1)

Upon appeal from judgment rendered after refusal to amend complaint to which demurrer has been sustained, it must be presumed that pleader has stated his case as strongly as it can be stated in his favor and all ambiguities and uncertainties must be resolved against him.

11. Pleading ⇐225(1)

Where plaintiffs amended complaint only perfunctorily after demurrer to original complaint was sustained, and evidenced satisfaction with the pleading and willingness to stand or fall on it in its amended form, court did not err in sustaining demurrer thereto without leave to amend.

Kenny & Morris, Thomas G. Neusom, Margolis, McTernan & Branton, and Robert W. Kenny, Los Angeles, for appellants.

Irving M. Walker, Herman F. Selvin, Loeb & Loeb, O'Melveny & Myers, Mitchell, Silberberg & Knupp, Freston & Files, Wright, Peeler & Garrett, Los Angeles, Joseph S. Dubin, Universal City, and Oliver B. Schwab, Beverly Hills, for respondents in No. 21769.

Guy Richards Crump and Slate & Sawtelle, Los Angeles, for respondents in No. 21100.

VALLÉE, Justice.

Appeals from two judgments of dismissal. The case is here on an amended complaint, referred to as the complaint. There are 23 plaintiffs and 23 counts. All of the defendants except three are motion picture producers and distributors. Two of the three remaining defendants are members of the Committee on Un-American Activities of the United States House of Representatives and the third is an investigator for that Committee. A demurrer of the motion picture producers and distributors was sustained without leave to amend and judgment of dismissal entered. One of the appeals is from that judgment. Demurrers of the three remaining defendants to the amended complaint were sustained with leave to amend. Plaintiffs declined to amend and judgment of dismissal followed. The other appeal is from that judgment.

Each count of the complaint relates to only one plaintiff. The counts are identical except for personal data. A statement of the first count will suffice as a statement of the pleading as a whole. It alleges:

1. Plaintiff Wilson is by profession a motion picture writer; has had more than 5 years experience as a writer; has acquired a reputation for work in the motion picture industry; has won high esteem as a writer in that industry; all of which defendants at all times knew.[1]

2. The corporate defendants are engaged in the production and distribution of motion pictures. The corporate and individual defendants, other than the Committee members and the investigator, control directly and indirectly all motion picture production and distribution in the United States and all motion picture employment opportunities for actors, writers, directors, producers, and other employees in that industry.

1. The allegations with respect to the other plaintiffs are identical except that those who are not writers are alleged to be actors, actresses, a story editor, a research worker, and a grip, respectively, with experience ranging from "more than 5" to "more than 25" years.

3. Defendant members of the Committee on Un-American Activities and the investigator at all times and with respect to the matters alleged "acted both in their official capacity with relation to said House Committee on Un-American Activities and individually in non-official capacities."

4. Prior to March 1951 and continuously thereafter defendants, and each of them, agreed with each other to refuse employment to and exclude from employment in the motion picture industry the following persons:

a. All employees and persons seeking employment who had been or thereafter were subpoenaed as witnesses before the Committee on Un-American Activities of the House of Representatives and who refused on constitutional grounds to answer questions "concerning their political affiliations, associations and beliefs."

b. All employees in the industry and persons seeking employment therein who were named before the Committee as Communists or who were subpoenaed to appear as witnesses before the Committee, or who were suspected of ever having been Communists or of ever having had associations with Communists, and who refused or failed to appear before the Committee and waive and surrender their constitutional rights and testify or give statements fully disclosing "their own political affiliations, associations and beliefs and those of their family, friends, associates and acquaintances."

c. Defendants, with the intent to prevent such employees and other persons from having or obtaining employment in the motion picture industry, maliciously and without justification undertook to and did induce and persuade each other and other employers in the industry to desist and refrain from employing and to refuse employment to all such employees and other persons.

d. All defendants, as a part of the agreement and as one of the means of effectuating it, have published and circulated throughout the entire motion picture production and exhibition fields a list containing the names of such employees and other persons with the direction and intent that they be not employed. Plaintiff contends defendants wrongfully, maliciously, and without justification or excuse have interfered with and injured the right of said employees and other persons reasonably to expect employment in the industry and to pursue their professions and occupations therein, and have prevented their employment therein.

5. On September 20, 1951 plaintiff Wilson appeared before the Committee pursuant to subpoena. He there refused to answer certain questions "concerning his political affiliations, beliefs and associations" basing his refusal on his constitutional rights, including the privilege against self-incrimination.

6. As a result of such refusal and by reason of the acts of and pursuant to the agreement of defendants, Wilson ever since September 20, 1951 has been and he now is refused and is excluded from employment in the industry. Therefore he will henceforth continue to find it impossible to obtain employment in the profession to which he has devoted a major part of his life and energy.

7. It is plaintiff's belief that the purpose of the agreement is to limit, control, and direct the political activities of defendants' employees; to coerce and influence them through and by means of threat of discharge and loss of employment from adopting or following any course or line of political action and activity not acceptable to the Committee; to limit employment in the industry to those persons whose political beliefs are acceptable to the Committee; and to limit the production of motion pictures by the industry to those the content of which is acceptable to the Committee.

8. Plaintiff has been damaged in the sum of $1,000,000 for loss of opportunity of employment in the industry and deprivation of artistic and intellectual gratification flowing therefrom and the resulting humiliation and anguish; in the sum of $250,000 for the jeopardizing of employment opportunities in other industries because of the necessity of disclosing the reasons for his inability to obtain employment in the industry; and in the sum of $1,000,000 as punitive damages.

The allegations in respect to the appearance of all but five of the plaintiffs before the Committee are, save for dates, identical. In each instance the appearance before the Committee was after the alleged making of the agreement. As to the five who did not appear, the averments are that each was named as a Communist by a witness appearing before the Committee; that each refused to appear before the Committee to answer questions concerning his or her "political affiliations, beliefs and associations," basing such refusal on his or her constitutional rights including the privilege against self-incrimination; as a result of the acts of and pursuant to the agreement, they have been refused and excluded from employment in the industry by defendants and all other employers therein; and they will henceforth find it impossible to obtain such employment. In each instance the refusal to appear was after the making of the alleged agreement.

The prayer is for money damages of $2,250,000 on each count and for an injunction.

[1–3] The amended complaint is to be implemented by the facts of which we take judicial notice. In considering a demurrer to a complaint, facts judicially noticed are deemed a part of the complaint even when the pleading contains an express allegation to the contrary.[2] We take judicial notice of the proceedings and reports of the Committee on Un-American Activities.[3] The proceedings and reports of the Committee show that each of 18 of the 23 plaintiffs was asked by the Committee whether he or she was then or ever had been a member of the Communist Party. Each refused to answer, asserting his or her constitutional privilege against self-incrimination. Each of the other 5 plaintiffs was stated to be a Communist by a witness before the Committee and on the same grounds refused to appear and state whether he was then or ever had been a member of the Communist Party. The refusals occurred in the course of hearings held as part of a Congressional investigation by the Committee on Un-American Activities of the House of Representatives acting within the scope of its authority into Communist infiltration of the motion picture industry,[4] for the protection of the internal security of this Nation and the public disclosure of the forces that menace the United States. It thus appears, contrary to the allegations of the complaint, that the questions which the 18 plaintiffs refused to answer and that the statements which the 5 refused to appear and give had nothing whatever to do with their political affiliations, associations, or beliefs but con-

2. Chavez v. Times-Mirror Co., 185 Cal. 20, 23, 195 P. 666; Loranger v. Nadeau, 215 Cal. 362, 365, 10 P.2d 63, 84 A.L.R. 1264; Hammell v. Britton, 19 Cal.2d 72, 75, 119 P.2d 333; Weil v. Barthel, 45 Cal.2d 835, 837, 291 P.2d 30.

3. Code Civ.Proc., § 1875(3); State of Arizona v. State of California, 283 U.S. 423, 425, 51 S.Ct. 522, 75 L.Ed. 1154, Footnote 4; Greeson v. Imperial Irr. Dist., 9 Cir., 59 F.2d 529, 531; Louisville Gas & Electric Co. v. Federal Power Comm'n, 6 Cir., 129 F.2d 126, 134, certiorari denied 318 U.S. 761, 63 S.Ct. 559, 87 L.Ed. 1133; Overfield v. Pennroad Corporation, 3 Cir., 146 F.2d 889, 898; Stasiukevich v. Nicolls, 1 Cir., 168 F.2d 474, 479; Osage Nations of Indians v. United States, 97 F.Supp. 381, 403, 119 Ct.Cl. 592, certiorari denied 342 U.S. 896, 72 S.Ct. 320, 96 L.Ed. 672; Rank v. Krug, D.C., 90 F.Supp. 773, 781; United States v. Aluminum Co. of America, D.C., 1 F.R.D. 71; Mullan v. State, 114 Cal. 578, 582, 46 P. 670, 34 L.R.A. 262; Davis v. Whidden, 117 Cal. 618, 623, 49 P. 766; French v. Senate of State of California, 146 Cal. 604, 608, 80 P. 1031, 69 L.R.A. 556; Pacific Employers Ins. Co. v. Carpenter, 10 Cal.App.2d 592, 602, 52 P.2d 992. Cf. Parker v. James Granger, Inc., 4 Cal.2d 668, 677, 52 P.2d 226, certiorari denied 298 U.S. 644, 56 S.Ct. 958, 80 L.Ed. 1375; Arnold v. Universal Oil Land Co., 45 Cal.App.2d 522, 529, 114 P.2d 408; El Zarape Tortilla Factory v. Plant Food Corp., 90 Cal.App.2d 336, 346, 203 P.2d 13.

4. Act of August 2, 1946, c. 753, Title I, Pt. 2, § 121(q), 60 Stat. 828; Senate Doc. No. 26, 80th Congress, 1st Session; Dennis v. United States, 84 U.S. App.D.C. 31, 171 F.2d 986, 987–988, affirmed 339 U.S. 162, 70 S.Ct. 519, 94 L.Ed. 734; Lawson v. United States, 85 U.S.App.D.C. 167, 176 F.2d 49, 51–52, certiorari denied 339 U.S. 934, 70 S.Ct. 663, 94 L.Ed. 1352; Barsky v. United States, 83 U.S.App.D.C. 127, 167 F.2d 241, 250, certiorari denied 334 U.S. 843, 68 S.Ct. 1511, 92 L.Ed. 1767.

cerned their membership in "a conspiratorial and revolutionary junta" [5] one of whose objectives is the overthrow of our government by force and violence,[6] a malignant force which menaces the very existence of the government. It also necessarily appears, contrary to allegations of the complaint, that the purpose of the agreement was not to limit, or control, or direct the political activities of defendants' employees or to coerce them from following any course of political action or to limit employment in the industry to those persons whose political beliefs are acceptable to the Committee. Nor was the investigation into the political beliefs of anyone. The allegations of the complaint in these respects are misleading and evasive. The word "political" implies "orderly conduct of government, not revolution." Lockheed Aircraft Corp. v. Superior Court, 28 Cal.2d 481, 485, 171 P.2d 21, 24, 166 A.L.R. 701.

The Case Against the Motion Picture Producers and Distributors

[4, 5] The complaint sounds in tort. To state a cause of action facts must be alleged showing that some legally protected interest of plaintiffs has been injured. MacLeod v. Fox West Coast T. Corp., 10 Cal.2d 383, 386, 74 P.2d 276; Stryker v. Republic Pictures Corp., 108 Cal.App.2d 191, 195, 238 P.2d 670. The complaint does not allege any present or existing contract or employment of any one of plaintiffs. The cause of action attempted to be alleged is obviously one for wrongful interference with future or prospective contract or business relations. In effect it is alleged the motion picture producers and distributors combined and agreed to make it a condition of employment in the

5. Concurring opinion of Mr. Justice Jackson, American Communications Ass'n v. Douds, 339 U.S. 382, 70 S.Ct. 674, 696, 94 L.Ed. 925.

6. Menace of Communism, Senate Doc. No. 26, 80th Congress, 1st Session; Report on the Communist Party of the United States as an Advocate of Overthrow of Government by Force and Violence, House Report No. 1920, 80th Congress, 2d Session; House Doc. No. 251, 83d Congress, 2d Session, 100 Congressional Record 80; Communism in Action, House Doc. No. 754, 79th Congress, 2d Session; Labor Management Relations Act, 1947, § 1 et seq., 29 U.S.C.A. §§ 141 et seq., 159(h); American Communications Ass'n v. Douds, 339 U.S. 382, 70 S.Ct. 764, 94 L.Ed. 925; Internal Security Act of 1950, § 1 et seq., 50 U.S.C.A. § 781 et seq.; Communist Control Act of 1954, § 1 et seq., 50 U.S.C.A. § 841 et seq.; Government Code, § 1027.5; National Labor Relations Bd. v. Highland Park Mfg. Co., 341 U.S. 322, 71 S.Ct. 758, 95 L.Ed. 969; concurring opinion of Mr. Justice Jackson in Dennis v. United States, 341 U.S. 494, 561–565, 71 S.Ct. 857, 95 L.Ed. 1137, 1181; Galvan v. Press, 347 U.S. 522, 529, 74 S.Ct. 737, 98 L.Ed. 911; Rosenberg v. United States, 2 Cir., 195 F.2d 583, certiorari denied 344 U.S. 838, 73 S.Ct. 20, 97 L.Ed. 652; National Maritime Union of America v. Herzog, D.C., 78 F. Supp. 146, affirmed 334 U.S. 854, 68 S.Ct. 1529, 92 L.Ed. 1776; Lawson v. United States, 85 U.S.App.D.C. 167, 176 F.2d 49, certiorari denied 339 U.S. 934, 70 S. Ct. 663, 94 L.Ed. 1352; United States v. Dennis, 2 Cir., 183 F.2d 201, 212–213, affirmed 341 U.S. 494, 71 S.Ct. 857, 95 L. Ed. 1137; Barsky v. United States, 83 U.S.App.D.C. 127, 167 F.2d 241, 247, certiorari denied 334 U.S. 843, 68 S.Ct. 1511, 92 L.Ed. 1767; Daniman v. Board of Education, 306 N.Y. 532, 540–541, 119 N.E.2d 373, 379; People v. Chambers, 22 Cal.App.2d 687, 709–713, 72 P.2d 746; 37 Georgetown L.J. 297. Said Judge Learned Hand in United States v. Dennis, supra, 183 F.2d 212: "The American Communist Party, of which the defendants are the controlling spirits, is a highly articulated, well contrived, far spread organization, numbering thousands of adherents, rigidly and ruthlessly disciplined, many of whom are infused with a passionate Utopian faith that is to redeem mankind. It has its Founder, its apostles, its sacred texts—perhaps even its martyrs. It seeks converts far and wide by an extensive system of schooling, demanding of all an inflexible doctrinal orthodoxy. The violent capture of all existing governments is one article of the creed of that faith, which abjures the possibility of success by lawful means. That article, which is a common-place among initiates, is a part of the homiletics for novitiates, although, so far as conveniently it can be, it is covered by an innocent terminology, designed to prevent its disclosure. Our democracy, like any other, must meet that faith and that creed on the merits, or it will perish; and we must not flinch at the challenge."

motion picture industry that the person shall not have been subpoenaed as a witness before the Committee and have refused on constitutional grounds to answer, not questions concerning his political affiliations, activities, or beliefs, but whether he is or ever has been a member of the Communist Party, or that the person was named before the Committee as a Communist and had refused on constitutional grounds to appear before the Committee to answer questions concerning his Communist affiliations, beliefs, and associations. The specific injury of which plaintiffs complain is the loss or prevention of future or prospective employment in the motion picture industry. To state facts sufficient to constitute a cause of action for such loss or prevention of employment, it must be averred that at the time of the alleged tort there was a certain or definite prospect that plaintiffs would obtain it.

[6] The general rule is that before recovery can be had for interference with and loss of a future or prospective contract or business relationship, it must appear that such contract or relationship would otherwise have been entered into. Cases collected 9 A.L.R.2d 228, 256–257. In Campbell v. Rayburn, 129 Cal.App.2d 232, 276 P.2d 671, the complaint alleged: the plaintiff wrote a letter to the attorney general describing gambling activities in Riverside County; the attorney general advised the plaintiff that the letter had been forwarded to the defendant sheriff of Riverside County for attention and appropriate action; the defendant sheriff induced or otherwise caused two named gamblers who owned property in Palm Springs not to rent the plaintiff office space for the purpose of carrying on his business as a real estate broker; one of the named gamblers told the plaintiff he would not " 'give the plaintiff standing room' "; and this same gambler had influenced his friends not to rent office space to the plaintiff, thus forcing him to conduct his business from his home. Demurrer was sustained without leave. Saying there was an attempt to state a cause of action for alleged wrongful interference with prospective contractual relations, the court on review held, 129 Cal.App.2d at page 234, 276 P.2d at page 672:

> "[N]o facts are alleged with respect to whether such accommodations would otherwise have been available on terms satisfactory to the plaintiff, the availability or lack of accommodations other than those referred to, or facts showing that the plaintiff had any reasonable expectation of economic advantage which would otherwise have accrued to him, and no facts are alleged tending to show the nature or amount of any damage to the plaintiff.
>
> "The general principles applicable here have been applied in decisions in other states."

The court then quoted with approval from Goldman v. Feinberg, 130 Conn. 671, 37 A.2d 355, Union Car Advertising Co. v. Collier, 263 N.Y. 386, 189 N.E. 463, and Debnam v. Simonson, 124 Md. 354, 92 A. 782. The judgment was affirmed.

In Goldman v. Feinberg, 130 Conn. 671, 37 A.2d 355, quoted from in the Campbell case, one of the defendants requested the plaintiff, a real estate broker, to show him some houses which were for sale. The plaintiff did so over a period of 7 months but to no avail. Among the homes was one which the plaintiff saw on a public listing issued by a bank, the list price for which was stated to be the irreducible minimum. At the defendant's request the plaintiff inquired of the bank if the price could be lowered and was told it could not. He did not inform the bank he was negotiating with the defendant. Later the bank sold the house to the defendant and paid the latter's father (also a defendant) a commission. The father had been present when the plaintiff showed the house to the son. The plaintiff's theory was that the defendants had conspired fraudulently to represent to the bank that the father was the procuring broker, thus depriving the plaintiff of a commission he would otherwise have been able to earn. The question as stated by the court was "whether the plaintiff, in order to make out a cause of action, must prove that he would have made a profit except for the unlawful interference with his business by the defendants." The court stated that in Connecticut a cause of action for wrongful in-

terference with business relations is recognized not only in respect to existing contracts but also as to one's right to pursue his lawful occupation or business and concluded, 37 A.2d 356:

"It does not follow from this, however, that a plaintiff may recover for an interference with a mere possibility of his making a profit. On the contrary, wherever such a cause of action as this is recognized, it is held that the tort is not complete unless there has been actual damage suffered. Pollock, Torts, 14th Ed., p. 441; Winfield, Law of Tort, 2d Ed., p. 643; Prosser, Torts, p. 1016 et seq. To put the same thing in another way, it is essential to a cause of action for unlawful interference with business that it appear that, except for the tortious interference of the defendant, there was a reasonable probability that the plaintiff would have entered into a contract or made a profit. [Citations.] In Lewis v. Bloede, supra [4 Cir.], the Circuit Court of Appeals says (202 F. [7] at page 17): 'When the parties have entered into a contract, the terms of which are fixed, the plaintiff is only required to show the malicious interference and the damage proximately resulting; whereas, if the ground of complaint is that he was about to make a contract, he is required to go further and show that he was not only "about to," but would, but for the malicious interference of the defendants, have entered into the contract.'"

In Union Car Advertising Co. v. Collier, 263 N.Y. 386, 189 N.E. 463, 469, also quoted from in the Campbell case, the plaintiff was one of two bidders on a proposal to lease advertising space in the cars and platforms of an elevated railway. The plaintiff's bid offered the higher rental of the two. The negotiations with the lower bidder had proceeded to a point which made it likely, if not certain, that the plaintiff would get the contract on which it was bidding. The railway company awarded the contract to the defendants after changes in terms, on which the plaintiff had not been given an opportunity to make a proposal. The plaintiff's contention was that the result came about from the defendants' wrongful interference. The interference consisted of misrepresentations as to the plaintiff's business ability and financial integrity; the bringing of political and economic pressure on the railway's trustees; and the defendants' indemnification of the railway from loss resulting from lawsuits arising out of rejection of the plaintiff's bid. The jury was instructed that the plaintiff could recover if the defendants' acts had prevented the railway company "'from entering with him into a contract which it is reasonably certain would have been made but for such interference.'" The judgment was for the plaintiff. Reversing, the Court of Appeals said, 189 N.E. 469:

"[Referring to the quoted instruction] If these words mean anything less than 'would have received,' we think they go too far. A cause of action exists where an executed contract is broken by a third person's unlawful interference. [Citation.] A cause of action has also been recognized where a party *would* have received a contract but for the malicious, fraudulent, and deceitful acts of a third party, such, for instance, as materially lying about him. [Citations.] There must be some certainty that the plaintiff would have gotten the contract but for the fraud. This cannot be left to surmise or speculation. The courts rightfully extended the arm of the law to reach one who deliberately interfered with an executed contract [citation], since which time they have gone a step further and mulcted in damages him who does the same thing to one who *would* have received such a contract but for the illegal interference. [Citations.] The courts will be a little slow in permitting juries to speculate upon what a competitor had reason to expect or might reasonably suppose would happen. The expressions 'reasonable expectation' or 'reasonably certain' may not be as precise as '*would* have received,' and we think the latter words are preferable."

In Debnam v. Simonson, 124 Md. 354, 92 A. 782, also quoted from in the Campbell case and cited with approval in Imperial Ice Co. v. Rossier, 18 Cal.2d 33, 36, 112 P.2d 631, the plaintiff devised a plan to buy certain land and build an apartment building thereon. He disclosed his project in confidence to one of the defendants who was an architect and entered into a contract with the latter to prepare the plans and specifications. He also entered into contracts for labor, materials, and financing, and was about to enter into a contract for the land. At that time the defendants, conspiring together, acquired the land for themselves, thus preventing the plaintiff from consummating his proposed purchase and also preventing his performance of the other contracts into which he had entered. A demurrer to the complaint was sustained. The Maryland Court of Appeals held, 92 A. 783:

> "The mere fact that the plaintiff has suffered damage or has lost an opportunity to profit financially because of his failure to consummate his plans owing to the purchase of said lot of land by the defendants does not in itself give him the right of recovery from the defendants for the damage sustained by him. The act must be of such a character as to create an actionable wrong before the right of recovery against the defendants exists, and, to create an actionable wrong, the legal rights of the plaintiff must in some way be invaded. There must be a violation of a legal right committed knowingly to create a cause of action. * * *
>
> 92 A. 784. "[T]his declaration is also defective because it does not allege with sufficient clearness, if at all, that, but for the alleged interference of the defendants, the plaintiff would have become the purchaser of the property, and would have succeeded in consummating his alleged contemplated plans or project. Such an allegation is necessary. Before he can recover it must be shown that, but for that interference, the purchase would have been made and his plans consummated." [7]

[7] The complaint in the case at bar is devoid of any allegation of fact that any contract or relationship would have been entered into between any one of plaintiffs and any one of defendant motion picture producers and distributors or with anyone in the motion picture industry but for the alleged agreement. There is no factual showing of denial of employment. There is no allegation that at the time the agreement was made, or at any time thereafter, any one of plaintiffs was an employee of any one of the defendants or had any reasonable prospect of becoming such; or that any one of them was, or is, or had any prospect of being a producer of motion pictures. There is not even an allegation that there were any negotiations pending or in progress between any one of plaintiffs and any one of defendants or with anyone in the industry, or that any plaintiff was seeking employment in the industry at the time of the alleged tortious interference. There is no allegation that at any time after the making of the agreement any one of plaintiffs requested employment from any one of defendants or from anyone in the motion picture industry. It is not alleged that but for defendants' alleged interference any one of plaintiffs would, or even probably or possibly would, have been employed in the industry. At the oral argument counsel for plaintiffs conceded it was not alleged "that individual plaintiffs did apply for work and were denied the right to work."

So far as appears, the last efforts of plaintiffs to obtain employment may have occurred years before the agreement. All that is alleged is that at some unspecified time prior to the agreement, they had been so employed. When and why that employment was terminated is not alleged. Since the employment terminated some time be-

7. And see Hundley v. Louisville & N. R. Co., 105 Ky. 162, 48 S.W. 429, 431, 63 L.R.A. 289, 88 Am.St.Rep. 298; Bailey v. Hans Watts Realty Co., 113 W.Va. 739, 169 S.E. 404; Celli & Del Papa v. Galveston Brewing Co., Tex.Com.App., 227 S.W. 941, 943; Payne v. Gebhard, Tex.Civ.App., 136 S.W. 1118, 1120; Harnick v. Avrum Realty Corp., 248 App. Div. 385, 288 N.Y.S. 256.

fore the agreement, in the absence of contrary allegation the inference necessarily is that the termination was the result of facts wholly disconnected from the agreement and that those facts, whatever they may have been, still are effective. It cannot be inferred from the alleged fact that at some unspecified time prior to the agreement plaintiffs were employed in the motion picture industry, they have not obtained employment since they invoked their constitutional privilege solely because of that fact.

There is an entire absence of factual allegation showing that any legally protected interest of plaintiffs has been interfered with. Neither an existing nor a prospective contract or business relationship is alleged. And there is nothing in the pleading from which it may be inferred that any prospective contract or business relationship has been interfered with by any wrongful act of defendants. The most that is alleged is a hope or expectation of employment. The complaint does not state facts sufficient to constitute a cause of action.

Bigelow v. RKO Radio Pictures, 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652, and Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 172 P.2d 867, cited by plaintiffs, are not apposite. In Bigelow, a suit for an injunction and damages for violation of the Sherman and Clayton Acts, 15 U.S. C.A. §§ 1–7, 15 note, 12 et seq., the sole question was, as stated by the court, "whether the evidence of damage [was] sufficient to support the verdict" for plaintiff. In Speegle the complaint alleged interference with existing contracts.

[8–11] Plaintiffs argue they should have been permitted to amend. One of the grounds of defendants' demurrer to the original complaint was that no cause of action was stated because of the absence of any allegation to the effect that an existing or prospective contract or business relationship had been interfered with.[8] The demurrer was sustained with leave. Plaintiffs then filed the complaint now before us. Plaintiffs amended only perfunctorily. For all practical purposes the original and the amended complaint are identical. No curative effort at all was exerted though opportunity was given. We must assume that plaintiffs have stated their cases as strongly as it was possible for them to do. Faulkner v. California Toll Bridge Authority, 40 Cal.2d 317, 328, 253 P.2d 659. Having declined to avail themselves of leave to amend in the particular which defendants specifically pointed out to them, plaintiffs must "stand upon their pleading as against all grounds and if the complaint is objectionable upon any ground the judgment of dismissal must be affirmed. [Citations.] Upon appeal from a judgment rendered after refusal to amend a complaint to which a demurrer has been sustained, it must be presumed that the pleader has stated his case as strongly as it can be stated in his favor and all ambiguities and uncertainties must be resolved against him." Metzenbaum v. Metzenbaum, 86 Cal.App.2d 750, 752, 195 P.2d 492, 493. Plaintiffs evidenced their satisfaction with the pleading and their willingness to stand or fall on it in its present form. The court did not err in sustaining the demurrer of the motion picture producers and distributors without leave to amend

In view of our conclusion, we do not reach other points argued by counsel.

8. In points and authorities filed in support of their demurrer to the original complaint, defendants said: "The complaint does not state facts sufficient to constitute a cause of action for interference with business relations. No existing contract between plaintiffs and any of the defendants is alleged. Consequently, there must be shown a reasonable probability that, but for the alleged interference, business relations between the parties would have been entered into. It is not enough that plaintiffs hoped or even expected that such relations might eventuate, the fact that they would have eventuated must appear.

" 'Before recovery can be had for interference with and loss of a prospective business relationship or contract, it is held that it must appear that such relationship or contract would otherwise have been entered into.'

"Annotation, 9 A.L.R.2d 256–257, and cases there cited."

The Case Against the Members of the Committee and the Investigator

The demurrers of these defendants were sustained with leave to amend. Plaintiffs declined to amend. As the complaint stands, it alleges these defendants entered into the agreement. For the reasons stated in considering the complaint as against the other defendants, it does not state facts sufficient to constitute a cause of action against the members of the Committee or the investigator. The complaint avers that with respect to all matters alleged these defendants "acted both in their official capacity with relation to said House Committee on Un-American Activities and individually in non-official capacities." These defendants argue they cannot be sued for the same acts both in their official capacities and in their personal capacities. In view of what we have said it is unnecessary to decide the point.[9]

The judgments are affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

Hearing denied; CARTER, J., dissenting.



142 Cal.App.2d Supp. 859

C. A. CULP and Wayne Copeland, etc., Plaintiffs, Defendants in Intervention, and Respondents,

v.

SIGNAL VAN & STORAGE, etc., et al., Defendants,

Minthorne Music Company, etc., Plaintiff in Intervention and Appellant.

C. A. 8944.

Appellate Department, Superior Court, Los Angeles County, California.

May 23, 1956.

Action in claim and delivery to recover possession of juke boxes purchased by plaintiffs from conditional vendee while he was in default under terms of conditional sales contract and resold by plaintiffs to such conditional vendee under conditional sales contract reserving title until full payment of purchase price. The original conditional seller filed a complaint in intervention seeking damages for conversion of the juke boxes. The Municipal Court of Los Angeles Judicial District, James H. Pope, J., rendered judgment in favor of defendants in intervention, and plaintiff in intervention appealed. The Appellate Department of the Superior Court, Patrosso, J., held that defendants in intervention were guilty of conversion of juke boxes as against plaintiff in intervention, and was liable for reasonable value of the juke boxes.

Judgment reversed with directions to amend findings and enter judgment accordingly in favor of plaintiff in intervention.

Swain, Acting P. J., dissented.

1. Sales ⇐480(6)

Where A purchased juke boxes from B under conditional sales contract by which B retained title until full payment of purchase price and, while in default under terms of such contract, sold juke boxes to C, C was guilty of "conversion" of juke boxes as against B, the true owner, and was liable to B for reasonable value of the juke boxes, though C resold them to A, but under conditional sales contract reserving title until full payment of purchase price, particularly where, upon default by A under terms of second conditional sales contract, C, claiming as owner, commenced action in claim and delivery to recover possession of juke boxes and denied B's claim of ownership.

See publication Words and Phrases, for other judicial constructions and definitions of "Conversion".

2. Trover and Conversion ⇐11

One who, though acting honestly and in good faith, purchases personal property from one having no title thereto or right

9. See Laughlin v. Rosenman, 82 U.S.App. D.C. 164, 163 F.2d 838, 843; Cooper v. O'Connor, 71 App.D.C. 6, 107 F.2d 207, 210; Reed v. Molony, 38 Cal.App.2d 405, 411, 101 P.2d 175; 67 C.J.S., Officers, § 125, p. 417.

to sell such property is guilty of conversion as against true owner.

3. Limitation of Actions ⇐55(5)
Trover and Conversion ⇐11

Where personal property is purchased from one having no title thereto or right to sell such property, a cause of action for conversion accrues against buyer and the statute of limitations thereon commences to run at time of such unauthorized sale of the property.

4. Trover and Conversion ⇐1, 4

"Conversion" is any act of dominion wrongfully exerted over personal property of another in denial of or inconsistent with his rights therein, and an act may constitute a conversion because it is accompanied by a wrongful assertion of ownership or a wrongful denial of the ownership of another.

5. Bailment ⇐16

Where bailee holds property entrusted to him as the property of bailor and upon demand by bailor redelivers such personalty to bailor without asserting any title thereto in himself and without knowledge that some other person is the owner thereof, bailee is not guilty of conversion of such property.

6. Trover and Conversion ⇐11

Where personal property is purchased from one having no title thereto or right to sell such property and buyer undertakes to deal with such property as his own, he is no less guilty of conversion because in so doing he later resells such property to the one from whom he purchased it.

Zimmerman, Kelly & Thody, Los Angeles, for appellant.

Edward H. Blixt, Los Angeles, for respondents.

PATROSSO, Judge.

The facts giving rise to this controversy are without dispute in material particulars and may be briefly stated.

Minthorne Music Company, hereinafter referred to as appellant, being the owner of two musical devices, commonly known as juke boxes, sold and delivered the same to one Gould under the terms of a conditional sales contract, whereunder appellant retained title thereto until the full payment of the purchase price, and wherein Gould expressly agreed not to sell or permit the same to come into the possession of any other person without the written consent of the vendor. Thereafter Gould, being in default under his contract with appellant and without the latter's knowledge or consent sold the juke boxes to plaintiff, Sierra Distributors, hereinafter referred to as respondent, who paid Gould therefor the sum of $1,019. Some time later, respondent sold and delivered the juke boxes and another device, with which we are not here concerned, to Gould under a conditional sales contract, by the terms of which respondent expressly reserved title to the goods until the full payment of the purchase price. Gould having defaulted under the terms of the latter contract, respondent instituted this action in claim and delivery against various defendants including Gould but not including appellant to recover possession of the juke boxes in question together with other items of personal property, in the complaint in which action respondent alleged that it was the owner and entitled to the possession of said juke boxes and other personal property therein described. Thereafter with leave of court, appellant filed a complaint in intervention against respondent and others for the conversion of said juke boxes and seeking damages therefor. To this complaint respondent filed an answer denying that appellant was the owner or entitled to the possession of the juke boxes, and denying that respondent had converted the same.

The case went to trial upon appellant's complaint in intervention and respondent's answer thereto; and at the conclusion of the trial the court found that the appellant was the owner and entitled to the possession of the juke boxes, and that the same were of the reasonable value of $1,100, but concluded that respondent was not guilty of conversion of the same and thereupon ordered judgment for the respondent, from which this appeal is taken.

[1–3] Having expressly found in accordance with the undisputed evidence as recited above that appellant was the owner

of the juke boxes in question at the time its conditional vendee Gould sold the same to respondent and the latter resold them to Gould under a conditional sales contract reserving title in respondent, the trial court erred in concluding that respondent was not guilty of conversion. One who, though honestly and in good faith, purchases personal property from one having no title thereto or right to sell the same is guilty of conversion. First Nat. Bank in Richmond v. Thompson, 1943, 60 Cal.App.2d 79, 82, 140 P.2d 75; Swim v. Wilson, 1891, 90 Cal. 126, 129–131, 27 P. 33, 13 L.R.A. 605, overruling Rogers v. Huie, 1852, 2 Cal. 571. This is also the rule of the Restatement (Torts, secs. 223(d), 229) and that prevailing in the great majority of jurisdictions. (53 Am.Jur., p. 832, sec. 36.) And in such situation a cause of action for conversion accrues and the statute of limitations thereon commences to run *at the time of the unauthorized sale of the property.* Harpending v. Meyer, 1880, 55 Cal. 555, 561; First Nat. Bank of Richmond v. Thompson, supra, 60 Cal.App.2d 79, 82, 140 P.2d 75.

[4, 5] Respondent argues that it was not guilty of conversion because it, in effect, but returned the juke boxes to Gould from whom it purchased and took possession thereof. This argument would, however, appear to be conclusively answered by the authorities hereinbefore cited to the effect that one who purchases personal property from another having no title thereto is guilty of conversion as against the true owner. See also: Price v. Hovsepian, 1952, 114 Cal. App.2d 385, 388, 250 P.2d 252. Moreover, this is not a case where respondent returned the property to Gould *free of any claim thereto* as respondent's argument would imply. On the contrary, the "return" of the property to Gould (if such it may be called) was pursuant to a contract of sale whereunder respondent as *owner* thereof agreed to sell the property to Gould and *retain title* thereto until the payment of the purchase price. Moreover respondent instituted this action to recover possession of the property in question upon the assertion and under the claim that it was the owner and entitled to the possession thereof *as against its vendee, Gould,* and in addition, when confronted by appellant's claim of ownership thereto in its complaint in intervention herein, undertook to deny that appellant was the owner or entitled to the possession thereof. "An act may be a conversion because it is accompanied by a wrongful assertion of ownership, or a wrongful denial of the plaintiff's ownership." (53 Am.Jur., p. 821, sec. 25.) "Conversion is any act of dominion wrongfully exerted over another's personal property *in denial of or inconsistent with his rights therein.*" (Emphasis added.) Igauve v. Howard, 1952, 114 Cal. App.2d 122, 126, 249 P.2d 558, 561. "* * (N)either good nor bad faith, neither care nor negligence, neither knowledge nor ignorance, is of the gist of the action." (24 Cal.Jur., p. 1023.) It may not be doubted that the conduct of respondent as hereinbefore detailed, however honestly and in good faith it may have acted, constituted a denial of and was inconsistent with appellant's rights in and to the property in question. We are not unmindful of the fact that circumstances may exist where one coming into possession of personalty who redelivers the same to the person from whom he received it without knowledge of the fact that he is not the true owner would not thereby necessarily be guilty of conversion. Such would be the case of a bailee who redelivers to his bailor property entrusted to him by the latter upon his demand therefor and without knowledge that some other person is the owner thereof; for in such circumstances it might not be said that the receipt of the goods or redelivery thereof were in denial of or inconsistent with the true owner's rights in the property. Even in such a situation, however, a bailee, if he would avoid liability to the true owner, must restore the property to the bailor *without the assertion of any title thereto in himself.* This is clearly pointed out by our Supreme Court in Steele v. Marsicano, 1894, 102 Cal. 666, at page 669, 36 P. 920, at page 921, where it is said:

> "In order to charge the defendant with the conversion of the plaintiffs' goods, he must be shown to have done *some act implying the exercise or assumption of title, or of a dominion over the goods, or some act inconsistent with*

the plaintiffs' right of ownership, or in repudiation of such right. A simple act of intermeddling with another's property, *which does not imply any assertion of title or dominion over the property,* and which is done in ignorance of the owner's claim thereto, and without any intention to deprive him of it, will not constitute a conversion. If I find a horse in my lot, I am not guilty of its conversion if I turn it into the highway. Nor is the warehouseman, who receives goods from a wrongdoer, and afterwards redelivers them to him, in ignorance of the claim of another, guilty of their conversion. Conversion is a tort, and, to establish it, there must be a tortious act. 'If a bailee have the temporary possession of property, holding the same as the property of the bailor, *and asserting no title in himself,* and in good faith, in fulfillment of the terms of the bailment, either as expressed by the parties or implied by law, restores the property to the bailor before he is notified that the true owner will look to him for it, no action will lie against him, for he has only done what was his duty.' Nelson v. Iverson, 17 Ala. 216. See, also, Burditt v. Hunt, 25 Me. [419] 422[; 43 Am.Dec. 289]." (Emphasis added.)

[6] Here respondent undertook to deal with the property as its own, and this is no less a conversion because in so doing it later resold it to the one from whom respondent had previously purchased it.

The judgment is reversed with directions to the trial court to amend its findings by striking finding II and substituting in lieu thereof the following: "The allegations of paragraph IX of the amended complaint in intervention of plaintiff Minthorne Music Company are true" and to amend its conclusion of law to read as follows: "Plaintiff in intervention Minthorne Music Company, is entitled to judgment against defendants C. A. Culp and Wayne Copeland doing business as Sierra Distributors, a co-partnership, in the sum of $1100.00 with interest from December 18, 1954, and for costs of suit," and thereupon enter judgment accordingly.

KAUFFMAN, J., concurs.

SWAIN, Acting Presiding Judge.

I dissent. There seems to be no doubt that in California one who, though honestly and in good faith, purchases personal property from one who has no right to sell it is guilty of conversion, Harpending v. Meyer, 1880, 55 Cal. 555. The case of First National Bank in Richmond v. Thompson, 1943, 60 Cal.App.2d 79, 140 P.2d 75, relied on in the majority opinion, is claim and delivery, not conversion.

However, the majority opinion does not fully discuss the effect of the return by respondent of the machines to Gould, the conditional sales vendee who without authority sold the machines to appellant. 89 C.J.S., Trover & Conversion, § 45, p. 552: "One is not liable in trover for redelivering a chattel to the person from whom he received it, notwithstanding he knew that such person's possession was wrongful."

The effect of a return of the goods by an innocent purchaser is the subject of comment by the Supreme Court which, though obiter, is well worth considering. Rogers v. Huie, 1852, 2 Cal. 571, 574: "Now suppose after the sale by the auctioneer, the vendee had refused to take the goods, and returned them to the auctioneer, and he to his principal, would the liability of the auctioneer be insisted on? I put it thus strongly to show, that such proposition would shock our common sense of justice." The principal holding in that case, that an auctioneer was not guilty of conversion who in good faith received and sold stolen stock certificates, was reversed in Swim v. Wilson, 1891, 90 Cal. 126, 27 P. 33, 13 L.R.A. 605. No question was there raised of the defense that the property was returned. There is also the rule that return of the goods mitigates damages despite the harsh California rule of liability of an innocent receiver of the property. In Goldberg v. List, 1938, 11 Cal.2d 389, 79 P.2d 1087, 116 A.L.R. 900, our Supreme Court held that delivery of converted goods to an owner whose title was paramount to that of the plaintiff (the conditional sales vendee) mitigated the damages claimed. 53 Am.Jur. 908: "Although there is some authority to

the contrary, the repossession of converted property by a third person who has an interest in the property is generally regarded as properly considered in mitigation of damages recoverable for the conversion. This is true not only where the third person seizes the property, or replevies the same, but also where the property is delivered to the third person upon a demand which is legally enforceable."—citing Goldberg v. List, supra, 11 Cal.2d 389, 79 P.2d 1087, also reported in 116 A.L.R. 900.

Respondent's return of the machines to Gould placed the plaintiff in intervention in exactly the same position it held prior to the unlawful sale by Gould. The plaintiff in intervention suffered no damage by that sale and resale. I would affirm the judgment.



142 Cal.App.2d Supp. 847

Tex RITTER, Plaintiff and Appellant,

v.

Winston N. SALSBERY et ux., Defendants and Respondents.

C. A. 8999.

Appellate Department, Superior Court, Los Angeles County, California.

May 18, 1956.

Order Denying Rehearing June 8, 1956.

Unlawful detainer action by redemptioner against judgment debtor. From a judgment of the Municipal Court of the South Bay Judicial District, Otto B. Willett, J., nonsuiting plaintiff, plaintiff appealed. The Appellate Department of the Superior Court, Patrosso, J., held that in order that a judgment debtor may redeem from a prior redemptioner he must not only pay to latter amount paid by him to redeem, together with interest thereon, but also amount of any lien held by such prior redemptioner.

1. Execution ⇐293

That subsequent judgment creditor did not obtain his judgment until after property had been sold under writ of execution issued upon prior judgment did not disqualify subsequent judgment creditor as a redemptioner. West's Ann.Code Civ. Proc., § 701, subd. 2.

2. Execution ⇐298

The written "notice of redemption" required to be filed by Code Civ.Proc. § 703 is not the "notice" mentioned in § 705, which is notice by one entitled to redeem, but has reference to notice to be given subsequent to time that redemption is effective and is designed to give notice to sheriff and others entitled to redeem of any sum expended by redemptioner for purposes stated and any lien held by him other than that upon which redemption was made. West's Ann. Code Civ.Proc., §§ 703, 705.

See publication Words and Phrases, for other judicial constructions and definitions of "Notice of Redemption".

3. Execution ⇐298

Where redemptioner had not claimed to have made payment of any of items referred to in Code Civ.Proc. § 703, failure to file post-redemption notice required by such section would not have invalidated redemption. West's Ann.Code Civ.Proc., § 703.

4. Execution ⇐296

In order that a judgment debtor may redeem from a prior redemptioner he must not only pay to latter amount paid by him to redeem, together with interest thereon, but also amount of any lien held by such prior redemptioner. West's Ann.Code Civ. Proc., § 703.

5. Execution ⇐302, 319

Legal title is acquired at execution sale and not by virtue of sheriff's deed, which only serves as evidence that there has been no redemption; and redemptioner could maintain unlawful detainer action against judgment debtor even though no deed had been issued to him prior to institution of action, where period of redemption had expired prior to that time and certificate of sale had been issued by sheriff to pur-

chasers at execution sale and certificate of redemption had likewise been issued by that officer to redemptioner. West's Ann.Code Civ.Proc., § 703.

6. Judgment ⇐497(1)

When attempt is made to collaterally attack judgment, court is confined to inspection of record, which is conclusively presumed to be correct.

7. Judgment ⇐499

Evidence outside record is not admissible upon collateral attack to show that summons was not served on defendant.

8. Process ⇐45

Under Code Civ.Proc., § 408, providing for service of alias summons where original summons is returned without being served upon all of defendants, issuance of second alias summons prior to return or proof of loss of previously issued alias summons is not prohibited, nor does fact that it was so issued affect jurisdiction of court. West's Ann.Code Civ.Proc., § 408.

On Petition For Rehearing

9. Trial ⇐106

Argument is not evidence.

10. Dismissal and Nonsuit ⇐55

If plaintiff in unlawful detainer action sought damages in excess of jurisdiction of municipal court, remedy was to transfer action to superior court, and not judgment of nonsuit. West's Ann.Code Civ.Proc., § 396.

Kenneth D. Holland, Monrovia, for appellant.

Edward H. Blixt, Los Angeles, for respondent.

PATROSSO, Judge.

Plaintiff appeals from a judgment of nonsuit in an action of unlawful detainer instituted by him pursuant to section 1161a (1) of the Code of Civil Procedure. The facts are not in dispute and may be briefly stated.

Pursuant to a writ of execution issued upon a judgment obtained against defendants herein in the Municipal Court of the Los Angeles Judicial District, wherein Customcraft Sheet Metal Products, Inc. was plaintiff, the Sheriff of Los Angeles County, on May 4, 1954, sold the property here involved to parties named, Nishimine, Curtright and Sevilla, and issued to them his certificate of sale therefor. Subsequently thereto and prior to the expiration of the period of redemption from the foregoing execution sale, plaintiff obtained judgments against defendants, upon which, at the time of plaintiff's redemption from the previous sale presently to be noted, there was due $1,827.51. Abstracts of said judgments were duly recorded prior to April 27, 1955, at which time plaintiff paid to the Sheriff the requisite amount to effect a redemption from the sale to Nishimine, Curtright and Sevilla, and thereafter on October 19, 1955, the Sheriff issued to plaintiff, his certificate of redemption which was duly recorded on November 2, 1955. On May 2, 1955, defendants paid to the Sheriff the sum of $61.81 for the purported purpose of effecting a redemption from the plaintiff, the defendants contending then, as they do now, that they were entitled to redeem from plaintiff without payment of his judgment, by virtue of which he redeemed from the purchasers at execution sale. Thereafter, following the expiration of the period of redemption, and on November 7, 1955, plaintiff instituted the present action in unlawful detainer, seeking possession of the property in question. Other salient facts will appear in connection with the discussion of the various contentions of the respective parties.

Defendants advance various reasons in support of the judgment of nonsuit which we shall proceed to consider seriatim.

[1] 1. Defendants first contend (although this does not clearly appear to have been one of the grounds of their motion for nonsuit) that plaintiff's redemption from the sale under execution was ineffectual because plaintiff was not entitled to redeem by virtue of his judgment against the defendants. The argument is that, inasmuch as plaintiff did not obtain his judgment until after the property was sold under execution in the prior action, he acquired no lien thereon and hence he did not qualify

as a redemptioner under C.C.P. section 701 (2). The argument requires no extensive discussion as it is conclusively answered and disposed of adversely to defendants by the recent case of Clark v. Cuin, 1956, 46 Cal.2d 386, 295 P.2d 401.

[2, 3] Defendants next contend that plaintiff's redemption was ineffectual in that plaintiff did not record notice of redemption as is required (so defendants say) by C.C.P. section 703. A proper understanding of this contention requires an amplification of the statement of facts appearing in an earlier part of this opinion. When plaintiff redeemed from the purchasers at execution sale, he delivered to the Sheriff the following: (1) written notice of intention to redeem; (2) certified copies of the judgments in favor of plaintiff against defendants; (3) affidavit showing the amount actually due under his judgment lien; and (4) cash in the sum of $60.00, representing the amount for which the property was sold to the purchasers at execution sale, together with accrued interest and a redemption fee of $2.90. There is no contention that the amount paid by plaintiff to the Sheriff was not the requisite amount required to effect a redemption in accordance with C.C.P. section 702. It is also clear that the documents then delivered to the Sheriff constituted all that are required by C.C.P. section 705. The controversy here, therefore, revolves about the proper construction to be accorded to the fourth paragraph of section 703, which reads as follows: "Written notice of redemption must be given to the sheriff and a duplicate filed with the recorder of the county, and if any taxes or assessments are paid by the redemptioner, or if any sum for fire insurance, maintenance, upkeep, or repair of any improvement upon the property, is paid by the redemptioner, or if he has or acquires any lien other than that upon which the redemption was made, notice thereof must in like manner be given to the sheriff and filed with the recorder; and if such notice be not filed, the property may be redeemed without paying such tax, assessment, sum, or lien."

Just what is meant by the words, "Written notice of redemption" as used in the foregoing provision is not entirely clear. It would not appear to refer to the "notice" mentioned in section 705, which is a notice by one entitled to redeem, manifesting his purpose and notifying the Sheriff making the sale of his desire to exercise his right of redemption, which must be accompanied (if he be a judgment creditor) with a certified copy of the judgment "under which he claims the right to redeem," and an affidavit "showing the amount then actually due on the lien." The "Written notice of redemption" mentioned in section 703, on the other hand, would appear to have reference to a notice to be given subsequent to the time that redemption is effected, for it speaks of "taxes or assessments paid by the redemptioner" and of sums paid by him (the redemptioner) "for fire insurance, maintainance, upkeep, or repair of any improvement upon the property" as well as any "lien other than that upon which the redemption was made" which "he has or *acquires*", and is apparently designed to give notice to the Sheriff and others entitled to redeem of any sum expended by the redemptioner for the purposes stated and any lien held by him other than that upon which the redemption was made, in order that the Sheriff, as well as others entitled to redeem from the redemptioner, may be informed of the amount which will be required to be paid to effect a redemption, in addition to any amount which was required to be paid by him to effect a redemption from the purchaser at execution sale or from a previous redemptioner having a superior lien to his own. That this is the proper construction to be accorded to the provision is fortified by the final clause: "if such notice be not filed, the property may be redeemed without paying such tax, assessment, sum, or lien ("other than that upon which the redemption was made")." This latter clause is also to be read in the light of the first paragraph of the section 703, which specifies the amount required to be paid by a subsequent redemptioner which, in addition to the sum paid by the last redemptioner, with 2% interest thereon, includes "the amount of any assessment or taxes * * * fire insurance, maintenance, upkeep, or repair of any improve-

ments * * * which the last redemptioner may have paid thereon *after the redemption by him*". When so read, it is reasonably made to appear that the notice required by the fourth paragraph to be given to the Sheriff and a duplicate filed with the recorder has reference to such items as are therein enumerated (assessments, taxes, etc.) as were paid by the redemptioner "*after the redemption by him*," and which he is entitled to claim from any subsequent redemptioner, and of which neither the Sheriff nor a subsequent redemptioner would otherwise have knowledge or notice. This seemingly was the construction placed upon this provision by the parties and not questioned by the court in Lawler v. Gleason, 1955, 130 Cal.App.2d 390, 393, 279 P.2d 70. As plaintiff did not claim to have made payment for any such items, there was no reason why such notice should be filed by him and we conclude that plaintiff made a valid redemption from the purchasers at execution sale.

In the foregoing discussion, we have assumed that no notice of redemption was given to the Sheriff other than that previously mentioned in accordance with section 705, and that a copy of said notice was not filed with the recorder, as there is no affirmative proof to this effect. In making this assumption, we do not, however, undertake to decide that plaintiff, in order to establish *prima facie* that he had redeemed the property from the purchaser at execution sale, was required to do more than he did, namely, producing and causing to be introduced in evidence the Sheriff's certificate of sale and the certificate of redemption issued to him by the Sheriff. See: White v. Costigan, 1901, 134 Cal. 33, 38, 66 P. 78; Foorman v. Wallace, 1888, 75 Cal. 552, 556, 17 P. 680. We have, however, given consideration to defendants' contention in this regard, as it will necessarily arise upon a retrial.

[4] Defendants further contend, however, that, conceding that plaintiff effectively redeemed from the purchasers at execution sale, they, in turn, effectively redeemed from plaintiff when they paid to the Sheriff the amount paid by plaintiff to effect such redemption, together with interest thereon at the rate of 2%. Specifically the claim is that they were not required to pay to plaintiff an additional amount representing the later's judgment lien. The contention is without merit. In order that a judgment debtor may redeem from a prior redemptioner, he must not only pay to the latter the amount paid by him to redeem, together with interest thereon, but also the amount of any lien held by such prior redemptioner. Not only is this clear from a reading of section 703, but it is directly so held in Lawler v. Gleason, 1955, 130 Cal.App.2d 390, 397, et seq., 279 P.2d 70, supra.

[5] Defendants next contend that plaintiff's title to the property was not perfected, and hence he could not maintain the action, because no Sheriff's deed was issued to him. As already noted, however, a certificate of sale was issued by the Sheriff to the purchasers at execution sale, and a certificate of redemption was likewise issued by the officer to the plaintiff, both of which were duly recorded. While no deed had been issued to plaintiff prior to the institution of this action, it is admitted that at that time the period of redemption had expired. While there is language to be found in the earlier cases to the effect that title to real property sold at execution sale does not pass until the execution and delivery of the Sheriff's deed, Anthony v. Wessel, 1858, 9 Cal. 103, 104; Cummings v. Coe, 1858, 10 Cal. 529, 530; People ex rel. Mulford v. Mayhew, 1864, 26 Cal. 655, 665, it is now well settled that legal title is acquired at the sale and not by virtue of the Sheriff's deed, which only serves as evidence that there has been no redemption. Allen v. McGee, 1942, 54 Cal.App.2d 476, 483–484, 129 P.2d 143. Plaintiff was, therefore, entitled to maintain the action.

[6–8] Finally, defendants contend that the judgment in the action wherein the writ of execution was issued pursuant to which the property was sold is void. This contention is predicated upon the following facts: The original summons therein was issued January 6, 1954, and was returned January 19, 1954, with proof of service upon the defendant Mr. Salsbery. On the latter date an alias summons was issued, and another alias summons was is-

sued on February 10, 1954. Both alias summonses were returned on February 26, 1954, the one first issued without proof of service and the second with proof of service upon defendant, Mrs. Salsbery. The argument is that the clerk is without authority to issue an alias summons while another alias summons is outstanding without a showing that the first alias summons has been lost. This constitutes an attempt to collaterally attack the judgment in question, Milstein v. Turner, 1948, 89 Cal.App.2d 296, 298, 200 P.2d 799, in which situation we are confined to an inspection of the record which is conclusively presumed to be correct. City of Los Angeles v. Glassell, 1928, 203 Cal. 44, 49, 262 P. 1084. Thus evidence outside the record is not admissible upon collateral attack to show that summons was not served on the defendant. Feig v. Bank of Italy, 1933, 218 Cal. 54, 56–57, 21 P.2d 421. Here the judgment recites that defendants were "personally served with summons and copy of complaint." Moreover, there is no evidence to the effect that the first alias summons had not in fact been lost when the second was issued. The fact that it was returned at a later date is not, necessarily, inconsistent with the fact that it may have been lost at an earlier date when the second alias was issued. Aside from this, however, there is nothing in section 408, C.C.P. which prohibits the issuance of an alias summons while a previously issued alias is outstanding. It merely provides that an alias summons may be issued if the original summons is returned without being served on any or all of the defendants or it has been lost. It further expressly provides, without further qualification or condition, that "As many alias summonses as are necessary may be issued within such time" (as the original summons "might have been served if it had not been lost or returned"). Thus it appears clear that after the return of the original summons the issuance of a second alias summons prior to the return or proof of loss of a previously issued alias summons is neither prohibited nor does the fact that it was so issued affect the jurisdiction of the court.

The judgment is reversed.

SWAIN, Acting P. J., and KAUFFMAN, J., concur.

Order Denying Rehearing

Before SWAIN, Acting P. J., and PATROSSO and KAUFFMAN, JJ.

BY THE COURT.

The petition of respondents for a rehearing after judgment of this court on appeal in the above entitled case having been filed and having been duly considered,

Said petition is hereby denied.

[9] There is neither pleading nor proof of a pending action to quiet title to the real property in question. One was mentioned in argument but that is not evidence.

[10] If plaintiff seeks damages in excess of the jurisdiction of the Municipal Court, the remedy is to transfer the action to the Superior Court, C.C.P. § 396, not a judgment of nonsuit.



140 Cal.App.2d Supp. 982

James Richard MITCHELL, d/b/a Mitchell Realty, Appellant and Respondent,

v.

Ruth L. JOHNSTON, Appellant,

and

W. E. Jordan, a/k/a Walt Jordan, Respondent.

C. A. 10.

Appellate Department, Superior Court, Orange County, California.

April 5, 1956.

Rehearing Denied June 28, 1956.

Action to recover real estate broker's commission. Judgment was entered against defendant vendor but denying recovery against purchaser, and both plaintiff and defendant vendor appealed. The Superior

Court, Appellate Department, Thompson, J., held that since broker had no listing agreement employing him to procure a purchaser for realty and only agreement to pay broker a commission was contained in deposit receipt agreement, broker was not entitled to commission upon termination of contract for purchase and sale of realty by mutual agreement.

Judgment affirmed in part and reversed in part and case remanded for further proceedings consistent with opinion.

West, P. J., dissented.

1. Brokers ⇐60

Where broker had no listing agreement employing him to procure a purchaser for realty and only agreement to pay broker a commission was contained in deposit receipt agreement between owner and prospective purchaser, broker's right to compensation was dependent upon performance of such agreement for purchase and sale of realty, and where such agreement was terminated by mutual agreement of owner and prospective purchaser, broker was not entitled to commission.

2. Brokers ⇐85(1)

Where vendor by deposit receipt agreement agreed to pay real estate broker specified sum as commission, or one-half of deposit, if forfeited by purchaser, evidence that deposit was retained by vendor, though contract for purchase and sale of realty was terminated by mutual agreement, was admissible in action to recover broker's commission.

3. Estoppel ⇐92(2)

Where vendor by deposit receipt agreement agreed to pay real estate broker specified sum as commission, or one-half of deposit, if forfeited by purchaser, retention of deposit by vendor pursuant to forfeiture upon termination of contract for purchase and sale of realty by mutual agreement would estop vendor from denying broker's right to one-half of such deposit.

James E. Walker, Santa Ana, for appellant and respondent Mitchell.

Roy J. Brown, Long Beach, for appellant Johnston and respondent Jordan.

THOMPSON, Judge.

This is a discussion of the appeal by defendant Ruth L. Johnston from a judgment against her by plaintiff real estate broker for a real estate commission, based upon what is often called a "standard form" deposit receipt agreement, a copy of which is attached to the complaint. The receipt was signed by Mitchell Realty, by Joe Steele, acknowledging receiving $500 as a deposit on the purchase of the property in question on account of a total purchase price of $34,000. Below the signature of the plaintiff is an agreement by defendant W. E. Jordan to purchase the property upon the terms set out in the receipt form and below that space is an agreement by defendant Ruth L. Johnston, to sell the property and to pay "the above signed agent as commission the sum of $1700.00, or one-half the deposit, in case same is forfeited by purchaser, provided the same shall not exceed the full amount of the commission."

It appears that after this agreement, Jordan and Johnston entered into an escrow with a title company, and thereafter, by mutual agreement, terminated the escrow and the agreement to sell and purchase.

Plaintiff did not have a listing agreement employing him to procure a purchaser for the property.

[1] We believe that under these circumstances, the rule as most recently stated in the case of Lawrence Block Co. v. Palston, 123 Cal.App.2d 300, 266 P.2d 856, 860, applies. That action was by a broker upon an agreement almost identical in form to the one in this case. The Court said:

> "Where the only agreement to pay a broker a commission is contained in the contract between his principal and the customer, the broker's right to compensation is dependent upon performance of that contract. If the customer refuses to perform, or if the contract is canceled or rescinded, the broker cannot recover. In such cases the broker, not having the protection of the ordinary broker's contract for

compensation for service to be performed, must stand or fall on the contract actually entered into; and if he has seen fit to allow payment of his compensation to be dependent upon the performance of a contract made between parties other than himself, he cannot complain if, through the nonperformance of that contract, his own contingent rights be lost."

Plaintiff argues strenuously that this case should not be followed; that the language quoted is dictum, and that the language is in conflict with other recent cases. It is true that there was another ground upon which the decision in the Lawrence Block case might have rested; that was that the contract was incomplete, leaving various important matters for future determination. Even if we concede (which we do not) that the case is dictum so far as the point involved is concerned, yet we find by examining the numerous decisions cited therein that the rule as stated is well established in California.

As was said in the case of Lundeen Corporation v. Barlow, 120 Cal.App. 391, at page 394, 7 P.2d 1102, 1103, a factually similar case,

"His rights under the contract are governed by section 1559 of the Civil Code which reads as follows: 'A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.' Plaintiff's only rights are such as he may claim under the terms of the exchange agreement, and he claims no other contract with defendant. The contract under which he claims recovery was rescinded before he attempted to collect his commissions, and his rights thereby terminated."

Reference is made to the Lawrence Block Co. v. Palston case, 123 Cal.App.2d at page 307, 266 P.2d 856, for other authorities upon which we rely.

Not only do we feel that the rule is supported by authority, but that it is in accordance with reason and justice. In the case of a broker having a listing whereby he is employed to procure a purchaser, it is just and proper that when he does obtain a buyer ready, willing and able to purchase upon the terms sought by the owner, that he has performed his contract and is entitled to compensation. On the other hand, where a broker comes into a situation as a volunteer and induces a property owner and a prospective buyer to enter into a contract between themselves providing for a commission to himself it is only reasonable and fair that his right to compensation should depend upon the actual consummation of the transaction by the principals.

We are aware of the following cases: Lipton v. Johansen, 105 Cal.App.2d 363, 369, 370, 233 P.2d 648; Deeble v. Stearns, 82 Cal.App.2d 296, 186 P.2d 173; Clements v. Rankin, 83 Cal.App.2d 779, 785, 189 P.2d 725; Ralston v. Demirjian, 86 Cal.App.2d 124, 126, 194 P.2d 41, and cannot assert that they can be reconciled with our ruling and the cases upon which we rely. We are following the cases which we deem to be the greater weight of authority and more consistent with reason and justice.

In the case of Lipton v. Johansen apparently the Court was not reminded of the cases which are cited above, and the point upon which we rely is not discussed.

The case of Clements v. Rankin apparently allowed recovery upon deposit receipt after the parties had rescinded; however, the opinion states "Defendant had listed their property for sale with plaintiff." There is no further discussion or mention of a prior listing.

[2, 3] There was an offer of proof by plaintiff in the lower court that the $500 deposit with the broker was retained by defendant. Objection to this offer was sustained. It seems to us that this evidence should have been admitted, and if it is true that there was a forfeiture it would seem that the defendant, having retained the deposit pursuant to the forfeiture, would be estopped from denying the claim of the broker for his half thereof, to-wit: $250.

Judgment of the lower court is reversed and the case remanded for further proceedings consistent with the views we have expressed. The same and other considera-

tions lead us to affirm the judgment in favor of the respondent, the buyer Jordan.

GARDNER, J., concurs.

WEST, Presiding Judge.

I dissent. I have no quarrel with the proposition that where the only agreement to pay a commission to a real estate broker is contained in the contract between the broker's principal and the purchaser, the broker's right to compensation is lost through nonperformance of that contract, but such is not the situation here presented.

Mitchell Realty, through its agent, Steele, procured a purchaser who agreed to buy the property, and who paid a deposit. Steele, in behalf of his principal, acknowledged receipt of the same "on account of the purchase price" of the property. Mrs. Johnston thereafter agreed to sell the property on the terms stated and agreed to pay "the above signed agent" as commission the sum of $1,700. All of these matters are contained in a standard form deposit receipt agreement. The buyer and seller thereafter entered into an escrow upon such terms.

It is my opinion that under the circumstances here existing, there was a separate contract of employment contained in the deposit receipt, and that the case is governed by the rule stated in Deeble v. Stearns, 82 Cal.App.2d 296, 186 P.2d 173, and followed in Clements v. Rankin, 83 Cal. App.2d 779, 785, 189 P.2d 725, Ralston v. Demirjian, 86 Cal.App.2d 124, 126, 194 P.2d 41, and Lipton v. Johansen, 105 Cal.App.2d 369, 233 P.2d 648. The four cases cited in this opinion all support my view that the broker who executes the deposit receipt setting forth the terms and conditions of the sale is a party to such agreement, and becomes entitled to his commission when his principal, in writing, approves the contract submitted by him in writing, and agrees in the same writing to pay such commission.

I would affirm the judgment in favor of Respondent Jordan and against Appellant Johnston.

46 Cal.2d 684

Frederick Sheets LORENZ, Petitioner and Appellant,

v.

BOARD OF MEDICAL EXAMINERS of the State of California, Respondent.

S. F. 19451.

Supreme Court of California.
In Bank.

June 19, 1956.

Rehearing Denied July 18, 1956.

Proceeding for writ of mandate to set aside order of Board of Medical Examiners revoking doctor's certificate to practice medicine and surgery. The Superior Court, City and County of San Francisco, Harry J. Neubarth, J., denied writ of mandate, and the doctor appealed. The Supreme Court, Traynor, J., held that offense of giving alcoholic beverage to person under age of twenty-one years does not, in every case, evidence bad moral character, and held that conviction of such offense does not alone warrant suspension or cancellation of license. The Court explained that while an offense, such as the aforementioned one, that does not necessarily involve moral turpitude may be committed by an act involving moral turpitude, licensee cannot, if convicted only for such offense be disciplined under procedure that makes record of conviction conclusive evidence of unprofessional conduct, but must be charged with fraudulent or immoral act and given hearing on that charge.

Reversed with directions.

Shenk, J., dissented.

Opinion, reported at 290 P.2d 79, vacated.

1. Physicians and Surgeons ⇦11(2)

Moral turpitude must be inherent in crime itself to warrant cancellation or suspension, of license to practice medicine, because of conviction.

2. Physicians and Surgeons ⇦11(2)

"Moral turpitude" is not inherent in crime itself unless conviction in every case would evidence bad moral character, and only if minimum elements for conviction necessarily involve moral turpitude, and conviction cannot be had without proof of facts showing moral turpitude, can conviction be held to be of an offense involving moral turpitude and thus justify suspension of license to practice medicine. West's Ann. Bus. & Prof.Code, § 2383.

See publication **Words and Phrases**, for other judicial constructions and definitions of "Moral Turpitude".

3. Physicians and Surgeons ⇦11(2)

Offense of giving alcoholic beverage to person under age of twenty-one years does not, in every case, evidence bad moral character, and moral turpitude is therefore not inherent in crime itself; and conviction alone of such an offense does not warrant suspension or cancellation of license to practice medicine. West's Ann.Bus. & Prof.Code, § 2383.

4. Physicians and Surgeons ⇦11(3)

In determining whether physician has been convicted of offense involving moral turpitude and thus warranting revocation of his license, inquiry into collateral acts is not permitted. West's Ann.Bus. & Prof. Code, § 2383.

5. Physicians and Surgeons ⇦11(2, 3)

If other acts committed at same time as offense for which licensee was convicted constitute unprofessional conduct, licensed physician may be disciplined for those acts; but he must be charged with such acts.

6. Physicians and Surgeons ⇦11(2, 3)

An offense that does not necessarily involve moral turpitude may be committed by an act involving moral turpitude; but medical licensee convicted only for such offense cannot be disciplined under procedure that makes record of conviction conclusive evidence of unprofessional conduct, but must be charged with fraudulent or immoral act and given hearing on that charge. West's Ann.Bus. & Prof.Code, §§ 2377 et seq., 2383, 25658; 26 U.S.C.A. (I.R.C.1939) § 145(b).

Lowell L. Dryden, Denison, Dietrich & Anderson, Los Angeles, and Hutchinson & Quattrin, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., and Dan Kaufmann, Deputy Atty. Gen., for respondent.

TRAYNOR, Justice.

On October 3, 1952 judgment of conviction was entered on petitioner's plea of guilty to a violation of section 61(a) of the Alcoholic Beverage Control Act [1] (now Bus. & Prof.Code, § 25658). On April 9, 1953 a special investigator for the Board of Medical Examiners filed with the board an accusation against petitioner, Gov.Code, § 11503, charging that his conviction was for an offense involving moral turpitude and that he was therefore guilty of unprofessional conduct under sections 2361 [2] and 2383 [3] of the Business and Professions Code. It was also alleged that on or about March 13, 1947 petitioner's license had been revoked for conviction of a crime involving moral turpitude, but that the revocation was suspended and petitioner placed on probation for five years.

A hearing was held before a hearing officer on February 23, 1954. He found that discipline had been previously imposed as alleged, that the conviction in question was for giving a drink of an alcoholic beverage to a seventeen year old boy, but that the crime did not involve moral turpitude. He recommended that the accusation be dismissed. The Board of Medical Examiners, however, decided that petitioner had been convicted of a crime involving moral turpitude and revoked his license to practice medicine and surgery in California.

Petitioner filed a petition for a writ of mandate in the Superior Court to review the order of the board, Code Civ.Proc., § 1094.5, and a trial was had on the record before the board. The court found that "* * * said conviction was of a crime involving moral turpitude in that it arose from the furnishing of intoxicating liquor by the petitioner on or about August 17, 1952 at the Travelodge Motel in Brawley, California, to a minor * * * without just cause or explanation, and that at said time and place and in connection with the furnishing of said intoxicating liquor the petitioner did engage in immoral acts with the said minor" and entered its order discharging the alternative writ. Petitioner appeals.

[1, 2] Under the plain language of section 2383 it is the conviction alone of an offense involving moral turpitude that empowers the board to suspend or cancel a license. Since the record of conviction is conclusive evidence of the unprofessional conduct, the circumstances in which the crime was in fact committed cannot be considered. Moral turpitude must be inherent in the crime itself to warrant cancellation or suspension of a license because of the conviction. In re Hallinan, 43 Cal.2d 243, 248–249, 272 P.2d 768. Moral turpitude is not inherent in the crime itself unless a conviction in every case would evidence bad moral character. (Ibid.) Only if the minimum elements for a conviction necessarily involve moral turpitude and a conviction cannot be had without proof of facts showing moral turpitude, can the conviction be held to be of an offense involving moral turpitude. (Ibid.)

[3, 4] We have concluded that the offense of giving an alcoholic beverage to a person under the age of 21 years does not in every case evidence a bad moral character and that moral turpitude is therefore not inherent in the crime itself. Conviction alone, therefore, of such an offense does not warrant the suspension or cancellation of a license under section 2383. Brainard v. State Board of Medical Exam-

1. "Every person who sells, furnishes, gives or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor."

2. "The board shall take action against any holder of a certificate, who is guilty of unprofessional conduct * * *." Business and Professions Code, § 2377 et seq., specify those acts which constitute unprofessional conduct.

3. "The conviction of a felony, or of any offense involving moral turpitude, constitutes unprofessional conduct within the meaning of this chapter. The record of the conviction is conclusive evidence of such unprofessional conduct."

iners, 68 Cal.App.2d 591, 157 P.2d 7, permitting inquiry into collateral acts to determine whether a conviction was for an offense involving moral turpitude is inconsistent with our opinion herein and is disapproved.

[5] If other acts committed at the same time as the offense for which a licensee is convicted constitute unprofessional conduct, Bus. & Prof.Code, § 2377 et seq., the licensee may be disciplined for those acts. He must, however, be charged with such acts. In re Hess, 45 Cal.2d 171, 288 P.2d 5. In the present case petitioner was neither charged nor convicted of anything but a violation of section 61(a) of the Alcoholic Beverage Control Act.

[6] An offense that does not necessarily involve moral turpitude may be committed by an act involving moral turpitude, e. g. section 145, subdivision (b) of the Internal Revenue Code, 26 U.S.C.A. § 145(b) may be violated by intentional fraud, see In re Hallinan, supra, 43 Cal.2d 243, 253, 272 P.2d 768; section 61(a) of the Alcoholic Beverage Control Act may be violated by adulterating a non-alcoholic drink with alcohol and inducing a minor to take it in the belief that it is non-alcoholic. In such cases a licensee cannot be disciplined under a procedure that makes the record of conviction conclusive evidence of unprofessional conduct, but must be charged with the fraudulent or immoral act and given a hearing on that charge. Petitioner was not charged with such an act and there is nothing in the record to indicate any deception or other immoral act in the giving of the alcoholic beverage.

If further proceedings are to be had against petitioner for unprofessional conduct in connection with his violation of the Alcoholic Beverage Control Act they must be initiated by those charged with that responsibility. Cf. In re Hallinan, supra, 43 Cal.2d 243, 253–254, 272 P.2d 768.

The judgment is reversed with instructions to the trial court to grant a peremptory writ of mandate directing the board to set aside its order of revocation.

GIBSON, C. J., and CARTER, SCHAUER, SPENCE and McCOMB, JJ., concur.

SHENK, Justice (dissenting).

The judgment is reversed on the ground that the crime of which the plaintiff was convicted (furnishing intoxicating liquor to a minor) does not necessarily involve moral turpitude and that in order to disclose the circumstances of sex perversion in connection with that crime it would be necessary independently to charge the plaintiff with, and prove, that particular crime.

I cannot agree with the circuitous course required by the court under the circumstances of this case. Dr. Lorenz was cited to answer to the charge of which he had been convicted. He appeared before the hearing officer to answer the charge. He was represented by counsel. The board was also represented. The judgment of conviction was conclusive evidence of that conviction. The board proceeded to inquire into the circumstances surrounding the conduct of the doctor in committing the crime of which he had been convicted. In my opinion the board had the power to do so. Those circumstances might disclose no moral turpitude. They might disclose conduct amounting to moral turpitude but not constituting a separate criminal offense or they might show an offense against the criminal laws of the state. If they tended to disclose any conduct involving moral turpitude the accused doctor should, in fairness, be given an adequate opportunity to meet the charge. Such an opportunity was accorded him in this case. When the board proceeded to inquire into the homosexual conduct of the accused doctor his counsel stated: "We know and we anticipated that we would have to meet this type of charge [homosexual conduct] here * * So we selected the two outstanding men in the field of neuro-psychiatry as involves homosexual behavior that we could find, and we had him [the accused doctor] examined. Those same two doctors * * * tell you out and out frankly across the board that Dr. Lorenz is not a homosexual

and there is nothing that would militate against his continuing his practice."

An objection was made to the introduction of evidence showing homosexual conduct but no objection was made on the ground that the accused doctor was taken by surprise or had no notice that the subject would be investigated. No request for a continuance was made to enable him to further combat the charge. In contesting it he introduced evidence of experts to prove that he was of good character and not homosexually inclined.

The record supports the conclusion of the board that the purpose of plying the boy with liquor was in furtherance of the accused doctor's homosexual intentions and that they were carried into effect. I see no good reason to require the round-about way of proving in an independent action what has already been disclosed. After the administrative hearing the accused doctor resorted to the court under established practice to have the order of the board set aside. After a court hearing the action of the board was upheld. There was no abuse of discretion on the part of the trial court in refusing the aid of the court to relieve the accused of the consequences of his reprehensible conduct. I would affirm the judgment.

Rehearing denied; SHENK, J., dissenting.



142 Cal.App.2d 287

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Walter Harry SMITH and Mildred Elizabeth Anthony, Defendants,

Walter Harry Smith, Appellant.

Cr. 5569.

District Court of Appeal, Second District, Division 2, California.

June 15, 1956.

Hearing Denied July 11, 1956.

Prosecution for burglary. Defendant in question was convicted in the Superior Court, Los Angeles County, Joseph M. Maltby, J., and appealed. The District Court of Appeal, Moore, P. J., held that evidence sustained conviction and that the photographing of the body of the accused did not offend constitutional guaranties.

Judgment affirmed.

1. Criminal Law ⇐1159(2, 3, 6)

Where there is substantial evidence, circumstantial or direct, undenied or contradicted, reviewing court will not reverse a judgment merely because what might be deemed equally convincing evidence was introduced at trial on behalf of defendant.

2. Burglary ⇐41(1)

Evidence sustained conviction for burglary in the second degree.

3. Criminal Law ⇐475

Opinions as to fibers taken from accused's clothing and from rug at scene of crime are beyond ken of jurors having common knowledge only and are therefore properly heard from experts only. West's Ann.Code Civ.Proc. § 1870, subd. 9.

4. Criminal Law ⇐475

In prosecution for burglary, one skilled in use of microscopes and learned in science of chemistry was correctly permitted to testify that brown splotches on clothing of accused were blood and that fibers on his clothing were same as those which came from rug in place which was burglarized. West's Ann.Code Civ.Proc. § 1870, subd. 9.

5. Criminal Law ⇐1153(2)

Determination of an expert's qualification to testify as to matters relating to his specialty is primarily the function of the trial court and its ruling will not be disturbed in absence of an abuse of discretion. West's Ann.Code Civ.Proc. § 1870, subd. 9.

6. Criminal Law ⇐478(1)

A university degree, earned by scientific pursuits, is helpful but not indispensable to qualification of an expert to testify on subjects in field of his specialty. West's Ann.Code Civ.Proc. § 1870, subd. 9.

7. Arrest ⇐71

It is duty of law enforcing agencies, after arresting an accused, to explore every area suggested by circumstances of appre-

hension, to end that if accused is probably guilty, evidence will have been so asserted and systematized as to expedite judicial procedure.

8. Constitutional Law ⇐266

Photographing of body of accused after his arrest was not offensive to fundamental constitutional guaranties against abridgment of the due process clause, where there was nothing brutal or shocking in the procedure. West's Ann.Const. art. 1, § 19; U.S.C.A.Const. Amends. 4, 14.

9. Arrest ⇐71

Where there is reasonable cause for arrest, search is proper before or after, and where it is not claimed that arrest was unlawful, it is fair conclusion that search was valid. West's Ann.Const. art. 1, § 19; U.S.C.A.Const. Amends. 4, 14.

10. Arrest ⇐71
Searches and Seizures ⇐7(12)

Where accused had been lawfully arrested, where blood had been left at scene of crime and blood was on clothing of accused, it was not unreasonable to search accused to inspect his clothing or his body, or to photograph the body of accused. West's Ann.Const. art. 1, § 19; U.S.C.A. Const. Amends. 4, 14.

11. Criminal Law ⇐792(3)

In prosecution for burglary, instruction that all persons concerned in commission of crime who either directly and actively commit crime or who knowingly and with criminal intent aid and abet its commission or, whether present or not, who advise and encourage its commission, are regarded as principals, was not objectionable with respect to phrase "whether present or not".

12. Criminal Law ⇐814(1)

An instruction is proper if it is consistent with any reasonable inferences jury might draw.

13. Criminal Law ⇐814(2)

Court properly performs its constitutional functions when it instructs jury upon any material question upon which any substantial evidence has been introduced, whether it was direct and positive or merely circumstantial.

14. Criminal Law ⇐778(10), 1186(4)

In prosecution for burglary, fact that accused attempted to establish alibi did not justify instruction that false, contradictory or misleading statements by accused other than from witness stand, or efforts to procure false or fabricated evidence to be produced at trial may be considered by jury as circumstance tending to prove consciousness of guilt, such instruction being proper only where there is some positive attempt to mislead jury with reference to act of which defendant is accused, but instruction was not prejudicial. West's Ann.Const. art. 6, § 4½.

A. H. McConnell, Long Beach, for appellant.

Edmund G. Brown, Atty. Gen., Robert S. Rose, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Having been convicted of burglary in the second degree, appellant demands a reversal of the judgment and the order denying his motion for a new trial. He maintains: The evidence is insufficient to support the verdict; prejudicial errors were committed in overruling his objections to the testimony of a chemist; certain photographs of his body were obtained in violation of the 4th and 14th Amendments to the Federal Constitution, and the Constitution of California, art. I, § 19; errors in instructions.

The Evidence, Sufficient

About 2:30 a. m. April 12, 1955, Officers Robertson and Miller of the Long Beach Police Department while cruising along Second Street heard falling glass on the premises of Miller Rental Company and observed a woman standing nearby. She ran south, then east through an alley, but was soon overtaken by Officer Robertson near a construction shack. The patrol car then arrived and the officers ascertained that the woman was Mildred Elizabeth Anthony, the codefendant of appellant, and had her enter their automobile. On returning to the building with the broken window pane, they observed a jagged piece of glass protruding upward and stained with a bloodlike sub-

stance. It was also on the wood of the door. After checking the building, the officers observed a 1951 Mercury automobile with its license plates so turned down as to obscure the number. It was registered to Felix Smith, brother of appellant. On its front seat the officers found a hammer of appellant and a blue leather purse containing the driver's license of Mrs. Anthony. On the purse was a napkin with dark brown stains. A closer inspection of the young woman revealed that she was bleeding from her left forefinger and her right ankle. She denied having broken the window and that the purse in the Mercury or the driver's license was hers, but asserted that she was Mildred Smith. Officer Miller had in the meantime inspected the area of the construction shack where he found a pair of lady's black leather gloves. The left glove had a hole in the seam of the left index finger on the thumb side and the part around the hole was damp with fresh blood. Mrs. Anthony denied ownership of the cut, bloodstained merchandise.

While the foregoing inspections and conversations were in progress, Mr. Miller, proprietor of the rental company arrived, examined the inside of his building and boarded the broken door inside. At 6:00 a. m. Miller returned to his office at the police officers' request, found the boards had been taken from the door and lay on the floor inside. Also, he discovered that a small muffin tin with five dollars in coin was gone from its place beneath the counter on the rental side of the room. The other side contained marine hardware and supplies. The two entrances at the front were so locked as to be opened on the outside only. The third entrance is on the side of the building where the pane was broken. Mr. Miller only had keys to the front doors.

Inspector Perle observed a triangular mark at the base of the side door. It looked like moist blood. Technician Dillon of the Long Beach Police Department lifted latent fingerprints from the triangular mark. They were found to be identical with the impression of appellant's hand. The inspector found also two Philip Morris cigarette butts on the rug. Appellant smokes that make of cigarette. Officer Dillon also took prints from a two-foot pine board found on the floor near the west door. They were the same as the impressions of appellant's middle, and little fingers. Pieces of plaster, broken from the wall board in the Miller office by the laboratory technician, were found to contain blood.

About 10:00 a. m. of the same day, Detective Parris and Officer Wishon called at appellant's apartment and were admitted. They examined him for scars and told him his car had been involved in a burglary. After some conversation on the subject, they told him that if he would come down to the Vehicle Department at the City Hall, the officers would give him an order for the Mercury. He then explained that the reason the car was in his brother's name was that he, appellant, had planned to go overseas with the Brown Drilling Company. When he called in a Ford convertible to get the Mercury, he was arrested. Evidently, the officers had concluded that he was a participant in the burglary. Thereupon, Officer Parris with the consent of appellant's wife took from the convertible a pair of trousers and a shirt in a box in the rear seat. They belonged to appellant. From the cuffs of the trousers, Officer Simonds took fragments of glass, and residual material from the shirt, and found bloodstains on both garments. He opined that the fibers taken from the shirt were the same as the rug fibers taken from the Miller rug and the particles removed from the trouser cuff were the same as the plaster taken from the wall board in the Miller office and that the brown substance on a particle of plaster removed from the Miller Rental Office was bloodstain. After the arrest, Officer Parris noticed fresh, slight cuts on appellant's right palm and right shoulder.

[1, 2] Appellant contends that such evidence is insufficient to support the judgment. He argues first that where circumstances that are relied upon as proof of guilt are equally compatible with innocence as with guilt, there is a failure of proof, citing People v. Newland, 15 Cal.2d 678, 104 P.2d 778. That is but a small part of the holdings of that decision. The para-

mount feature of the Newland case is the announcement that on an appeal based upon the insufficiency of the evidence, before the verdict can be upset "'it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below.'" People v. Newland, supra, 15 Cal.2d at page 681, 104 P.2d at page 780. Under that authority, so long as there is substantial evidence, circumstantial or direct, undenied or contradicted, the reviewing court will not reverse a judgment merely because what might be deemed equally convincing evidence has been introduced at the trial on behalf of appellant. The fact that appellant explained the presence of blood on his clothes by his story of a fight near Wander Inn when he suffered a bloody nose; that the shirt and trousers in evidence are the same he wore in that fight; that he was corroborated by two persons who witnessed the fight—despite such testimony, the jury was not compelled to accept it rather than the recital of the circumstances heretofore related. Neither were the jurors compelled to accept the eloquent alibi of appellant or its cordial support by his wife who testified she was at home with her husband at the very time the Miller office was burglarized. The jury rejected the evidence presented on behalf of appellant, adopted that presented by the People and determined that he had committed the burglary. Therefore, in the absence of prejudicial error during the trial of the action, the judgment is secure.

Rulings on the Admissibility of Evidence

[3–6] The People called Officer Simonds for opinion testimony involving learning and experience in chemistry. The basis of appellant's objection to such testimony was that Mr. Simonds held no university degree in that science. The objection was properly overruled. The witness had held the position of laboratory technician for the past sixteen years; had studied in two midwestern universities and in two California universities; had studied the use of comparative microscopes, various substances and their composition with animal and vegetable and chemical compounds and most all the fields of chemistry and physics, had, after completing his course, taken one year in medical school. Opinions as to fibers taken from appellant's clothing and from the rug at the scene of the crime are beyond the ken of jurors having only common knowledge and are therefore properly heard from experts only. People v. Lovren, 119 Cal. 88, 91, 51 P. 22, 638. As one skilled in the use of microscopes and learned in the science of chemistry, Officer Simonds was correctly permitted to testify that the brown splotches on the clothing of appellant as well as on that of Mrs. Anthony were blood and that fibers on appellant's clothing were the same as those that came from the rug in Miller's Rental Office. Code Civ.Proc. § 1870(9). The determination of an expert's qualification to testify as to matters relating to his specialty is primarily the function of the trial court and its ruling will not be disturbed in the absence of an abuse of discretion. People v. Horowitz, 70 Cal.App.2d 675, 689, 161 P.2d 833; People v. Salas, 17 Cal.App.2d 75, 78, 61 P.2d 771. Where an officer had had many years' experience in investigating traffic accidents and reporting their causes, his opinion based on skid and gouge marks on the pavement and on the location of oil, broken glass and parts was admissible. People v. Haeussler, 41 Cal.2d 252, 261, 260 P.2d 8. A university degree, earned by scientific pursuits, is helpful, but it is not indispensable to the qualification of an expert to testify on subjects in the field of his specialty.

[7–10] After appellant's arrest, the officers took photographs to show the scars on his body. Objection to their receipt in evidence was made on the ground that "under the Cahan case they were illegally obtained without a search warrant." Appellant now urges the court's ruling was prejudicial and recounts that appellant was arrested, taken to the crime laboratory and there commanded to disrobe against his will, and without his consent his body was photographed for scars. He cites Irvine v. People, 347 U.S. 128, 132, 74 S.Ct. 381, 98 L.Ed. 561; Rochin v. People, 342 U.S. 165, 174, 72 S. Ct. 205, 96 L.Ed. 183, and People v. Cahan, 44 Cal.2d 434, 282 P.2d 905, in support of his

contention that the admission of such photographs of his body was illegal and prejudicial. There is no evidence that the photographs were obtained by the exertion of "brutal or shocking force" as in the case of Rochin. The body of appellant was photographed after he had been arrested and in a manner compatible with a proper administration of law. When a culprit has been justifiably arrested for a felony, he can not expect to have the red carpet rolled out for his reception. It is the duty of law-enforcing agencies, after such arrest, to explore every area suggested by the circumstances of the apprehension of the accused to the end that if the latter is probably guilty, the evidence will have been so assorted and systematized as to expedite judicial procedure, and if the evidence should not in the opinion of the People's counsel warrant a trial, the accused will be promptly discharged.

Appellant was examined and the photographs were taken at three p. m. in the crime laboratory of the Long Beach Police in the presence of Officer Beck, Inspectors Parris and Wishon and the technicians. The photographs were taken while the accused was under questioning concerning his bloody shirts. There was nothing brutal or shocking in such procedure. See Rochin v. People, supra, 342 U.S. at page 172, 72 S.Ct. 205. It was not offensive to the fundamental constitutional guaranties against abridgment of the due process clause. See Snyder v. Massachusetts, 291 U.S. 97, 105, 54 S.Ct. 330, 78 L.Ed. 674; People v. Haeussler, supra. After the officers had already obtained evidence of appellant's probably having participated in a burglary, where the burglar had left his blood in the enclosure and blood was on the clothing of appellant, it was not an unreasonable search of the latter to inspect his clothing or his body. Since no claim is asserted that the arrest was unlawful, it is a fair conclusion that the search was valid, People v. Winston, 46 Cal.2d 151, 293 P.2d 40, for where there is reasonable cause for the arrest, search is proper before or after. People v. Simon, 45 Cal.2d 645, 290 P.2d 531. It follows that inasmuch as appellant had been lawfully arrested, the search of his person was reasonable. People v. Haeussler, supra; People v. Woods, 139 Cal.App.2d 515, 293 P.2d 901.

Instructions Not Prejudicial

[11–13] Appellant complains of the following instruction:

> "All persons concerned in the commission of a crime who either directly and actively commit the act constituting the offense or who knowingly and with criminal intent aid and abet in its commission or, whether present or not, who advise and encourage its commission, are regarded by the law as principals in the crime thus committed and are equally guilty thereof."

Appellant deems himself to have been aggrieved by the phrase: "whether present or not." He says: Since Mrs. Anthony had the keys to appellant's car and his hammer was in it at the time of the burglary, the jury might have concluded that even though Smith was not present, he advised defendant Anthony to commit the crime.

It is the law that an instruction is proper when it is consistent with any reasonable inferences the jury might have drawn. People v. Latona, 2 Cal.2d 714, 725, 43 P.2d 260; People v. Perkins, 75 Cal.App.2d 875, 880, 171 P.2d 919.

The court properly performs its constitutional functions when it instructs the jury upon any material question upon which any substantial evidence has been introduced whether it was direct and positive or merely circumstantial. People v. Perkins, supra. Certainly, if from the evidence, the jury could have inferred that appellant advised Mrs. Anthony to burglarize the office of Miller Rental Company, under the cited authorities, the instruction was proper. People v. Fremont, 22 Cal.App.2d 292, 70 P.2d 1005, is not applicable. That judgment was reversed because the testimony of the prosecutrix was not credible and the evidence was not sufficient.

[14] Appellant criticizes the following instruction:

> "Evidence, if any, that defendant, on one or more occasions other than from the witness stand, made false, contradictory or misleading statements concerning the charge against him which

now is being tried (or that he endeavored to procure false or fabricated evidence to be produced at the trial) may be considered by the jury as a circumstance tending to prove a consciousness of guilt, but is not sufficient of itself to prove guilt. The weight to be given to such a circumstance, and the significance, if any, to be attached to it, are matters for the jury to determine."

The giving of that instruction was unfortunate. The fact that appellant offered his alibi, testified in support of it and called witnesses in support thereof is not such behavior as would justify the instruction. To justify such an instruction, the defendant must be guilty of having made some positive attempt to mislead the jury with reference to the act of which he was accused.

Withal, however, the instruction was not prejudicial and the technical error does not warrant a reversal. Const. art. VI, § 4½.

Judgment affirmed.

FOX and ASHBURN, JJ., concur.



142 Cal.App.2d 258

In the Matter of the ESTATE of Henry CUEN, Incompetent.

Chloe HUBBS, Petitioner and Appellant,

v.

DEPARTMENT OF MENTAL HYGIENE OF THE STATE of California, Objector, Contestants and Respondents,

Amelia McFarland, Objector, Contestant and Respondent.

Civ. 21529.

District Court of Appeal, Second District, Division 2, California.

June 15, 1956.

Proceeding upon petition of beneficiary of Totten trust established by one who later became incompetent, for order directing that all other assets of the incompetent's estate be exhausted before the trust fund. The Superior Court, Los Angeles County, John Gee Clark, J., rendered a decision from which the petitioner appealed. The District Court of Appeal, Moore, P. J., held that the failure of the court to receive proof as to the probable longevity of the incompetent, the condition and cost of upkeep of the realty, taxes and insurance and other relevant factors invalidated the judgment.

Reversed.

1. Trusts ⇐34(1)

Mere deposit by one person of his own money in his own name as trustee for another does not establish an irrevocable trust during the depositor's lifetime.

2. Trusts ⇐34(1)

Where one makes deposit of his own money in his own name as trustee for another, it continues as property of depositor held in tentative trust unless depositor dies while deposit stands as so recorded or unless depositor by lawful means transmutes trust into gift inter vivos.

3. Mental Health ⇐236

Where one established Totten trust for his niece and then became incompetent, it was province of court and not of guardian to determine, by balancing equities, whether guardian should first exhaust such trust fund or other property of incompetent in providing for his care. West's Ann.Prob. Code, § 1516; West's Ann.Civ.Code, § 3433.

4. Mental Health ⇐211

Where guardian was appointed for incompetent, property of the incompetent was in custodia legis, subject only to the orders of the court. West's Ann.Prob.Code, § 1516.

5. Mental Health ⇐215

Petition for instructions was appropriate and correct method for obtaining court ruling as to whether funds of Totten trust created by incompetent before incompentency should be first exhausted or whether other property of incompetent should first be exhausted in providing for care of the incompetent. West's Ann.Prob.Code, § 1516.

6. Mental Health ⇐215

Failure of court, in determining whether guardian should first exhaust funds of Totten trust created by incompetent before incompetency or first exhaust other property in providing for his care, to receive proof as to probable longevity of incompetent, condition and cost of upkeep of realty, taxes, insurance and other relevant factors resulted in order which was not based upon competent evidence and vitiated judgment. West's Ann.Prob.Code, § 1516; West's Ann.Civ. Code, § 3433.

George I. Devor, Los Angeles, for petitioner and appellant, Paul P. Selvin, Los Angeles, on the brief.

Edmund G. Brown, Atty. Gen., Ariel C. Hilton, Deputy Atty. Gen., for respondent Department of Mental Hygiene of the State.

Moss & Sherman, Los Angeles, for Amelia McFarland.

MOORE, Presiding Justice.

In this action the Probate Court held that it had no jurisdiction to try title to a certain tentative trust fund; that title to such fund must be tried in another forum. However, the title to such fund was in effect tried. Now, appellant contends that (1) no one asked the trial court to determine title; (2) in fact, no question as to title exists; (3) there is no dispute between the guardian and appellant.

Henry Cuen at an advanced age became mentally and physically incapacitated on January 8, 1951. Amelia McFarland, his sister, was appointed guardian of his estate and person on January 30, 1951. His property consisted of a savings account in the sum of $3,751.89; a mortgage owing from Elmer Moorehead and Chloe Hubbs Moorehead in the sum of $2,594.74; two pieces of improved realty appraised at $5,800 and $5,700 respectively; and also a deposit in the sum of $4,783.82 in the Coast Federal Savings and Loan Association in the name of "Henry Cuen, trustee for Mrs. Chloe Hubbs, niece."

By such deposit, the incompetent clearly intended to retain ownership thereof but that in the event his niece should survive him, the entire trust fund should go to, and become her property. He did not promptly pass from the mundane scene, but survived and, though he became a helpless incompetent, still survives the ravages of time. However, as time marched on, the care of him ate into his modest estate until finally by June 9, 1954, all the assets of the estate had been exhausted for his medical expenses and the maintenance of the real properties except (1) the deposit with Coast Federal tentatively in trust for Mrs. Hubbs [1] and (2) the two pieces of real property. On the last-mentioned date, the court authorized the guardian to draw $2,000 out of the tentative trust fund to repair the real property. But such fund was not withdrawn.

On June 7, 1955, Mrs. Hubbs filed a petition asking that all other assets of the estate be exhausted before any drafts be made on the tentative trust fund, on the basis that she was the beneficiary of such trust and had an interest in same. The basis for her petition was Civil Code, section 3433, relative to the rights of different creditors, to wit:

> "Relative rights of different creditors. Where a creditor is entitled to resort to each of several funds for the satisfaction of his claim, and another person has an interest in, or is entitled as a creditor to resort to some, but not all of them, the latter may require the former to seek satisfaction from those funds to which the latter has no such claim, so far as it can be done without impairing the right of the former to complete satisfaction, and without doing injustice to third persons."

1. The petition of appellant alleged that "prior to his adjudication of incompetency and prior to the year 1951, the incompetent created a tentative trust for the benefit of petitioner * * * by a deposit of $4,783.82 in the Coast Federal Savings and Loan Association of Los Angeles California, by the now incompetent and the issuance to him of a pass book inscribed as follows: 'Henry Cuen, trustee for Mrs. Chloe Hubbs, niece.'"

At the hearing on the petition, the guardian, who was the mother of Mrs. Hubbs, testified that she was "indifferent" to the petition and would give her daughter the money. No explanation was volunteered as to why the $2,000 had not been withdrawn to improve and repair the real property, but it was pointed out that the sale of the real property would cut off the incompetent's income and that the cost of his care in the state hospital would rapidly deplete the resources of the estate. It was suggested also that the second annual report showed that the income from one piece of property was $550 and from the other piece, $660 for the preceding year, while the income from the fund on deposit at Coast Federal was only the annual interest. From such contrast it was at once apparent that the real property is more valuable to the incompetent's estate than the money which constitutes the tentative trust.

Appellant's petition presented the distinct question as to what order should be followed in exhausting the incompetent's estate. This required the court to determine which item of the estate should be consumed first in the care and treatment of the incompetent and in the maintenance of the property with the view of having it so used as was best calculated to extend its existence so that the incompetent might the longer be supported by his own resources and so that if any portion of the estate should not be consumed it would be the funds of the tentative trust. While counsel for the Department of Mental Hygiene contended that the proceeding involved the issue of title and that the probate court had no jurisdiction, appellant conceded that title to the tentative trust fund "is still vested in the incompetent." Despite such concession, the court indicated that there has to be a determination of title before spending the fund. In its order instructing guardian, the court ordered that "Amelia McFarland, as guardian of the person and estate of the above named incompetent be, and she is hereby instructed to exhaust all assets, other than the sum of $4,783.82 now on deposit in the Coast Federal Savings and Loan Association of Los Angeles, California, before resorting to said fund for the support and maintenance of the above named incompetent unless prior thereto the rights, if any, of Chloe Hubbs to said fund shall have been finally determined, and if no action or proceeding shall have been filed after the exhaustion of all other assets the guardian may resort to the said funds for the support of said incompetent."

[1–6] Now, since Mrs. Hubbs does not maintain that she is presently entitled to the fund and the guardian agrees that the deposit in the Coast Federal is a tentative trust, no question as to title was by pleading or evidence presented to the court below. In fact, if it had been an issue, all the evidence would impel the finding that the title of the trust fund was not involved in the proceeding. The mere deposit by one person of his own money in his own name as trustee for another does not establish an irrevocable trust during the depositor's lifetime. Unless the depositor dies while the deposit stands as at first recorded on the books of the depositary, or unless the depositor by lawful means transmutes the trust fund into a gift *inter vivos*, it continues as the property of the depositor held in a tentative trust. Brucks v. Home Federal Savings & Loan Association, 36 Cal.2d 845, 850, 228 P.2d 545. The assertion of the Attorney General that title was involved was not evidence and did not, by its mere utterance, constitute an issue as to the title of the Coast Federal deposit. Inasmuch as (1) no one asked the trial court to determine title and (2) appellant concedes on appeal that the title to the fund remains in the incompetent and (3) the finding is that the fund is a tentative or Totten Trust, the only matter yet to be judicially determined is whether all or any part of the fund should be consumed in the care of the incompetent and in the maintenance of the real properties, rather than sell one or both parcels of realty for the care and treatment of the incompetent. Such determination may be made after ascertaining the probable longevity of the incompetent, the condition and the cost of the upkeep of the realty, the amount of its taxes and insurance and such other facts as will illuminate the scene and enable the court to determine the equities of the situation. The guardian cannot make such determination. See Katz v. Greeninger, 96

Cal.App.2d 245, 248, 215 P.2d 121; Rickel v. Peck, 211 Minn. 576, 2 N.W.2d 140, 138 A.L.R. 1383. The property is in *custodia legis*, subject only to the orders of the court. (25 Am.Jur., Guardian and Ward, sec. 72.) A petition for instructions pursuant to Probate Code, section 1516, is the appropriate and correct method for presenting such a matter to the court. The court's order must be based upon competent evidence. Failure to receive such proof went to the heart of the proceeding and invalidated the judgment now on appeal.

Reversed.

FOX and ASHBURN, JJ., concur.



142 Cal.App.2d 513

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Charles R. LITTLE and Bill W. Collier, Defendants and Appellants.

Cr. 1068.

District Court of Appeal, Fourth District, California.

June 25, 1956.

Defendants were found guilty of conspiracy to commit the crime of pimping and of rape. From a judgment of conviction and an order denying a motion for new trial in the Superior Court of San Diego County, John A. Hewicker, J., the defendants appealed. The District Court of Appeal, Barnard, P. J., held that rulings which prevented defendant from bringing out evidence that the prosecuting witness had made contradictory statements to officers, that she had made charges which the officers found to be unsupported and that she had made retractions of the various charges required a reversal.

Judgment and order reversed and cause remanded for a new trial.

1. Criminal Law ⇐511(1)

Evidence was sufficient to support conviction for conspiracy to commit the crime of pimping on the ground that there was sufficient corroboration of the testimony of the prosecuting witness who was an accomplice.

2. Witnesses ⇐388(2)

Questions as to the making of contradictory statements should be allowed without laying the formal foundation for impeachment, since the result may depend upon the answer received and the witness may impeach himself and otherwise the foundation may then be laid or since other circumstances may justify allowing the question to be answered.

3. Witnesses ⇐387

In prosecution for conspiracy to commit the crime of pimping, whether the prosecuting witness had made contradictory statements to officers, whether she had made charges which the officers found to be unsupported and whether she had made written retractions of the various charges were material on the question of her credibility and questions on cross-examination relating thereto should have been allowed.

4. Criminal Law ⇐338(6)

The object of a trial is to bring out the true facts as far as possible and the court's discretion should be exercised to that end, particularly with respect to matters affecting the credibility of the prosecutrix, especially where it appears that there might be a retraction which at one time caused the investigating officers to drop the matter and release one of the defendants.

5. Criminal Law ⇐338(6), 1170(1)

In prosecution for conspiracy to commit the crime of pimping and for rape, rulings which prevented defendant from bringing out evidence that the prosecuting witness had made contradictory statements to officers, that she had made charges which the officers found to be unsupported and that she had made retractions of the various charges, required a reversal on the ground that defendant did not have a fair trial especially, where the case was close on the evidence.

Augustine, Bryans & Ragen, San Diego, for appellant Little.

William B. Enright, San Diego, for appellant Collier.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendants were charged with conspiracy to commit the crime of pimping in Count I of an indictment, alleging seven overt acts between April 26, 1955 and May 7, 1955. In Count II both were charged with the crime of pimping committed on April 28; in Count III, Collier was charged with the crime of pimping committed on May 5; in Count IV Little was charged with the crime of rape; and in Count V Collier was charged with the crime of rape. All of the alleged offenses involved the same young woman, who was 17 years of age. A jury found the defendants guilty of conspiracy as charged in Count I; found each guilty of rape on the applicable count, recommending imprisonment in the County Jail; and found them not guilty of the crime of pimping as charged in Counts II and III. They were sentenced to jail on the rape counts, and to prison on the conspiracy count. They have appealed from the judgment, and from an order denying their motion for a new trial.

[1] It is contended that the evidence does not support the conspiracy conviction in that there was no sufficient corroboration of the testimony of the prosecuting witness, who was an accomplice. It is argued that nothing appears in this connection except that the defendants registered the prosecuting witness at three motels during this period, with one of the defendants, in each instance, registering as Mr. and Mrs. Miller; and that this is not sufficient to connect them with the crime of pimping unless it is aided by the testimony of the prosecuting witness. While it must be conceded that the corroboration was very slight, the testimony of the defendants as to their activities with the prosecuting witness during this period, and the reasons therefor, was somewhat unsatisfactory, and it could probably be held that there was sufficient corroboration under established rules as set forth in People v. MacEwing, 45 Cal.2d 218, 288 P.2d 257.

Appellants' main contention is that the court erred in limiting their cross-examination of the prosecuting witness, thus preventing them from bringing out important matters affecting her credibility; that this was necessarily prejudicial; and that the rulings in this connection had the practical effect of destroying their defense. It is argued that a report was made by the prosecuting witness to the Oceanside police department and the Marine Corps authorities on May 11, in which in addition to the charges here involved she accused the defendant Collier of committing an armed robbery in San Diego, of planning a robbery in Nevada, of being engaged in the narcotic traffic, and of killing two of her former girl friends "because they wouldn't stay in line"; that Collier was arrested on May 12; that on May 12 or 13 the prosecuting witness stated to the authorities that the charges she had made against Collier were all untrue and he had never done her any wrong, which was followed by a written statement reiterating her oral retraction; that Collier was released on May 14; and that some of these matters could properly be brought out on cross-examination.

At the trial the defendants endeavored to bring out evidence showing that the prosecuting witness had made oral and written statements to the authorities retracting her charges, and had made statements which conflicted with her testimony on the stand. None of this evidence was admitted and it is claimed that a large number of the rulings in this connection were erroneous. It appears that the defendant Collier was rearrested sometime in July, and the defendants were indicted by the grand jury on August 15, 1955.

There are 260 pages in the briefs alone, and it would serve no useful purpose to set out all the details in connection with the numerous errors claimed in this connection. In some instances the objections to questions were properly sustained and in some the matters were of little or no importance. In some of the others, how-

ever, a different situation appears. In several of the questions the prosecuting witness was asked as to whether she had talked with investigating agents of the Marine Corps and with police officers on May 7 and May 13, with respect to her charges of robbery, narcotic traffic and murders, and whether any further investigation had been made by these agents and police officers after May 13, and objections were sustained on the ground that these matters were immaterial. She was also asked the following questions, to which objections were sustained on the ground they were immaterial: "Have you ever made any statement inconsistent with your testimony now?"; "Have you ever told anyone that you lied about Sergeant Collier?"; "Have you made two written statements concerning your activities from April 20th to May 7th?"; "Have you ever made a written statement inconsistent with your present testimony in court here?"; "Have you ever read over your written statements prior to your testimony here in court?"; "Have you ever said Sergeant Collier did not procure for you, did not pimp for you, did not have intercourse with you, have you ever made such a statement?"; "Is it not true, * * * in the early morning hours between 12:00 midnight and 2:00 A. M. on May 13th in the city of Oceanside that you made a statement, both oral and written, that Sergeant Collier was not guilty of any and all of the accusations you had made against him?" When this question was asked no objection was made, but the court said: "You don't have to answer that question. I will sustain an objection on the same grounds as I have sustained it heretofore."

An offer of proof was made offering to lay a foundation for two conversations, both of which produced a written statement; to prove that when the prosecuting witness made her initial charges she stated, in addition to what she stated at the trial, that Collier was engaged in narcotics traffic, was wanted for robbery, and had murdered two of her friends because they would not stay in line, and that she feared for her life because of these things; that these charges were an integral part of her original story; that she later made statements at the Oceanside police station withdrawing all her charges against Collier and at the same time made a complete written retraction; and that in withdrawing her charges she stated that Collier had nothing to do with any payment to her, or ever committed rape or had intercourse with her. The offer of proof was rejected. Counsel for the defendants tried in many ways, without success, to get some of this evidence into the record, citing to the court People v. Gallardo, 41 Cal.2d 57, 257 P.2d 29, where an exception to the usual rule is pointed out, when the prosecution has in its possession statements made by a prosecution witness which are contradictory of his present testimony upon relevant matters; and People v. Hume, 56 Cal.App.2d 262, 132 P.2d 52, pointing out the importance in such a case as this of bringing out whether the prosecutrix had told the identical story at other times, and holding that great liberality should be used in receiving such evidence.

[2] It has frequently been held that questions as to the making of contradictory or inconsistent statements should be allowed, without laying the formal foundation for impeachment, since the result may depend upon the answer received and the witness may impeach himself, and otherwise the foundation may then be laid; or since other circumstances may justify allowing the question to be answered. People v. Jones, 160 Cal. 358, 117 P. 176; People v. Campos, 10 Cal.App.2d 310, 52 P.2d 251; People v. Hume, 56 Cal.App.2d 262, 132 P.2d 52; People v. Vollmann, 73 Cal.App.2d 769, 167 P.2d 545; People v. Goldberg, 110 Cal.App.2d 17, 242 P.2d 116; People v. Brophy, 122 Cal.App.2d 638, 265 P.2d 593. Some of the questions asked did not require any foundation, and some were preliminary. All were disallowed as not being material to the issues in the case, and where, in some instances, witnesses were produced for the purpose of showing the statements had been made, objections were sustained on the ground that a proper foundation had not been laid. As was said in People v. Hume [56 Cal.App. 2d 262, 132 P.2d 56], "It seems to us that

defendant's counsel should have had the active cooperation of the court in any good faith endeavors to test the credibility of the prosecuting witness."

[3–5] This was a close case as is shown by the evidence and by the fact that the jury was out practically 24 hours. The jury did not believe a large part of the testimony of the prosecuting witness, as shown by the finding of not guilty on the direct charges of pimping. Under the circumstances shown by the record the most important question in the entire case was as to the credibility of the prosecuting witness, and that matter affected both appellants. Many of the questions ruled to be immaterial were material on that question. Whether the prosecuting witness had made contradictory statements to the officers, whether she had made charges which the officers found to be unsupported, and whether she had made oral and written retractions of the various charges, including those here involved, were certainly material on the question of her credibility. Assuming that in some instances a proper foundation may have been necessary, in many of them the evidence was admissible under established rules without any showing as to the time and place and parties present. The respondent's main contention in this regard is that in some instances the time, place and parties present were not clearly specified, that in some the reference to any and all of the accusations she had made was "quite general", and that in view of the general nature of the questions asked the exclusion of an answer was within the discretion of the trial court. The object of a trial is to bring out the true facts as far as possible, and the court's discretion should be exercised to that end. This is particularly true with respect to matters affecting the credibility of the prosecuting witness in such a case as this, especially where it appeared that there might have been a retraction which at one time caused the investigating officers to drop the matter and release one of the defendants. Many of the statements in People v. Hume, supra, on the compelling reasons for extending the right of cross-examination to its broadest reasonable limits in such a case are applicable here. As the court there said:

> "If he had been allowed to proceed and had succeeded, such contradictory statements might have influenced the decision of the entire case. Nothing which occurred at the trial would have been more helpful to the court in arriving at the truth than to know whether the prosecutrix had told the identical story each time she had related it or whether she had varied it or added to it after her first narration, and nothing could have been more vital to defendant's case than to be able to show that she had made conflicting statements."

It is not necessary to consider many other points raised, some of which are not entirely without merit. From the record as a whole we are of the opinion that a number of prejudicial errors occurred, as a result of which the appellants did not have a fair trial.

The judgment and order are reversed, and the cause remanded for a new trial.

GRIFFIN and MUSSELL, JJ., concur.



142 Cal.App.2d 252

Egmont A. TISCHHAUSER, Plaintiff, Respondent, Cross-Defendant,

v.

Mary A. TISCHHAUSER, Defendant, Appellant, Cross-Complainant.

Civ. 21457.

District Court of Appeal, Second District, Division 2, California.

June 15, 1956.

Action for divorce on grounds of extreme cruelty. The Superior Court of Los Angeles County, Thomas J. Cunningham, J., entered judgment granting wife divorce and both parties appealed. The District

Court of Appeal, Moore, P. J., held inter alia, that where divorcing court had jurisdiction of both spouses, it could properly require execution of conveyances of real or movable property in foreign state to insure complete determination of controversy.

Judgment affirmed.

1. Courts ⇐18

Where court does not have personal jurisdiction over one of the parties, it cannot compel conveyance of real estate situate outside the state.

2. Courts ⇐18

Where divorcing court had jurisdiction of both spouses, it could properly require execution of conveyances of real or movable property in foreign state to insure complete determination of controversy.

3. Divorce ⇐254

A divorce decree requiring parties to convey real or movable property situate in another state does not operate directly upon property or affect title but is made effectual through coercion of parties directing some action on their part.

4. Courts ⇐18

Where court has power to order party to convey land outside state, upon party's failure to do so, court has power to enforce order by directing clerk to execute conveyance.

5. Divorce ⇐254

Judgment, entered in divorce action, purporting to make immediate disposition of out of state realty and personalty but also providing that each of the spouses upon request should execute deeds, releases, and bills of sale necessary to carry out provisions of judgment, was sufficient to require divorced wife to execute deed conveying to divorced husband foreign realty as separate property.

6. Husband and Wife ⇐14(2)

An estate by the entirety is a common-law estate recognized by Oregon law but not existing in California.

7. Husband and Wife ⇐254

Community property does not lose its character as such merely by reason of change of form of title, and property purchased with community funds remains community property unless spouses expressly or impliedly agree to change its status.

8. Husband and Wife ⇐254

In absence of contrary agreement, if spouses in California use community funds to purchase real property situate in another state, property is regarded by California as community property.

9. Evidence ⇐390(4)

Evidence is admissible to prove that real property is community property, even though title has been acquired under deed executed in form that ordinarily creates common-law estate.

10. Trial ⇐395(5)

A finding that certain property owned by married person is separate or community property is finding of ultimate fact, but evidence from which ultimate fact is derived need not itself be found.

11. Appeal and Error ⇐1011(1)

Reviewing court does not weigh conflicting evidence if there is substantial evidence to support conclusion reached by trial court.

12. Husband and Wife ⇐264

In divorce action, evidence sustained trial court's finding that realty located in Oregon, title to which had been placed in spouses as tenants by the entirety without knowledge of wife, was community property.

13. Divorce ⇐252

Where wife was awarded divorce on ground of extreme cruelty, it was proper to award her more than half of community property.

14. Divorce ⇐254

On appeal from interlocutory decree in divorce case, in view of facts that more than year had passed from date of entry of decree and that decree was not to be modified as result of reviewing court's decision, contention that court should not have attempted to make immediate and final division of community property could not be considered.

W. P. Smith, Los Angeles, by William H. Abrams, Los Angeles, for appellant.

George E. Danielson, Los Angeles, for respondent.

MOORE, Presiding Justice.

Appeal from an interlocutory decree of divorce. Appellant contends that the trial court exceeded its jurisdiction by ruling on and dividing real and personal property located outside the boundaries of California; in making a present disposition of the property rights of the parties, and in failing to award the wife at least one-half of the community property since she was awarded the decree on the grounds of extreme cruelty.

Appellant and respondent were married April 19, 1936, at Yuma, Arizona. They separated on January 8, 1954. No children. The property of the parties consisted of a ranch in Oregon worth $64,000; 190 head of sheep worth $1,900; a new crop of 190 lambs of indeterminate value; a new crop of rye-grass on the ranch of no appraised value; a cashier's check in the possession of appellant of the value of $13,000; an additional cashier's check in the possession of appellant of the value of $20,964.92; a dry-cleaning plant in Los Angeles worth $16,500; lease and utility deposits of the value of $695; operating capital at the dry-cleaning plant in the sum of $700; American Telephone and Telegraph stock and debentures worths $11,875; certain furniture and furnishings in the possession of both parties of no ascertained value. All this property was bought with community funds with the exception of $27,000 which Mr. Tischhauser commingled with the community, but makes no claim thereto as separate property.

By the interlocutory decree, the trial court found that $8,000 of the $13,000 cashier's check in the possession of appellant was her separate property and that all other assets were community property. Appellant was awarded the ranch; the sheep; $5,000 of the $13,000 cashier's check; the new crop of rye-grass; the furniture and fixtures in her possession. The total of her award was $70,900 which was reduced by the amount of the lien on the ranch in the sum of $11,535.08, making her net award $59,364.92. On top of this, she was allowed $100 a month as alimony.

The total value of the community estate was $122,409.92. The attorney's fees and court costs amounted to $6,095 and were paid out of community property, leaving a net community of $116,314.92. Appellant's net award was $59,364.92, leaving a balance of less than one half, or $56,950 for respondent.

[1] Appellant contends that the court erred in fixing the nature and status of the Oregon properties; that a California court cannot make a decree which will operate to change title to real or personal property beyond the territorial limits of this state, citing Taylor v. Taylor, 192 Cal. 71, 218 P. 756, 51 A.L.R. 1074; Abelleira v. District Court of Appeal, 17 Cal.2d 280, 288, 109 P.2d 942, 132 A.L.R. 715; and Title Insurance & Trust Co. v. California Development Company, 171 Cal. 173, 152 P. 542. Such authorities are all distinguishable on their facts from the case at bar. They are all based upon the established principle that where the court does not have personal jurisdiction over one of the parties, it cannot compel conveyance of real property situate outside the state.

[2–4] In the instant controversy, the trial court had jurisdiction over both parties and because they both submitted their differences to it, the court properly disposed of all issues. In such situation, the court can require the parties to execute conveyance of real or movable property in a foreign state to insure a complete determination of the controversy in litigation. Tomaier v. Tomaier, 23 Cal.2d 754, 760, 146 P.2d 905. " 'Such a decree does not operate directly upon the property nor affect the title. The decree is made effectual through the coercion of the parties by directing some action on their part * * *. If the court has the power to order a party to convey land outside the state, it follows that upon his failure to do so the court has power to enforce its order by directing the clerk to execute the conveyance.' " Chamberlain v. Wakefield, 95 Cal.App.2d 280, 292, 213 P.2d 62, 69. This principle is recognized even in the cases cited by appellant as in the case of Taylor, supra, 192 Cal. at page 76, 218 P.

756, where the court declared that by means of its power over the parties, it may compel them to act in relation to property not within the jurisdiction of the court. See Launer v. Griffen, 60 Cal.App.2d 659, 666, 141 P.2d 236.

[5] The judgment herein purports to make an immediate disposition of the Oregon properties, but it also provides "that each of the parties hereto upon request shall execute, acknowledge and deliver to the other his or her heirs, assigns or other representatives any and all deeds, releases, bills of sale or instruments which now or hereafter be necessary to carry out and execute the provisions of this judgment."

This language, read in the light of the other provisions of the judgment, was sufficient to require respondent to execute a deed conveying to appellant the Oregon ranch as her separate property.

Appellant contends that the trial court erred in holding that the land and cashier's checks were community property; that respondent placed the ranch property in a status other than community property or in one of joint tenancy and therefore, the court could not hold that the property was community.

[6] At respondent's behest and without knowledge or consent of appellant wife, the title to the ranch was placed in the spouses as tenants by the entirety, a common law estate recognized by Oregon law, one which does not exist in California. Swan v. Walden, 156 Cal. 195, 103 P. 931.

[7–12] The proof is that the entire property was purchased with community funds; that the respondent alone changed the form of the deed; that the purpose was not to take the property out of the community and that there was no agreement between the parties so to change the character of the title of the property. Community property does not lose its character as such merely by reason of change of form of title. A property purchased with community funds remains community property unless the spouses expressly or impliedly agree to a change of its status. In the absence of a contrary agreement, if spouses in this state use community funds to purchase real property situate in another state, that property is regarded in law as community property. Tomaier v. Tomaier, supra, 23 Cal.2d at page 759, 146 P.2d 905. Moreover, evidence may be admitted to prove that real property is community property even though title has been acquired under a deed executed in a form that ordinarily creates in the grantee a common law estate. Tomaier v. Tomaier, supra; Rotea v. Rotea, 93 Cal.App.2d 827, 833, 209 P.2d 963; Schindler v. Schindler, 126 Cal.App.2d 597, 602, 272 P.2d 566. A finding that certain property owned by a married person is separate or community is a finding of an ultimate fact, but the evidence from which this ultimate fact is derived need not itself be found. Estate of Cummins, 130 Cal.App.2d 821, 831, 280 P.2d 128. The appellate court does not weigh conflicting evidence if there is substantial evidence to support the conclusion reached by the trial court. Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689.

[13] The contention is made that the trial court erred in not giving appellant at least one half of the community property inasmuch as she was awarded a decree on the grounds of extreme cruelty. Such contention is based upon her assumption that the trial court erred in its determination of the character of the community property. But as demonstrated above, no such error existed. Appellant was awarded $59,364.92, whereas respondent received only $56,950 in value of the community estate, less than half of the community property. This is in compliance with the decisions that announce the law of this state. Tipton v. Tipton, 209 Cal. 443, 444, 288 P. 65; Williams v. Williams, 103 Cal.App.2d 276, 229 P.2d 830; Nelson v. Nelson, 100 Cal.App.2d 348, 350, 223 P.2d 636; Shapiro v. Shapiro, 127 Cal.App. 20, 27, 14 P.2d 1058. Appellant is really making no contention contrary to the above. She has assumed, and appeals her case on the theory that the trial court's action in disposing of the Oregon properties is void for lack of jurisdiction to make a judgment affecting them. That is disposed of above.

[14] As to the contention that the trial court should not have attempted to make an immediate and final division of the community property in the interlocutory decree,

it will avail nothing to enter into a discussion of that subject for the reason that more than one year has elapsed since the entry of the interlocutory decree which is not to be modified as a result of this decision. Therefore, its provisions with respect to the disposition of the property may now be carried forward into the final decree. See Johnston v. Johnston, 106 Cal.App.2d 775, 781–782, 236 P.2d 212; Davis v. Davis, 123 Cal. App.2d 753, 756, 267 P.2d 403.

Judgment affirmed.

FOX and ASHBURN, JJ., concur.



142 Cal.App.2d 424

Leon FERRIER and Mary Ferrier, doing business under the fictitious firm name and style of Harbor Laundry Company, Plaintiffs and Appellants,

v.

COMMERCIAL STEEL CORPORATION, a corporation, et al., Defendants,

Commercial Steel Corporation, a corporation, and Commercial Steel Co., a copartnership composed of Samuel L. Simon, Willard M. Marks, Ralph Simon and Edward M. Marks, Respondents.

Civ. 21585.

District Court of Appeal, Second District, Division 2, California.

June 19, 1956.

Suit to recover the reasonable value for work performed in laundering, ironing and removing the ink imprints from cotton bags that have been damaged in a flood. From a judgment for an alleged inadequate amount in the Superior Court of Los Angeles County, Joseph M. Maltby, J., the plaintiffs appealed. The District Court of Appeal, Fox, J., held that the evidence sustained the finding of the trial court as to the amount rendered.

Judgment affirmed.

1. Work and Labor ⇐28(4)

In action to recover the reasonable value of work performed in laundry and removing imprints from cotton bags that had been damaged in a flood, evidence was sufficient to establish that the total weight of the bags was 47,550 pounds.

2. Work and Labor ⇐28(4)

In action to recover for work performed in removing ink imprints from cotton bags that had been damaged in a flood, evidence sustained the finding that the reasonable value of removing the ink imprints and ironing the bags was $137.90.

3. Evidence ⇐572

Credibility of testimony of expert witness testifying as to cost of removing ink imprints from cotton bags was for the trial court to appraise in the light of witness' years of experience and broad scope of his operations in the industry.

4. Work and Labor ⇐28(4)

In action to recover the reasonable value of the work performed in removing the ink imprints from cotton bags that had been damaged in a flood, evidence did not establish that the contract price for the laundering job on the bags was too low and hence it could properly be used as a base for figuring the reasonable value for ironing and removing the ink imprints on the bags.

5. Work and Labor ⇐29(2)

The price agreed upon by parties for work to be done may be used as the criterion in ascertaining the reasonable value of the services performed.

6. Appeal and Error ⇐996

The Appellate Court cannot re-evaluate the evidence and draw inferences contrary to those drawn by the trial court.

Clifton A. Hix, and Elizabeth Hix, San Pedro, for appellants.

George I. Devor, Los Angeles, for respondents.

FOX, Justice.

Plaintiffs sought to recover the reasonable value for work performed for defendants in laundering, ironing, and removing ink imprints from some 210,000 cotton bags that had been damaged in a flood, see Simon v. Bemis Bros. Bag Co., 131 Cal.App.2d 378, 280 P.2d 528. They alleged the reasonable value of the work and labor performed was $7,500, of which only $1,000 had been paid.

In their answer defendants alleged that the processing of these bags was pursuant to a written contract in which plaintiffs agreed to do the work in question for .029 cents per pound; that the weight of these bags was 47,550 pounds; that the total charge therefor was $1,378.95 and that they had paid $1,000 on said account leaving a balance due of $378.95.

The trial court found there was a written contract between the parties for the processing of these bags which included "washing, extracting, drying and bundling" for two and nine tenths cents per pound, and that while plaintiffs were performing this contract "defendants requested plaintiffs to remove ink from any of the sacks having ink-imprints thereon and to iron said sacks" and that defendants agreed to pay plaintiffs the reasonable value for such additional work, which the court found to be $137.90. The court thereupon rendered judgment for plaintiffs for $516.85, being the balance of $378.95 due under the contract plus $137.90 representing the reasonable value of the extra work. Plaintiffs appeal from this judgment.

Eight certificates, issued by a public weigh master, were received in evidence to show the weight of the bags. They aggregate 47,550 pounds.

Mr. Kirshbaum, who had been in the industrial laundry business for 12 years and operated laundries in Los Angeles, Fresno, San Jose, South San Francisco, and Vallejo, California, and who bid on this particular laundering job, testified that the prevailing rate in Los Angeles at that time "for washing, extracting, drying and bundling sacks of the character of those involved in this action" was "between 3 and 4 or 4½ cents" per pound for that volume. He also testified that an additional 3% should be added for removing ink imprints from the sacks and 7% for ironing or pressing them.

In seeking a reversal plaintiffs argue that the evidence is insufficient to prove that (1) the total weight of the bags was 47,550 pounds, and that (2) the reasonable value of removing the ink prints and ironing the bags was $137.90. Neither position is well founded.

[1] As to the total weight of the bags, that was established by the weight certificates issued by a public weigh master. These certificates were received in evidence without objection on the part of the plaintiffs, who did not question their correctness. They were sufficient to support the court's finding on that question.

[2, 3] We come now to the sufficiency of the evidence to sustain the finding that $137.90 was a reasonable amount to allow for removing ink prints and ironing. Preliminarily it should be recalled that the court found there was a written contract to laundry these bags at .029 cents per pound but this did not include removing ink prints and ironing. The amount, therefore, for the laundrying job which was covered by the written contract was $1,378.95. Mr. Kirshbaum testified an additional 3% should be added for removing ink prints and another 7% for ironing or pressing. This means that an additional 10% of the contract price should be added to cover the two additional items. Ten percent of the amount called for under the contract is $137.895. The manner in which the court arrived at the figure for the extra work is thus apparent. The testimony of Mr. Kirshbaum furnishes ample basis for the court's finding. Plaintiffs seek to discredit his testimony but that was for the trial court to appraise in the light of his years of experience and the broad scope of his operations in that industry.

[4] But, argue plaintiffs, the amount allowed for the extra work is not reason-

able because plaintiffs' bid was too low. Hence adding 10% to the contract price fails to produce a reasonable figure for ironing and removing ink imprints. The difficulty with this argument is that the initial premise that the contract price for the laundering job was too low is not established. The testimony of Mr. Kirshbaum indicates that the contract price for this laundering as reflected by plaintiffs' bid was not substantially out of line with prevailing rates in Los Angeles County at that time. Kirshbaum testified that the "going rate for that kind of work" was "between 3 and 4 or 4½ cents" per pound for that volume. Thus plaintiffs' bid was only one mill per pound below Kirshbaum's minimum figure. As related to the quantity of laundry here involved, one mill per pound would amount only to $47.55. It is thus apparent that it is not established that the contract price was too low. This being so it could properly be used as a base for figuring the reasonable value for ironing and removing ink imprints on those cotton sacks.

[5, 6] It is well settled that the price agreed upon by the parties for work to be done may be used as a criterion in ascertaining the reasonable value of services performed. The point is illustrated by Whitty v. Fidelity & Deposit Co., 123 Cal.App. 334, 11 P.2d 84, 85. In that case plaintiffs had sued to recover "the reasonable value of the work performed by them." The amount which the trial court found to be the reasonable value of the work performed was the exact sum specified in the contract to be paid for it. The only point urged on appeal was that the amount of the reasonable value of the services found by the trial court was not supported by the evidence. In affirming the judgment the court pointed out, 123 Cal.App. at page 337, 11 P.2d at page 85: "it has been repeatedly held in this state that the contract price of work to be performed furnishes some evidence of its reasonable value. In the case of Divani v. Donovan, 214 Cal. 447, 455, 6 P.2d 247, 250, it was said: 'The contention of the defendants apparently is that, in the absence of any proof other than proof of the price paid, or the contract price, the plaintiff cannot recover. But the lack of merit in this contention is made apparent by a number of decisions in which it has been held that the contract price or the price paid is some evidence of value. [Citation.]' It necessarily follows that the findings of the trial court as to the reasonable value of the work done by the plaintiffs find support in the evidence and in the contract between plaintiffs and the cross-complainants; the contract price being some evidence of value which the trial court could adopt as the measure of the reasonable value of the work done." In Wilson v. Mattei, 84 Cal.App. 567, 258 P. 453, 456, it is held that in an action on a common count for the value of materials furnished and labor performed the contract between the parties was competent evidence " 'as an admission of the standard of value.' " In 27 Cal.Jur., 232, sec. 40, the rule is stated thus: "Evidence of a special contract to pay a sum certain for services is admissible under a common count for work and labor as tending to show the value of the services. * * *" Kimes v. Davidson Inv. Co., 101 Cal.App. 382, 386, 281 P. 639; Pacific States Savings & Loan Co. v. Painter, 37 Cal.App.2d 645, 646, 99 P.2d 1103. There is therefore ample basis to support the trial court's method of computation and sufficient evidence to sustain its finding of the reasonable value of plaintiffs' services.

[7] The basic difficulty with plaintiffs' position is that they would have this court reevaluate the evidence and draw inferences contrary to those drawn by the trial court. We, of course, are not at liberty to do this.

The judgment is affirmed.

MOORE, P. J., and ASHBURN, J., concur.

142 Cal.App.2d 549

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Billie Lee TUCKER and Joseph Johnson Griessett, Defendants,

Joseph Johnson Griessett, Appellant.

Cr. 5393.

District Court of Appeal, Second District, Division 1, California.

June 26, 1956.

Hearing Denied July 24, 1956.

Defendant was convicted of second degree robbery. The Superior Court, Los Angeles County, Herbert V. Walker, J., entered judgment, and defendant appealed. The District Court of Appeal, White, P. J., held that, where witness, who was called to support defendant's defense of alibi, testified that she saw defendant on designated date and that such day was a Thursday, but calendar showed such date to be a Wednesday, refusal to permit witness to testify as to specific events prior to and following day upon which she had seen defendant for purpose of relating such date to some specific events and clearing up inconsistency in the testimony, constituted prejudicial error.

Judgment reversed, and cause remanded for new trial.

1. Witnesses ⇐287(1)

It is the policy of the law to afford a witness on re-direct examination every reasonable opportunity to support the presumption that he is speaking the truth.

2. Witnesses ⇐287(1)

Upon redirect examination, it is proper to permit witness to state facts and circumstances which tend to correct or repeal any wrong impressions or inferences which might arise on matters drawn out in cross-examination.

3. Criminal Law ⇐1170½(1)

Where witness, who was called to support defendant's defense of alibi, testified that she saw defendant on designated date and that such day was a Thursday, but calendar showed such date to be a Wednesday, refusal to permit witness to testify as to specific events prior to and following day upon which she had seen defendant for purpose of relating such date to some specific events and clearing up inconsistency in the testimony, constituted prejudicial error.

4. Criminal Law ⇐382

Where, in criminal proceeding, witness, who was offered by defendant in support of defendant's defense of alibi, testified to having seen defendant on designated date and that such date was a Thursday, but calendar revealed it to be a Wednesday, refusal to permit police officer to answer question whether, to officer's personal knowledge, defendant was in police custody on day following designated date was error, since the evidence sought to be elicited was competent and material.

5. Criminal Law ⇐385

The law makes admissible all competent evidence, whether direct or circumstantial, and leaves the jury to determine its relative weight in each case.

Albert S. Friedlander, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County containing two counts, defendants were accused in both counts of the crime of robbery. As to the disposition of the charges against defendant Tucker the record is silent, but counsel for defendant Griessett in his brief advises that, "It appeared from an independent examination of the record by counsel that the charges set forth against the said Billie Lee Tucker in said information had been dismissed in the interests of justice after said Billie Lee Tucker had pleaded guilty to one count of robbery as set forth in another and independent information with which appellant had no connection."

As to defendant Griessett, the information also charged three prior felony convictions which were admitted.

The last-named defendant entered a plea of not guilty to both counts of the information. Trial by jury resulted in verdicts finding defendant not guilty as to Count I and guilty as charged in Count II. The robbery was found to be robbery of the second degree. From the judgment of conviction defendant Griessett prosecutes this appeal.

Concerning the factual background surrounding this prosecution under Count II, the record reflects that James W. Larkin testified he was engaged in the business of selling used automobiles. That about 7 p. m. on the evening of December 30, 1953, he was at his place of business when two men came into his office and inquired about the purchase of an automobile. The witness identified defendant Griessett as one of the men. That this defendant then ordered the witness to keep his hands on the table, that "this is a stick-up". That defendant had "something in his coat pocket and he pointed it at me". That defendant Griessett reached into the pocket of the witness and abstracted the latter's wallet. That the entire transaction consumed some two or three minutes. That the wallet contained about $80 and some checks, the latter of which were never cashed.

Defendant Griessett did not take the witness stand in his own behalf but offered the testimony of three witnesses that at the time of the alleged robbery he was visiting with his family and friends at the home of one Evelyn Brown, his foster sister.

As his first ground of appeal appellant urges that the trial court erred prejudicially in its rulings and statements on material matters made during the redirect examination of Arlene Chapman, one of the alibi witnesses.

In that regard it appears from the record that in support of his defense of alibi, appellant called one Arlene Chapman who testified that on December 30, 1953, she was living with her husband at the home of Evelyn Brown, appellant's foster sister. That on the day in question she saw appellant at that place from about 3 p. m. and that he remained there continuously in her presence until approximately 11:15 p. m. That others present were appellant's wife, and the mother and husband of the witness, all of whom corroborated the testimony of the witness as to the presence of appellant on the night in question. On cross-examination by the district attorney, Mrs. Chapman testified that her recollection was that December 30, 1953, was a Thursday. Upon request of the district attorney the court took judicial notice that the calendar showed December 30, 1953, to be a Wednesday.

On redirect examination of the witness, appellant's counsel, in an obvious effort to rehabilitate her testimony that she believed December 30, 1953, was a Thursday when the undisputed fact was that the date was a Wednesday, the following occurred:

"Q. (By Mr. Neusom, appellant's counsel): Now, Mrs. Chapman, of your own knowledge, was Mr. Griessett taken to a police station in the City of Los Angeles, and detained there?

"Mr. Crail (Deputy District Attorney): Objected to on the ground that proper foundation has not been established. If she was personally present, the—

"Mr. Neusom: I asked, 'of your own knowledge'. What counsel is objecting to is his right to cross examine the witness, but if she knows of her own knowledge whether he was detained at a station, that, I think, would be material.

"Mr. Crail: Witnesses don't always understand what is meant by their own knowledge.

"The Court: I appreciate that is true. The objection will be sustained. She can testify as to what she saw happen to the man on the next day.

"Mr. Crail: That's right. * * *

"Q. (By Mr. Neusom): All right. Now, how many days after the day that you testified that Mr. Griessett was at your house from 3:00 P.M. to 11:15 P.M., was it that you went to pick up

his clothes? A. (By the witness): It was on the second day.

"The Court: Two days after that. All right. Proceed.

"Q. (By Mr. Neusom): Now, Mrs. Chapman, on the day following the day that you were there from 3:00 P.M. to 11:15 P.M., I mean, that he was there, did you see Mr. Griessett at all? A. (By the witness): No, I didn't. * * *

"Q. (By Mr. Neusom): Mrs. Chapman, on the day prior to the day that Mr. Griessett visited your home, can you recall whether or not you worked that day?

"Mr. Crail: Objected to, your Honor, on the ground that there is no foundation established that she had personal knowledge.

"The Court: Sustained.

"Q. (By Mr. Neusom): On the day prior to December 30, 1953, do you recall whether you worked? A. (By the witness): Yes, I did.

"Mr. Crail: Whether she worked?

"Mr. Neusom: Yes.

"The Witness: Yes, I did.

"Q. (By Mr. Neusom): And on that day, approximately what time did you arrive home? A. (By the witness): At 2:30 A.M. in the morning.

"Q. And what time the next day did you see Mr. Griessett?

"Mr. Crail: Objected to as having been asked and answered, your Honor.

"The Court: Sustained.

"Q. (By Mr. Neusom): Are you positive, Mrs. Chapman, that you saw the defendant Joseph Griessett on December 30, 1953?

"Mr. Crail: Objected to as assuming facts not in evidence, and it's been asked and answered.

"The Court: Already objected to, and objection sustained on the same question. Sustained."

Appellant also called as his own witness, Frank Estrada, a police officer of the City of Los Angeles attached to the robbery division, and who had previously testified for the prosecution. In part, and so far as material here, the following transpired:

"Q. (By Mr. Neusom): Mr. Estrada, of your own knowledge, do you know whether Mr. Griessett (appellant) was in custody on December 31, 1953?

"Mr. Crail: Objected to as being immaterial.

"The Court: Sustained."

It is appellant's contention that by its rulings the trial court unduly restricted him in his attempt to show that the testimony of Mrs. Chapman that December 30, 1953, was a Thursday instead of Wednesday was an error on her part. That he was attempting so to do by relating the day on which the witness saw appellant to some specific events prior to and following the date upon which she had testified that she saw appellant, to-wit, December 30, 1953.

[1–3] It is the policy of the law to afford a witness every reasonable opportunity to support the presumption that he is speaking the truth. In consonance with that policy, it is proper upon redirect examination to permit the witness to state facts and circumstances that tend to correct or repel any wrong impressions or inferences that might arise on the matters drawn out in cross-examination. People v. Corey, 8 Cal. App. 720, 725, 97 P. 907; 27 Cal.Jur. 109, and cases therein cited. That by its rulings the court unduly limited the questions asked on redirect examination seems obvious to us. For instance, the court sustained an objection to a question propounded to the witness as to whether or not she worked on a certain day, and which objection was made on the ground that the witness did not have personal knowledge of such fact. Throughout the redirect examination and in connection with questions as to whether the witness Mrs. Chapman saw appellant on December 30, 1953, the court consistently ruled that Mrs. Chapman could not testify thereto on the ground that it was assuming a fact not in evidence. Since Mrs. Chapman herself had testified on direct examination that she did see appellant on the date in question, it is difficult for us to understand the basis for the ruling, viz., that the questions on redirect examination assumed

a fact not in evidence. To us it appears that the ruling may well have influenced the jury that since the witness had on cross-examination testified that she saw appellant on a Thursday, and December 30, 1953, was a Wednesday, the witness could not or did not see appellant on December 30, or, in other words, that her testimony on direct examination was not to be given consideration. This, added to the rulings which precluded the efforts of appellant's counsel to clear up an inconsistency in the testimony of the witness constituted error which was prejudicial, since we are unable to say that had proper latitude been afforded appellant in his redirect examination of Mrs. Chapman, the jury might not have acquitted appellant on Count II as well as Count I. This we are disposed to say because the triers of fact encountered difficulty in arriving at the conclusion that appellant was guilty of the offense charged in Count II. This was the second trial of this cause. At the first trial, the jury deliberated one day and were locked up for the night. On the second day of their deliberations, the minutes reflect that, "It appearing to the Court that the jury is hopelessly deadlocked, the Court declares a mistrial". At the second trial, the record shows that the case was given to the jury at 11:35 a. m. on February 3, 1954. At 4:05 p. m. they were locked up for the night. On the following day they resumed their deliberations at 9 a. m.; returned into court at 10:10 a. m. with the request that certain testimony be read to them; retired at 10:30 a. m., and at 11:48 a. m. returned into court with their verdict finding defendant not guilty on Count I and guilty on Count II.

[4, 5] Finally, appellant urges that the court erred in not permitting the witness Officer Frank Estrada to answer the question as to whether appellant was, to the personal knowledge of the witness, in custody of the police on December 31, 1953. Much of what we have herein said as to the rulings of the court on the questions propounded to the witness Mrs. Chapman on her redirect examination is applicable to appellant's final contention. We are persuaded that the evidence sought to be elicited was competent and material. The law makes all competent evidence admissible, whether direct or circumstantial, and leaves the jury to determine its relative weight in each case. Foster v. Keating, 120 Cal.App.2d 435, 451, 261 P.2d 529; People v. Holden, 13 Cal.App. 354, 359, 109 P. 495.

As pointed out by appellant, "It was obvious that the purpose of the defense counsel's question was to corroborate the testimony of Mrs. Arlene Chapman or to rehabilitate the same in that Mrs. Chapman was attempting to testify, but prevented from so doing, that she saw the appellant on the day before he was arrested. Hence, if Mr. Estrada were permitted to, and did testify that the appellant was placed in custody on December 31, 1953, then Mrs. Chapman's testimony that she saw him on December 30th would have had greater credibility and her apparent confusion over whether December 30th was a Wednesday or a Thursday would have probably been dispelled. In other words, the testimony of Mr. Frank Estrada, if admitted, may well have supported the alibi of the appellant, which alibi was certainly an issue in the case."

The judgment from which this appeal was taken is reversed and the cause remanded for a new trial.

DORAN and FOURT, JJ., concur.

Thurman TUCKER, Jr., a minor, by his guardian ad litem, Thurman Tucker; and Thurman Tucker, Plaintiffs and Appellants,

v.

Philip LOMBARDO, Defendant and Respondent.*

Civ. 21406.

District Court of Appeal, Second District, Division 2, California.

June 12, 1956.

Rehearing Denied July 6, 1956.

Hearing Granted Aug. 8, 1956.

Action for injuries sustained by boy who, while working at a skeet-shooting range, was struck by shot from gun handled by defendant. The Superior Court, Los Angeles County, William P. Haughton, J., entered judgment upon a verdict in favor of the defendant, and the boy and his father appealed. The District Court of Appeal, Fox, J., held that the trial court had erred prejudicially in refusing a requested instruction on the res ipsa loquitur doctrine and in failing to charge that one handling firearms must exercise extreme caution.

Reversed; purported appeal from order denying motion for new trial dismissed.

Ashburn, J., dissented.

1. Appeal and Error ⇐110

Order denying motion for new trial of civil negligence action was nonappealable and purported appeal therefrom would be dismissed.

2. Weapons ⇐18(2)

In action for injuries sustained by boy who, while working at a skeet-shooting range, was struck by shot, instruction that amount of care "may be greater" than if loaded weapon were not being handled, and that "where the danger of injury is greater the amount of care to be used may be great", was objectionable as diluting quantum of care required of person handling loaded weapon.

3. Weapons ⇐18(1)

Ordinary care in use of firearms requires a very high degree of caution.

4. Weapons ⇐18(1)

A person handling firearms must use extreme caution while so engaged.

5. Appeal and Error ⇐216(3)

Where instruction which was given in negligence action was erroneous and misleading, the error was not waived by failure to request instruction which correctly defined duty.

6. Negligence ⇐124(3)

Where issue is one of negligence in performance of an act, evidence of the ordinary practice and custom which is generally followed in performance of such act under similar circumstances is competent, but is received not as proof of, or substitute for, standard of conduct, which is due care, but merely as factor for consideration by jury in determining whether or not particular conduct of a party measures up to the legal standard.

7. Negligence ⇐5

Conformity to general practice or custom does not excuse actor's conduct unless it is also consistent with due care.

8. Negligence ⇐121(2)

Doctrine of res ipsa loquitur has three conditions: (1) accident must be of kind which ordinarily does not occur in absence of someone's negligence; (2) it must be caused by agency or instrumentality within exclusive control of defendant; (3) it must not have been due to any voluntary action or contribution on plaintiff's part.

9. Weapons ⇐18(2)

In action for injuries sustained by boy who, while working at a skeet-shooting range, was struck by shot, fact that boy was engaged in reloading trap machine within cramped confines of high house before he heard defendant's shot was relevant on issue of contributory negligence on his part, but did not deprive him of benefit of res ipsa loquitur.

10. Negligence ⇐121(2)

Condition of res ipsa loquitur doctrine requiring that accident must not have been due to any voluntary action or contribution on plaintiff's part should not be confused with underlying issue, namely, applicability of the doctrine where accident is of such

* Opinion vacated 303 P.2d 1041.

nature that it probably occurred as result of negligence by someone and that defendant is probably the person responsible.

11. Weapons ⇐18(2)

In action for injuries sustained by boy who, while working at a skeet-shooting range, was struck by shot from gun handled by defendant, doctrine of res ipsa loquitur was applicable and instruction thereon should have been given.

12. Negligence ⇐121(2)

One factor in application of res ipsa loquitur doctrine is that defendant may have superior knowledge of what occurred, with chief evidence of cause of accident accessible to defendant but inaccessible to plaintiff.

13. Weapons ⇐18(1)

Fact that one was on shooting range did not diminish standard of care required of him in the handling of his gun.

14. Weapons ⇐18(1)

Duty of one handling gun on shooting range was owed as much to boy working inside high house from which targets were ejected as to members of the gun handler's shooting party, where all were within foreseeable ambit of danger from careless discharge of the gun.

15. Weapons ⇐18(2)

In action for injuries from discharge of firearm, requested instruction on res ipsa loquitur, to effect that from happening of accident as established by evidence there arises inference that proximate cause of injury was some negligent conduct on defendant's part, that if there was no other evidence to overthrow such inference or if inference preponderated, it warranted verdict for plaintiff, and that it was incumbent upon defendant to rebut inference by showing that he did, in fact, exercise ordinary care and diligence or that accident occurred without being proximately caused by any failure of duty on his part, was proper in form.

16. Appeal and Error ⇐1170(9)

Trial court's error, in action for injuries sustained by boy who was struck by shot from gun, in failing to give requested instruction on res ipsa loquitur doctrine, and error in failing to charge that extreme caution is required in handling of firearms, constituted "miscarriage of justice" within import of constitutional provisions and required reversal.

See publication Words and Phrases, for other judicial constructions and definitions of "Miscarriage of Justice".

17. Trial ⇐251(8)

In action for injuries sustained by boy who, while working at skeet-shooting range, was struck by shot from gun handled by defendant, instruction given on behalf of defendant to effect that it was duty of boy's employer to furnish to his employees a safe place to work and that defendant was entitled to assume that safe place had been furnished was erroneously given as it was not responsive to any issue in case. West's Ann.Labor Code, §§ 6401, 6402.

18. Master and Servant ⇐101(1)

Sections of Labor Code requiring employer to furnish safe place to work deal primarily with relationship of employer and employee, the latter being a member of the class whose interests they were designed to protect. West's Ann.Labor Code, §§ 6401, 6402.

19. Negligence ⇐31

Sections of Labor Code requiring employer to furnish safe place to work cannot be used to insulate from liability a member of the public who owes an independent duty of care to such employee. West's Ann. Labor Code, §§ 6401, 6402.

20. Weapons ⇐18(1)

One who was not employer of boy working at skeet-shooting range could not blindly assume that boy had been made safe by some person other than himself against direct fire from shotgun, notwithstanding sections of Labor Code making it duty of employer to furnish safe place to work. West's Ann.Labor Code, §§ 6401, 6402.

21. Negligence ⇐1

General principle that one has right to assume that another will obey the law is subject to qualification in that it is only when there is nothing in situation to warn one of impending danger that he is not guilty of negligence in relying on such assumption.

22. Negligence ⇐136(14)

Reasonableness of conduct of person relying upon assumption that another will obey the law is primarily a question for determination by trier of fact.

Madden & McCarry, Long Beach, for appellants.

Moss, Lyon & Dunn, Gerold C. Dunn, and Henry F. Walker, Los Angeles, for respondent.

FOX, Justice.

[1] In plaintiffs' action to recover for personal injuries allegedly caused by defendant's negligence, the jury returned a verdict for defendant upon which judgment was entered. This appeal is from the judgment and the order denying plaintiffs' motion for a new trial. The latter order being nonappealable, the purported appeal therefrom is dismissed.

The record discloses that at the time of the accident plaintiff, Thurman Tucker, Jr., (hereinafter called Tommy) was a schoolboy who had almost attained his thirteenth birthday. For about three months, Tommy had been employed on Saturdays and Sundays at the Dominguez Skeet Range. He reported for work on May 3, 1953, and at about 9:00 a. m. was ordered to work the "high house." His job there was to load a spring apparatus known as a Remington Trap Machine, which ejected targets commonly referred to as birds. He had done this work on about six previous occasions. The high house contains an aperture through which the target bird is ejected into the air to be shattered by the gunner. The actual release of the target is effected by an employee manipulating a mechanism situated in what is known as the "control house." In skeet shooting, the gunner assumes the "ready position" at the firing line and gives the command "Pull." The operator in the "control house" (referred to as the "puller") then presses a button which releases the target placed in the trap machine. Tommy was injured while working in the high house when struck by a shot discharged from a gun held by defendant who was firing from shooting position No. 8. He subsequently lost the sight of his right eye.

The accident occurred on a range which was laid out in a half circle. It was one of several ranges in the vicinity. The high house was located just to the west of station No. 1, which was the most westerly of the shooting points. Stations Nos. 2 to 7 were placed at intervals along a semi-circle arching to the south and east. The terminal point, station No. 7, was due east of station No. 1. Station No. 4 was the most southerly of the shooting points on the curve of the semi-circle. Station No. 8 was located at the midway point of an east-west line (imaginary) running from station No. 1 to station No. 7. It was some 45 feet directly north of station No. 4 and about 60 feet to the east of the high house. The "control house" consisted of a small shed located just to the north of the No. 4 position and was manned by a sixteen year old boy named Bayless on the day of the accident. Bayless' function was to press the button releasing the targets loaded by plaintiff in the high house, and to keep the score made by the shooters.

When the target bird was released from the high house for a gunner at the No. 8 position, its path of flight was north by east towards the "breaking point," the point beyond which the target, if hit, would not count as a score. The "breaking point" was 18 feet north of station No. 8. Thus, a target ejected from the high house would travel about 67 feet before it reached the breaking point and, in order to score, the gunner would have to hit it at some point between its place of emergence and the "breaking point." While the skeet shooter may not score by shooting at the bird which has passed the "breaking point," he may shoot at it at any point in its trajectory prior to its crossing the "breaking point." Alex Kerr, an expert in skeet shooting, testified regarding the difficulty of shooting at station No. 8, asserting it "gives you about half as much time to shoot as the rest of them. You have to shoot much faster there."

Defendant Lombardo, who was shooting a round of skeet with a party of six, reached the No. 8 station at about 10:00 a.

m. He was armed with a twelve-gauge over-and-under shotgun belonging to his brother-in-law which he had used about twenty-five or thirty times. He had shot skeet about once or twice before. Defendant assumed the "ready position" about two feet south of the small post marking station No. 8. In that posture, he looked west toward the high house, with his back turned to the south and the barrel of his gun angled to point at the ground. His left hand was on the forward part of the gunstock while his right hand held the grip of the gun which was near his lower rib.

The "high house" from which defendant awaited the release of the target was constructed of a wood base. It was built of 2x4 framing lumber which was covered by corrugated metal. It was 9½ feet high, 60 inches wide and 60 inches deep. It was entered by a door on the north side. The aperture through which the targets were ejected, and behind which plaintiff was employed in loading the trap machine, was in the east wall and was 17 inches in width and 7 inches from top to bottom. The aperture was shielded by two metal plates attached to the outer wall. One plate, 18x18 inches, jutted out from the bottom of the aperture, tilted up slightly from the horizontal. It was joined at one side by a vertical triangular-shaped shield 17 inches wide at the top and 7 inches at the bottom. The trap machine was mounted on a wooden shelf which extended 25½ inches back from the east wall of the "high house." The distance between the edge of this shelf and the rear or west wall of the house was 34½ inches. Tommy testified that in operating the trap machine, he placed a bird in the machine and then cocked it by pulling down on a throwing lever. This lever extended 6 inches beyond the shelf when cocked, and it swung upwards in an arc when the bird was ejected from the machine. Tommy testified he stepped back to the wall behind him after cocking the machine to be clear of the upward swing of the throwing lever. When the "puller" in the control house released the target, Tommy would step forward towards the machine and reload it. Since there was no communication between the high house and the control house, Tommy would step forward to reload as soon as the target was released, without ascertaining whether a gun was fired. When not obscured by the noise of the lever operating, he could hear a shot go off, but he could not tell from which range or at what bird it was fired.

Immediately prior to the accident, defendant gave Bayless the command "Pull" from his "ready position" at station No. 8. Bayless pressed a button which released the bird from the "high house." Defendant stated that he waited until the bird was visible, at which time he raised his gun and fired. The bird was approximately 2 feet from the "high house" when he fired. A second or two later, defendant testified he heard plaintiff "holler" and come out of the high house. Bayless testified that after he pressed the release button, he watched the bird so that he might score defendant's shot. He stated he first saw the bird when it was 2 feet from the high house, and that it emerged broken "in little pieces." (While a broken bird need not be taken as a target, many shooters will fire if it comes out "fairly intact," and has a "fairly normal flight path," since it may be difficult to withhold a shot once they have swung upon the target.) Since he noted the bird was broken, Bayless looked towards defendant to see what he would do. Defendant's back was towards him and he observed that he was bringing the gun down from the firing position when he heard it discharge. Bayless recorded defendant's shot at station No. 8 as a miss. Henry Lewis, a member of defendant's shooting party, testified he was concentrating on the aperture and saw the bird emerge in broken pieces. Simultaneously he heard a gunshot. After the accident, Mrs. Ruth, co-owner of the range with her husband, asked defendant about the accident. She testified defendant told her "he guessed his gun *was discharged accidentally.*" (Italics added.)

Defendant testified his shot shattered the bird. He stated that when he fired at the bird the high house was directly in his line of fire. Mr. Kerr, the expert, testified regarding the general custom in the field of skeet shooting. He stated it was custom-

ary for a shooter to fire at a bird as soon as he can after its emergence, even if the target is between him and the high house.

Tommy testified that after Bayless released the bird, he stepped forward to reload the machine. He was reaching for one of the birds stacked on the shelf alongside the machine when he was struck by six pellets from the shotgun. He was thrown against the wall and began to bleed. One of the pellets caused a double perforation of his right eye, which was subsequently removed.

Defendant introduced photographs of the high house showing perforations resembling shot punctures in the corrugated metal around the aperture. Tommy testified he had never noticed them. Mrs. Ruth, when cross-examined about the marks, testified: "This house was made of some old reclaimed tin and I don't know what caused those marks except our houses are all beat up, and painted over." Bayless testified the boys working in the high house were told to stand back after putting the target in. He knew that buckshot had come into the high house before and had talked to "the boys" about it but there was no testimony he had informed Tommy of this. Tommy testified he did not know that shot had penetrated the high house before. Mrs. Ruth testified she was not aware prior to Tommy's accident that shooters had hit the high house.

Defendant testified he had never been inside the high house and did not know what, if any, protective clothing the trap machine operator wore, nor whether the shields outside the aperture were adjustable. He did not know what procedure the operator followed inside the high house when he fired, but assumed the shot would not go into the high house. He knew that when shot was discharged from a shotgun, it spread out into a pattern, but he did not know how large an area the pattern covered when discharged from his gun.

Plaintiffs' paramount contention on appeal is that the court committed prejudicial error in its instructions to the jury, and by its refusal of certain instructions submitted by them. We have concluded, on the basis of cases of our Supreme Court decided subsequent to the trial of the instant matter, that this contention must prevail.

At defendant's request, the court instructed the jury on the standard of care required of defendant, and the quantum of care applicable to the circumstances, in the following language: "You are instructed that the duty owed by the defendant to the plaintiff in this case was to exercise ordinary care, that is the care that would be exercised by a reasonably prudent person in the same or similar circumstances. In this particular instance, however, the defendant was possessed of and using a firearm and a firearm is capable of causing severe injury. For that reason the defendant was required to foresee the possibility of injury and, to avoid it, to exercise a degree of care commensurate with and in proportion to the danger involved, and, in the exercise of ordinary care, the quantum or amount of care exercised *may be greater* than would be necessary if he was not handling a loaded weapon. This is but another way of saying that the amount of care to be exercised by a reasonably prudent person will vary with the circumstances, and where the danger of injury is greater the amount of care to be used *may be great.*" (Italics added.)

[2, 3] The vice of this instruction is that while it correctly informed the jury that the standard of care required of defendant was that of ordinary care under the circumstances, it attenuates and dilutes, in the portion italicized above, the established quantum of care required of a person handling a loaded weapon. It is now settled law "that owing to the dangerous character of the instrumentality, *ordinary care in the use of firearms requires a very high degree of caution.*" Jensen v. Minard, 44 Cal.2d 325, 327, 282 P.2d 7, 8. (Italics added.) The Jensen case quotes with approval, 44 Cal.2d at page 328, 282 P.2d at page 8, the following language from Rudd v. Byrnes, 156 Cal. 636, 105 P. 957, 26 L.R.A., N.S., 134: ' "By reason of the dangerous nature of such weapons, a person handling them is held to a high degree of care. If he has not used the degree of care appropriate to the circumstances, and injury results, he

will be liable to the person injured * * *.'" In Warner v. Santa Catalina Island Co., 44 Cal.2d 310, at page 317, 282 P.2d 12, at page 16, a case decided on the same day as the Jensen case, the subject is well crystallized by the following observation: "All persons are required to use ordinary care to prevent others being injured as the result of their acts; ordinary care has been defined as that degree of care which people of ordinary prudent behavior could be reasonably expected to exercise under the circumstances of a given case. In other words, the care required must be in proportion to the danger to be avoided and the consequences that might reasonably be anticipated. [Citations.] The risk incident to dealing with * * * firearms * * * requires a great deal of care to be exercised. In other words, the standard of care required of the reasonable person when dealing with such dangerous articles is so great that a slight deviation therefrom will constitute negligence. [Citations.]"

[4, 5] It is at once patent that the challenged instruction not only failed to apprise the jury that a person firing a gun must use extreme caution (as did the instruction in Jensen approved by the court) but it departed significantly from this standard by asserting "* * * in the exercise of ordinary care, the quantum or amount of care *may be greater* than would be necessary if he was not handling a loaded weapon * * *" and concluding "where the danger of injury is greater, the amount of care to be used *may be great.*" By the employment of the permissive word "may" the court injected a quantitatively false element into the jury's deliberations, for the mandate of the law is that a person handling firearms *must* exercise extreme caution while so engaged. Jensen v. Minard, supra; Warner v. Santa Catalina Island Co., supra; Rudd v. Byrnes, supra. Having undertaken to expound the law respecting the duty of care which is placed on one using a loaded gun, and having rejected instructions on the subject tendered by plaintiffs, the court was under an obligation, in charging the jury on this fundamental and vital issue, to embody in its only instruction on the subject an accurate presentation of the governing legal principles germane to the case. The instruction given was clearly incorrect, incomplete and misleading and the jury was left without a proper orientation in, or understanding of, the controlling rules for judging defendant's conduct. As stated in Sexton v. Brooks, 39 Cal.2d 153, 158, 245 P.2d 496, 499: "The instruction which was given was erroneous and misleading, and defendant did not waive the error by failure to request an instruction which correctly defined her duty to plaintiff."

[6, 7] That this error was serious cannot be doubted. Mr. Kerr, the expert, testified that if he wanted to get the feel of his gun by firing prior to embarking on a shoot, he would not shoot at the high house. This, in part, would be due to the possibility of a ricochet, a danger enhanced by the fact that the metal surface of the high house was not flat but corrugated. He also testified that shooting directly in front of the high house was in accord with the customary practices of skeet shooters. Where the issue is one of negligence in the performance of an act, evidence of the ordinary practice and custom which is generally followed in the performance of such act under similar circumstances is competent. Burke v. John E. Marshall, Inc., 42 Cal.App.2d 195, 203–204, 108 P.2d 738; Hargrave v. Acme Tool & Tester Co., 125 Cal.App.2d 34, 39, 269 P.2d 913. But evidence of custom is received not as proof of, or a substitute for, the substantive law's standard of conduct, which is due care, but merely as a factor for consideration by the jury in determining whether or not the particular conduct of a party measures up to the legal standard. Miller v. Midway Fishing Tool Co., 106 Cal.App.2d 612, 614, 235 P.2d 630. Conformity to the general practice or custom does not excuse the actor's conduct unless it was also consistent with due care. Irelan-Yuba Gold Quartz Mining Co. v. Pacific Gas & Electric Co., 18 Cal.2d 557, 567, 116 P.2d 611; Jensen v. Southern Pacific Co., 129 Cal.App.2d 67, 73, 276 P.2d 703; Reagh v. San Francisco Unified School Dist., 119 Cal.App.2d 65, 70, 259 P.2d 43. If, instead of being equivocally instructed that the quantum of care of one handling a loaded

weapon "may be great" the jury had been properly apprised of defendant's positive duty to exercise great care or extreme caution, it would have been able to evaluate intelligently defendant's conduct in shooting directly at the high house which he knew was occupied by a human being, even though that might have been the prevailing practice. It would then have been able to judge by the appropriate criterion whether defendant's shooting toward the high house in his zeal for a good score at the difficult No. 8 position was consistent with the due care required of one using a firearm. The prejudice of the misdirection of the jury under the circumstances is obvious. The fact that defendant was lawfully shooting at the time does not lessen the standard of care expected of him. In the Jensen case, supra, defendant was shooting at a bird in a strawberry patch on his farm, which also was a not unlawful activity. The law demands extreme caution on the part of one using firearms in the vicinity of others, regardless of how lawful or innocent such use may be. 56 Am.Jur., Weapons & Firearms, sec. 23, p. 1006.

[8–11] The court also erred in refusing to instruct upon the doctrine of res ipsa loquitur. "The doctrine of res ipsa loquitur has three conditions: '(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.'" Ybarra v. Spangard, 25 Cal.2d 486, 489, 154 P.2d 687, 689, 162 A.L.R. 1258. Condition 1 is clearly satisfied: "Ordinarily, * * * accidents of this sort do not occur if those using firearms use due care." Jensen v. Minard, 44 Cal.2d 325, 329, 282 P.2d 7, 9. Adverting to condition 2: That, too, is met because the gun was exclusively in defendant's control. This brings us to a consideration of the third element, namely, that the accident "must not have been due to any voluntary action or contribution on the part of the plaintiff." In explanation of this requirement, the court in Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 444, 247 P.2d 344, 348, makes the following clarifying statement: "Some cases have stated that the accident must not have been due to any voluntary action or contribution on the part of the plaintiff. [Citations.] This is allied to the condition of control by the defendant and has also been employed as a means of showing that the defendant, rather than the plaintiff, had control and was responsible for the injury. [Citation.] It should not be confused with the problem of contributory negligence, as to which defendant has the burden of proof, and its purpose, like that of control by the defendant, is merely to assist the court in determining whether it is more probable than not that the defendant was responsible for the accident." Here there was no activity on plaintiff's part which interfered with or impinged on defendant's exclusive control of the instrumentality causing the injury. The fact that he was engaged in reloading the trap machine within the cramped confines of the high house before he heard defendant's shot would be relevant in considering contributory negligence on his part, on which the jury was fully and correctly instructed, but it does not deprive him of the benefit of res ipsa loquitur. See Freitas v. Peerless Stages, Inc., 108 Cal. App.2d 749, 758, 239 P.2d 671, 33 A.L.R.2d 778. For, as the Zentz case emphasizes, that element should not be confused with the underlying issue, namely the applicability of res ipsa loquitur where the accident is of such a nature that it can be said it probably occurred as the result of negligence by someone and that defendant is probably the person responsible. 39 Cal.2d at pages 444, 446, 247 P.2d at pages 348, 349.

[12] That this is such a situation is clear. In Jensen v. Minard, 44 Cal.2d 325, 329, 282 P.2d 7, a case in which defendant fired at a bird in a bush on his farm and the bullet struck plaintiff, the court held the doctrine applicable even though not requested. In Skinner v. Ochiltree, 148 Fla. 705, 5 So.2d 605, 140 A.L.R. 410, which involved a skeet shooter who fired his gun prematurely and injured plaintiff, who was employed in the high house as a loader, the court held it error to refuse an instruction

on res ipsa loquitur. In Crump v. Browning, D.C.Mun.App., 110 A.2d 695, 696, 46 A.L.R.2d 1212, in considering an accidental shooting, the court addressed itself to the applicability of res ipsa loquitur as follows in reversing the lower court: "It would be hard to imagine a situation more uniquely in the realm of res ipsa loquitur than this one. A man holds an automatic pistol in his hands, the pistol is discharged and wounds a friend. To say that res ipsa does not apply is to cast on the person shot the anamolous, if not impossible, burden of explaining how it happened." This consideration is peculiarly applicable to the situation confronting us—where a person is injured by a gun in the hands of one having entire control over the aiming and firing of it. As was said in the Zentz case, supra, 39 Cal.2d at page 445, 247 P.2d at page 348, and quoted with approval in Seneris v. Haas, 45 Cal.2d 811, 825, 291 P.2d 915: "Another factor which some of the cases have considered in applying the doctrine is that the defendant may have superior knowledge of what occurred and that the chief evidence of the cause of the accident may be accessible to the defendant but inaccessible to the plaintiff [citations]."

[13, 14] Considering the respective positions of the parties and mindful that ordinary care on defendant's part required the exercise of extreme caution, we have no doubt that the instruction on res ipsa loquitur was erroneously refused, whether viewed upon the theory (1) that defendant was negligent by reason of the manner in which he aimed and fired the gun, or (2) that the gun was unintentionally and accidentally discharged after the target came out broken. Particularly apposite is the observation in Stanford v. Richmond Chase Co., 43 Cal.2d 287, 292–293, 272 P.2d 764, 767, that "it obviously seems more probable than not that a person standing in plaintiff's position would not have been struck by a fork lift if due care were used in its operation, and, therefore, under the doctrine of res ipsa loquitur, it can be inferred that the operator of the fork lift which struck plaintiff was negligent." It may be said with equal validity that it is far more probable than not that a person situated as was Tommy would not have been wounded had defendant used extreme caution in the handling of his gun and the balance of probabilities in favor of defendant's negligence justified the invocation of the principle of res ipsa loquitur. The fact that defendant was on a shooting range did not diminish the standard of care required of one handling a gun. This duty was owed as much to Tommy as to the members of defendant's shooting party since all of them were within the foreseeable ambit of danger from a careless discharge of defendant's gun.

[15] Defendant challenges the form of the requested instructions. However, one of the two proposed res ipsa instructions should have been given. That is the one taken from BAJI, 206–B.[1] That instruction was recently approved by this court in Burger v. Burger, 136 Cal.App.2d 360, 364, 288 P.2d 926. That such an instruction is proper has been settled law at least since Burr v. Sherwin Williams Co., 42 Cal.2d 682, 691, 268 P.2d 1041. Since our foregoing discussion shows the unequivocal existence of the conditions upon which the operation of the doctrine is predicated, plaintiff was entitled to the instruction quoted in the precise form given.

[16] It is clear that the foregoing errors in the instructions affected the very core of the instant case, and since it cannot

1. The requested instruction reads:
"From the happening of the accident to the plaintiff Thurman Tucker, Jr., as established by the evidence, there arises an inference that the proximate cause of his injury was some negligent conduct on the part of the defendant. That inference is a form of evidence, and if there is none other tending to overthrow it, or if the inference preponderates over contrary evidence, it warrants a verdict for the plaintiffs. Therefore, you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendant to rebut the inference by showing that he did, in fact, exercise ordinary care and diligence or that the accident occurred without being proximately caused by any failure of duty upon his part."

be conscionably said that in the absence of such fundamental errors a different verdict would have been improbable, we must conclude that these errors constituted a miscarriage of justice within the import of the constitutional provisions and require a reversal. Daniels v. City and County of San Francisco, 40 Cal.2d 614, 624, 255 P.2d 785.

[17–20] It may be useful, in the event of a new trial, to append a comment on another instruction given at defendant's request. It reads: "You are instructed that it is the duty of an employer to furnish to his employees a safe place for them to work. You are further instructed that defendant, Philip Lombardo, if exercising ordinary care himself, was entitled to assume that plaintiff's employer had furnished to plaintiff a safe place within which to work and he could further assume that the plaintiff would reasonably use the protection afforded to him by the employer." That instruction is palpably improper for several reasons. To begin with, it is not responsive to any issue in this case, for it has not been contended that plaintiff's employer failed to provide him with a safe place to work and that such failure, if any, was the sole proximate cause of plaintiff's injury. Furthermore, the duty to provide a safe place to work, which the instruction borrows from sections 6401 and 6402 of the Labor Code, is one owed by an employer to his employee. Those sections deal primarily with the relationship of employer and employee, Neuber v. Royal Realty Co., 86 Cal.App.2d 596, 619, 195 P.2d 501; Douglas v. Maloney, 105 Cal.App.2d 284, 286, 233 P.2d 59, the latter being a member of the class whose interests they were designed to protect. They cannot be used to insulate from liability a member of the public who owes an independent duty of care to such employee. A third party such as defendant, therefore, who was himself bound to exercise towards plaintiff great care, could not blindly assume that plaintiff had been made safe by some other person against direct fire from a shotgun.

[21, 22] The effect of the instruction was to inform the jury, categorically, that it was reasonable for defendant to assume that plaintiff's employer had provided plaintiff with a safe place to work, without qualification as to any knowledge defendant himself might have and regardless of the fact that defendant might be shooting squarely at a place in which he knew plaintiff to be. It completely removed from the jury the question of the reasonableness of the assumption that an independent obligation between plaintiff and his employer would not be violated, despite the fact that defendant himself was operating a dangerous instrumentality, fraught with peril toward plaintiff unless extreme caution were employed. The general principle relied on by defendant in support of the instruction that one has a right to assume that another will obey the law was not only inapplicable in the context here present, but contains a significant qualification. "It is only when there is nothing in the situation to warn him of impending danger that he is not guilty of negligence in relying upon such assumption. The reasonableness of the conduct of a person relying upon the assumption that another will obey the law is primarily a question for determination by the trier of fact [citations]." Shiya v. Reviea, 122 Cal.App.2d 155, 163, 264 P.2d 190, 196. Under the instruction, the court told the jury that *as a matter of fact* defendant "was entitled to assume that plaintiff's employer had furnished to plaintiff a safe place within which to work." For the various reasons stated, the instruction should not have been given.

The parties have also argued the propriety of giving instructions on assumption of risk. We need not extend this opinion by a consideration of this issue, since much will depend on the manner in which the facts are developed on a retrial. We cannot foretell what will be adduced in this connection upon retrial and we refrain from anticipatory expression.

The judgment is reversed.

MOORE, P. J., concurs.

ASHBURN, Justice (dissenting).

Reluctantly I feel constrained to voice a dissent in this case. The jury found unanimously for defendant, the trial judge immediately expressed approval of the verdict

and later denied a motion for new trial which was based upon alleged insufficiency of the evidence as well as other grounds. I dissent because the prevailing opinion reversing the judgment appears to me to work a miscarriage of justice.

No claim of insufficiency of the evidence is made on this appeal and the reversal is based upon the conclusion that grievous error was committed in the giving of certain instructions and the refusal of others. This posture of the case requires that the evidence be viewed from two angles, (1) the findings which the jury and trial judge inferentially made, and (2) any theory advanced by plaintiff which is supported by substantial evidence.

Defendant Lombardo visited the Dominguez Skeet Range for the purpose of skeet shooting, paying the operator for the privilege of so doing. A duty of exercising reasonable care to have the skeet range in safe condition was owed to him, McCordic v. Crawford, 23 Cal.2d 1, 6, 142 P.2d 7, and the furnishing of a reasonably safe place to work was due the operator's employees. 16 Cal.Jur. § 21, p. 995; Powell v. Jones, 133 Cal.App.2d 601, 606, 284 P.2d 856. Defendant, in the exercise of ordinary care, was entitled to rely upon the assumption that the operator of the range had obeyed the law and exercised reasonable care toward him and toward persons working on the range,—a right to so rely until apprised of the contrary by circumstances which would alert a reasonably prudent man to the fact that the contrary was the case. "It is axiomatic that in the absence of conduct to put him on notice to the contrary a person is entitled to assume that others will not act negligently or unlawfully." Porter v. California Jockey Club, Inc., 134 Cal.App.2d 158, 160, 285 P.2d 60, 61. In Leo v. Dunham, 41 Cal.2d 712, 715, 264 P.2d 1, 3, the court quotes from Harris v. Johnson, 174 Cal. 55, 58, 161 P. 1155, L.R.A. 1917C, 477, as follows: " 'The general rule is that every person has a right to presume that every other person will perform his duty and obey the law, and in the absence of reasonable ground to think otherwise it is not negligence to assume that he is not exposed to danger which comes to him only from violation of law or duty by such other person.' " Shivers v. Van Loben Sels, 109 Cal.App.2d 286, 289, 240 P.2d 635, 637: "White was driving his equipment at a lawful rate of speed. The brakes on his equipment were in good condition. He knew he was traveling on a through highway protected by stop signs. Under these circumstances, he had a right to assume that a driver on a street intersecting the through highway would obey the stop signs and yield the right of way. In making such assumption, White was acting wholly within his rights, and he cannot be charged with negligence in acting thereon. He can only be charged with negligence under such circumstances from the time he had knowledge, or in the exercise of ordinary care should have known, that the Pontiac was going to disregard the stop sign and enter the highway. After such knowledge, he was bound to use the care of an ordinary prudent person. [Citing cases.] Whether a person exercises the required degree of care is ordinarily one for the jury." Hendricks v. Pappas, 82 Cal.App.2d 774, 778, 187 P.2d 436, 438, points out that: " 'Whether or not reasonable care is used under the circumstances, in relying upon this presumption, is a question for the jury.' "

This initial right to assume that others have exercised due care and to continue to do so until alerted to the contrary applies to those who are charged with the exercise of the highest degree of care as well as those owing only ordinary care. Connor v. Pacific Greyhound Lines, 104 Cal.App.2d 746, 753, 232 P.2d 500; Merritt v. Interstate Transit Lines, 8 Cir., 171 F.2d 605, 608–609.

Defendant therefore rightly entered upon the shoot assuming that the operator of the range had fulfilled his duty to his own participating employees, as well as to patrons engaged in shooting. That frame of mind gave rise to no duty of defendant to protect plaintiff in performing his work as loader of the trap machine.

"It is an elementary principle that an indispensable factor to liability founded upon negligence is the existence of a duty of care owed by the alleged wrongdoer to the per-

son injured, or to a class of which he is a member." Routh v. Quinn, 20 Cal.2d 488, 491, 127 P.2d 1, 3, 149 A.L.R. 215. This fundamental proposition is not confined to statutory duties; it applies also to those arising from the common law. This is shown by the opinion in Richards v. Stanley, 43 Cal.2d 60, 63, 271 P.2d 23, and many other rulings exemplified by Gleason v. Fire Protection Engineering Co., 127 Cal. App. 754, 757, 16 P.2d 750; Neuber v. Royal Realty Co., 86 Cal.App.2d 596, 611–612, 195 P.2d 501. See also, 38 Am.Jur. § 12, p. 652; 65 C.J.S., Negligence, § 4, p. 332, § 4 c, p. 347, § 5 a, p. 350, § 5 c(2), p. 354. The ultimate question of whether any duty exists with respect to a given person or situation depends upon the foreseeability of probable or possible injury from the conduct of one charged with negligence. 65 C.J.S., Negligence, § 5 c(2) (a), p. 354: "Negligence is, or may be, gauged by the ability to anticipate danger. Accordingly, reasonable foresight of harm is essential to the concept of negligence, and supplies the criterion for determining whether it exists in a particular case, and reasonable foreseeability of harm is the fundamental basis of the law of negligence. * * * On the other hand, one is not bound to foresee every possible injury which might occur, or every possible eventuality, but only those which were reasonably foreseeable; and one is not required to anticipate against dangers which it is not his duty to avoid." Moreover, the foreseeability which creates a duty in favor of a specific person must relate to the risk of injury to him and not someone else. That is the doctrine of the Routh and Richards cases, supra. The proposition is supported by numerous authorities. See Johnson v. Union Furniture Co., 31 Cal.App.2d 234, 238, 87 P.2d 917; West v. Cruz, 75 Ariz. 13, 251 P.2d 311, 314; American Lumber Sales Co. v. Fidelity Trust Co., 127 Me. 65, 141 A. 102, 105; Moen v. Madison Rys. Co., 199 Wis. 168, 225 N.W. 821, 822; Kapphahn v. Martin Hotel Co., 230 Iowa 739, 298 N.W. 901, 906; Hale v. Cooper, 271 Mich. 348, 261 N.W. 54, 57, 263 N.W. 769; 38 Am.Jur. § 18, p. 650; Harper v. Remington Arms Co., Inc., 156 Misc. 53, 280 N.Y.S. 862; Campbell v. Cunningham Natural Gas Corp., 164 Misc. 1, 298 N.Y.S. 200; Jefferson v. Young Men's Christian Ass'n, 354 Pa. 563, 47 A.2d 653; Rue v. Wendland, 226 Minn. 449, 33 N.W.2d 593; Eckenrode v. Pennsylvania R. Co., 3 Cir., 164 F.2d 996; Miller v. El Mirasol, Inc., 163 Misc. 346, 297 N.Y.S. 380.

In the leading case of Palsgraf v. Long Island R. Co., 248 N.Y. 339, 162 N.E. 99, 59 A.L.R. 1253, a passenger who was running to catch a train of defendant was assisted by its servants; in the process a package fell from his arms upon the rails; it contained fireworks which exploded with violence and the concussion overturned some scales many feet away and they fell upon plaintiff who was standing on the platform; she was injured thereby. It was held that the defendant was not liable because its servants could not have foreseen harm to her from the package. Mr. Justice Cardozo used the following language, 162 N.E. at pages 99–100: "The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all. Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed. Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. 'Proof of negligence in the air, so to speak, will not do.' * * * If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to outward seeming, with reference to her, did not take to itself the quality of a tort because it happened to be a wrong, though apparently not one involving the risk of bodily insecurity, with reference to some one else. 'In every instance, before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining, the observance of which would have averted or avoided the injury.' * * * the orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty. * * * We are told that one who drives at reckless speed through a crowded

city street is guilty of a negligent act and therefore of a wrongful one, irrespective of the consequences. Negligent the act is, and wrongful in the sense that it is unsocial, but wrongful and unsocial in relation to other travelers, only because the eye of vigilance perceives the risk of damage. *If the same act were to be committed on a speedway or a race course, it would lose its wrongful quality.* The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension." (Emphasis added.) The concurring opinion of Mr. Justice Traynor in Mosley v. Arden Farms Co., 26 Cal.2d 213, at page 220, 157 P.2d 372, at page 376, 158 A.L.R. 872 adopts the Palsgraf doctrine, saying: "It remains to determine only whether the harm falls within the limits of defendant's legal responsibility for the consequences of its conduct. In my opinion that determination is made once it is established that defendant's conduct was or was not wrongful with respect to the plaintiff; for the risk reasonably to be foreseen not only creates the liability but defines its limits." The Palsgraf case and numerous other authorities are cited in support of the proposition. The Restatement of the Law of Torts reflects the same view in § 281. Comment c on clause (b) at page 735 says: *"Risk to class of which plaintiff is member.* If the actor's conduct creates a recognizable risk of harm only to a particular class of persons, the fact that it causes harm to a person of a different class, to whom the actor could not reasonably have anticipated injury, does not render the actor liable to the persons so injured." The opinion in Richards v. Stanley, supra, 43 Cal.2d 60, 63, 271 P.2d 23, cites with approval and applies the rule stated in Restatement, § 281, and in comments c, e and g thereto. The Palsgraf doctrine plainly prevails in this state.

The case at bar is not that of a spectator who was injured, as in Warner v. Santa Catalina Island Co., 44 Cal.2d 310, 282 P.2d 12, but is a parallel to Mr. Justice Cardozo's example of a high rate of speed which is wrongful on the city street but loses that quality when occurring on a speedway or race course.

Defendant had shot at the Dominguez range on one or two previous occasions; he had never been in the high house or looked inside; he realized that some person was there but did not know it was a 13 year old boy; he saw the necessary opening for passage of the targets and the shields placed below and on one side of it; he did not know whether they were adjustable, nor did he know whether the operator wore a face mask or other protective covering or what other precautions had been taken to protect him from injury. Defendant did not know these things and he had no duty to investigate. There was nothing to suggest to his mind that he should not shoot in accordance with the rules and prevailing practices of skeet shoots.

Station number eight was about 60 feet directly east from the high house. The breaking point (east of which the bird could not be shot) was immediately north of station eight and only 18 feet distant. The bird when ejected from the machine traveled at 60 miles an hour or 90 feet a second, a distance of approximately 67 feet to the breaking point; hence the shooter had less than a second, about two-thirds of one, in which to make a score by hitting the target. Mr. Alex Kerr, a well-qualified expert, testified without contradiction as to the rules, practices and customs of skeet shooting. Indeed, appellant's briefs are built upon the assumption that his testimony is correct. He explained that, because the difficulty of a shot from station eight steadily increases as the bird reaches the breaking point, it is customary and in accordance with nationally recognized rules for the sportsman to fire immediately upon the emergence of the bird from the high house, his gun being pointed at that house. The photographs of that structure support the inference that such was the practice on this range; they bear the marks of having been peppered by innumerable gunshots.

There is another practical consideration which enters into the custom of firing straight at the house. The circular pattern of a shot discharged from this shotgun has

a diameter of 30 inches when 75 feet from the gun. In this instance the distance was 60 feet and the diameter of the pattern slightly less, say 25 inches at that distance. If the gun is to be shifted so that none of the pattern of shot will hit the house there is an immediate loss of over 25 inches out of a total 67-inch firing distance, with the shot becoming more difficult all the time. The practical thing to do, the one that is actually done, is to fire immediately upon seeing the bird emerge.

The jury and the trial judge gave credence to defendant's version of the accident. He said that he took the firing position at station eight, called "pull" (the signal for the boy in the control house to electrically spring the trap in the high house), waited for the target, saw it emerge unbroken from the aperture and shot when it was about two feet from the high house; that he hit it, shortly heard plaintiff "holler" and saw him come out of the high house. The implied findings of jury and trial judge that this version of the accident is correct leave no room for any inference of negligence on defendant's part. The basic reason is that defendant did exactly what he was supposed to do and therein had violated no duty that he owed to plaintiff. When the verdict was brought in the trial judge said, in part: "[I]f it is of any comfort to you, I would say that I would determine it [the case] in the same way. * * * It is a sad, sad case, * * * but to say that it is the fault of the one who is shooting on the range, to me, seems to be going too far."

This is the background against which the propriety of requested instructions and the claim of prejudicial error in those given must be considered if error be found in any of the rulings about which plaintiff complains. However, the question of whether there was such error must also be tested in the light of any substantial evidence, positive or negative, supporting plaintiff's theories. See Gilbert v. Pessin Grocery Co., 132 Cal.App.2d 212, 222, 282 P.2d 148, and cases therein cited.

The evidence upon which plaintiff relies is sufficiently substantial to sustain a verdict based upon an accidental firing of defendant's gun had such a finding been made. Mrs. Elva Ruth, who worked in the office, testified that about a half hour after the accident she asked defendant, "How in the world could it ever have happened?" and that he said he did not know, "He guessed his gun was discharged accidentally." The admission of a party is independent and affirmative evidence of the fact admitted by him. Crawford v. Alioto, 105 Cal.App.2d 45, 50, 233 P.2d 148; Bonebrake v. McCormick, 35 Cal.2d 16, 18–19, 215 P.2d 728. Gerald L. Bayless, the "trap puller" in the control house, testified that when defendant called "pull" he was at the "ready position," meaning that the barrel of the gun was up in the air and the stalk down at the hip; that when the witness pressed the button the bird came out "busted" in several little pieces. (It is optional with the shooter to fire at a broken target if it is not in little pieces; such was the Kerr testimony.) Bayless said that when he saw the bird was broken he looked at Lombardo who was "just bringing the gun down from his shoulder from the firing position," that he did not see the gun but heard it go off; that the barrel was right in front of defendant's face and the stalk coming down to "ready position;" that he was scoring and marked a miss against Lombardo on that station. Defense witness Henry L. Lewis, who was shooting with defendant, said he was watching for the bird and saw pieces of broken target coming out of the high house and that simultaneously he heard a shot. In the aggregate this evidence would sustain a finding of an accidental and unintended firing of the gun.

Plaintiff complains of refusal of his requested res ipsa loquitur instructions, relying principally upon Jensen v. Minard, 44 Cal.2d 325, 282 P.2d 7, a firearm case wherein res ipsa was held applicable. That was the bird shooting case mentioned in the prevailing opinion. But the situation at bar is substantially different. There was no dispute in that case about what happened and the court was passing upon the pertinence of the doctrine rather than the form of an appropriate instruction. In the instant case the rule would not be applicable to the factual situation depicted by defendant and impliedly accepted by the jury and

the trial judge. This follows from the above discussion which shows that there was no negligence on defendant's part under such circumstances, or at least that the jury and judge were justified in so finding. It was held in La Porte v. Houston, 33 Cal. 2d 167, 169, 199 P.2d 655, and Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 442, 247 P.2d 344, 347, that " 'the applicability of the doctrine of res ipsa loquitur depends on whether it can be said, in the light of common experience, that the accident was more likely than not the result of their defendants') negligence. (Citations.) "Where no such balance of probabilities in favor of negligence can be found, res ipsa loquitur does not apply."' " But if plaintiff's contention be accepted to the effect that the discharge of the gun was unintentional, that would give rise to a res ipsa inference under such cases as Jensen v. Minard, supra, and Skinner v. Ochiltree, 148 Fla. 705, 5 So.2d 605, 140 A.L.R. 410. This is on the theory that an accidental firing may be a violation of a general duty owing to all within range of danger to exercise extreme caution in handling firearms. Contrasted with this is the absence of any duty to protect the operator in the high house from the normal hazards of ordinary skeet shooting. The state of the evidence in this case is such that it should have been left to the jury (if proper instructions were requested) to determine the facts which would render res ipsa applicable or inapplicable. Seneris v. Haas, 45 Cal.2d 811, 827, 291 P.2d 915, 924: "The existence of the conditions upon which the operation of the doctrine is to be predicated is a question of fact and the right of the jury to find those facts must be carefully preserved."

Plaintiff's requests, if given, would have invaded the province of the jury for they state without qualification that the rule does apply to this case. There are two of them, one begins with this declaration: "You are instructed that this is a case in which the doctrine of res ipsa loquitur, that is to say, the thing speaks for itself, is applicable. * * *" The other says: "From the happening of the accident to the plaintiff Thurman Tucker, Jr., as established by the evidence, there arises an inference that the proximate cause of his injury was some negligent conduct on the part of the defendant. * * *" Both were properly refused, and Burger v. Burger, 136 Cal.App. 2d 360, 288 P.2d 926, does not hold otherwise, nor does Burr v. Sherwin Williams Co., 42 Cal.2d 682, 691, 268 P.2d 1041. There was no duty resting on the trial judge to modify these requests and give the instructions as modified. Sloan v. Stearns, 137 Cal.App.2d 289, 290 P.2d 382; Austin v. Riverside Portland Cement Co., 44 Cal. 2d 225, 235, 282 P.2d 69; Tossman v. Newman, 37 Cal.2d 522, 525, 233 P.2d 1. The Jensen case, supra, 44 Cal.2d 325, 282 P.2d 7, does not hold the contrary with respect to a situation such as shown at bar, and this is not a case in which the jurors were left without guidance upon the vital issue or issues of the case.

Appellant complains of the instruction first quoted in the prevailing opinion.[1] There is no contention that this instruction does not square with the Jensen decision except in the use of the word "may" rather than "must" in these phrases: "the quantum or amount of care exercised may be greater than would be necessary if he was not handling a loaded weapon;" "where the danger of injury is greater the amount of

1. " 'You are instructed that the duty owed by the defendant to the plaintiff in this case was to exercise ordinary care, that is the care that would be exercised by a reasonably prudent person in the same or similar circumstances. In this particular instance, however, the defendant was possessed of and using a firearm and a firearm is capable of causing severe injury. For that reason the defendant was required to foresee the possibility of injury and, to avoid it, to exercise a degree of care commensurate with and in proportion to the danger involved, and, in the exercise of ordinary care, the quantum or amount of care exercised may be greater than would be necessary if he was not handling a loaded weapon. This is but another way of saying that the amount of care to be exercised by a reasonably prudent person will vary with the circumstances, and where the danger of injury is greater the amount of care to be used may be great.' "

care to be used may be great." Assuming that the word "must" should have been used, it does not appear that the jurors were likely to be misled by the word "may." The interchangeable use of those words is so common that it cannot be said that anyone is likely to be misled thereby. Moreover, this was but one of a series of instructions to the effect that the amount of care to be exercised increases with the foreseeable danger.[2] Witkin California Procedure, at page 1800, says: "The underlying principle is that, under the constitutional prohibition against reversal for nonprejudicial error, it must be shown that the error was likely to *mislead* the jury. If this does not affirmatively appear, there is no reversible error." "In considering an instruction assigned as prejudicial the reviewing court must adopt such construction thereof as will support the judgment rather than one that will defeat it, if the one adopted is susceptible of such interpretation. Mullanix v. Basich, 67 Cal.App.2d 675, 681, 155 P.2d 130." Perbost v. San Marino Hall-School, 88 Cal.App.2d 796, 801, 199 P.2d 701, 703.

Moreover, appellant is precluded from urging error in this instruction for it was his duty to propose further and more specific instructions on the subject if he deemed this one to be inadequate or incorrect in any particular. Smith v. Pacific Greyhound Corp., 139 Cal.App. 696, 705, 35 P.2d 169; Ohran v. County of Yolo, 40 Cal.App.2d 298, 307, 104 P.2d 700; State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal.2d 330, 340, 240 P.2d 282. Plaintiff did in fact propose instructions upon the subject.[3] But they were erroneous because they attempted to place the burden of proof upon defendant to show that he was not negligent. Such instructions were held to be erroneous in the Jensen case, supra. Counsel argue as if they had proposed instructions such as the one found in the Jensen case [44 Cal.2d at page 328, 282 P.2d at page 8] concerning extreme caution, but there was no such request at bar.

Finally, it does not appear that a different verdict would have been probable if the alleged error had not entered into this instruction. The jury and trial judge accepted defendant's version of the facts and that gave rise to no duty on defendant's part to exercise care for plaintiff's safety; the jurors' common sense told them there was no negligence there. And from that standpoint the instruction given was more favorable than plaintiff was entitled to have.

Appellant asserts error in giving an instruction on unavoidable accident, but he cannot complain because he requested it. "A party may not complain of error in an in-

2. "Negligence is not an absolute term, but a relative one. By this we mean that in deciding whether there was negligence in a given case, the conduct in question must be considered in the light of all the surrounding circumstances as shown by the evidence."

"Inasmuch as the amount of caution used by the ordinarily prudent person varies in direct proportion to the danger known to be involved in his undertaking, it follows that in the exercise of ordinary care, the amount of caution required will vary in accordance with the nature of the act and the surrounding circumstances. To put the matter in another way, the amount of caution involved in the exercise of ordinary care increases or decreases as does the danger that reasonably should be apprehended."

3. "In applying the standards of ordinary care and negligence which I have given you to the acts of the defendant in this case, I instruct you that as firearms are extraordinarily dangerous, the defendant in the use and handling of the shotgun he had in his possession on the day that the plaintiff Tommy Tucker was hit, was bound to use extraordinary care to prevent injury to Tommy Tucker and all other persons. If you find that plaintiff Tommy Tucker was injured through the discharge of the shotgun the defendant had in his possession, then the defendant must show that he was absolutely without fault, and if he does not show that he was absolutely without fault, you must find him guilty of negligence."

"You are instructed that if a person is injured by the discharge of a gun in the hands of another who has entire control of it, the burden is cast upon the latter to prove that the gun was not fired at the party injured either intentionally or negligently, but the result was inevitable and without the least fault upon the part of the one handling the gun."

struction given at his own request. Yolo Water & Power Co. v. Hudson, 182 Cal. 48, 51, 186 P. 772. In the instant case the record discloses that both plaintiff and defendant requested the foregoing instruction. Therefore this rule is applicable and plaintiff may not allege error in the giving thereof." Bivens v. Haber, 105 Cal.App.2d 628, 629, 233 P.2d 923. The trouble with the two instructions given in the Jensen case, supra, to the effect that no inference of negligence arose from the mere fact of the accident and concerning unavoidable accidents, is that the rule of res ipsa loquitur there applied, thus rendering the no inference instruction inapplicable and erroneous, while the unavoidable accident instruction created a conflict with the one pertaining to res ipsa. The instant situation is not comparable.

At defendant's request the court gave this instruction: "The mere fact that an accident happened, considered alone, does not support an inference that some person, or any party to this action was negligent." Appellant says this was error. That does not appear to be the case, for the instruction is confined to the fact of the accident considered alone. This means the fact that plaintiff was shot. In order to raise an inference of negligence it is necessary to know more about the circumstances of the accident. If the shooting was accidental then an inference of negligence would arise, but if it occurred in the manner explained by defendant, no such inference could be drawn. The mere fact of the accident was not enough to raise an inference either way. If it were concluded that this instruction was erroneous it could not in my judgment be held to have worked a miscarriage of justice.

Appellant claims that there was error in the refusing of instructions on contributory negligence. These requests declared as a matter of law that plaintiff was not guilty of contributory negligence. Hudson v. Rainville, 46 Cal.2d 474, 297 P.2d 434, 436: "The rule is accurately stated by Mr. Justice Schauer in Gray v. Brinkerhoff, 41 Cal.2d 180, at page 183 [1], 258 P.2d 834, 836, thus: 'Whether or not defendant was guilty of negligence (citing cases) or plaintiff was guilty of contributory negligence (citing cases) is ordinarily a question of mixed fact and law and may be determined as a matter of law only if reasonable men following the law can draw but one conclusion from the evidence presented (citing cases).'" The evidence at bar was such that the question was properly left to the jury and there is no discernible error in the instructions which were actually given on that subject.

Likewise, there was no error in leaving to the jury the question of assumption of risk. The evidence affords solid basis for such a ruling.

There was no error in the instruction quoted in the majority opinion which begins with the words " 'You are instructed that it is the duty of an employer to furnish to his employees a safe place for them to work.' " That part of the instruction merely pointed to one of the bases for defendant's right to assume that the operator of the range had exercised due care, both with respect to himself and those with whom he had to deal while a paying guest on those premises. There was no likelihood of the jury being misled by the instruction, nor was it intrinsically erroneous.

There was no error in receiving evidence of the rules, practices and customs of skeet shooting. They have a direct bearing on the question of negligence though they do not of themselves establish the standard of prudent conduct. Burke v. John E. Marshall, Inc., 42 Cal.App.2d 195, 203–204, 108 P.2d 738; Fowler v. Key System Transit Lines, 37 Cal.2d 65, 230 P.2d 339; Hargrave v. Acme Tool & Tester Co., 125 Cal.App.2d 34, 39, 269 P.2d 913; Miller v. Midway Fishing Tool Co., 106 Cal.App.2d 612, 235 P.2d 630.

The judgment herein should be affirmed.

142 Cal.App.2d 457

Alvin P. HOBBY and Mae C. Hobby, Plaintiffs, Cross-defendants and Appellants,

v.

CITY OF SONORA, a Municipal Corporation of the Sixth Class, Defendant, Cross-Complainant and Respondent.

District Court of Appeal, Third District, California.

June 21, 1956.

Proceeding to enjoin a city from collecting an annual service charge for sewer use. The Superior Court, Tuolumne County, J. A. Smith, J., entered judgment for city on its cross-complaint, and plaintiffs appealed. The District Court of Appeal, Peek, J., held that an ordinance which imposed an annual service charge for sewer connections to two-family dwellings located outside the corporate limits was not unconstitutional and arbitrary and it did not discriminate against users outside city.

Affirmed.

1. Municipal Corporations ⇐712

Where plaintiffs' predecessors, whose property was located outside the corporate limits of a city, paid the city $100 for privilege of connecting a sewer from their property to a private sewage line which connected with the city's sewage system, an ordinance which imposed an annual service charge for sewer connections to two-family dwellings located outside the corporate limits was not unconstitutional and arbitrary and did not discriminate against users outside city.

2. Injunction ⇐128

In action by property owners outside the corporate limits to enjoin a city from collecting an annual service charge for privilege of using a city sewer, evidence sustained finding that there was no contract between plaintiffs' predecessors and the city for use of the sewer but merely a continuing revocable permit to connect with the city's sewage system and use same upon payment of such sum as the city might charge for the use thereof.

Ross A. Carkeet, Sonora, for appellants.

William C. Coffill, Sonora, for respondent.

PEEK, Justice.

Plaintiffs and appellants are the owners of real property located outside the corporate limits of the defendant city. The property is improved with a duplex dwelling. During the year 1939 plaintiffs' predecessors in interest paid the city the sum of $100 for the privilege of connecting a sewer from said property to a private sewage line outside said city limits, which line in turn emptied into the city's sewage system. Since the date of the original connection neither plaintiffs nor their predecessors in interest have paid any other or further charge to the defendant for such sewage service. On June 15, 1953, the city enacted Ordinance No. 244 which, among other things, provided for the imposition and collection of a service charge of $36 per year for sewer connections to two-family dwellings located outside the corporate limits of said city. Plaintiffs refused to pay the charge and instituted the present proceeding to enjoin the defendant city from collecting the same. The city answered, denying generally the allegations of plaintiffs' complaint, and by cross-complaint sought recovery of the service charge and penalty. The court found that plaintiffs' predecessors in interest had paid the city the sum previously alleged for the privilege of connecting a sewer from their property as heretofore mentioned; that there was no contract, written or otherwise, entered into between either plaintiffs' predecessors in interest or plaintiffs and the city wherein the city agreed to perpetually process or dispose of sewage without charge; and that plaintiffs' predecessors in interest received only a revocable permit to connect to the city's sewage system. Plaintiffs' appeal is from the judgment which was entered pursuant to said findings.

Although numerous contentions were originally made by plaintiffs, they rely now upon only two: (1) That the ordinance is invalid and unconstitutional because of arbitrary discrimination against users resid-

ing outside of the city; and (2) that the city has attempted to impair the obligation of its contract. We find no merit in either contention.

[1] In summarizing the argument in support of their first contention, plaintiffs properly concede that the city could not be compelled to set up a schedule of rates which would apply equally to users within the city and to those without. But they contend that the action of the city in setting up its schedule of charges for connection with the city's system is a fund-raising scheme which places the entire burden upon the county users who have already paid in full for their service privileges, and therefore since no portion of the burden is placed upon the users inside of the city, it is discriminatory to plaintiffs. We find nothing in the cases relied upon by plaintiffs which supports such contention. If it could be said that the plaintiffs, as well as all other residents of Tuolumne County, constituted a class equally amenable to any ordinance passed by the council of the city, then there might be some validity to plaintiffs' argument, but such is not the case. The city of Sonora could no more compel the plaintiffs, as residents of the county, to connect with the city's sewer system than could plaintiffs compel the city to extend its lines into county territory and allow the county residents to connect therewith. The system is owned wholly by the taxpayers of the city of Sonora. The area is not embraced within a sewage district wherein plaintiffs would be placed upon a parity with the residents of the city of Sonora, thereby affording plaintiffs such equality of right as to service and charges as would be available to persons constituting a class within such a district. In other words, since the city owns the system and the plaintiffs do not, nor as noted do they have any interest whatsoever therein, any right they might acquire to use the system could only arise out of and be predicated upon a contractual relationship with the city. It necessarily follows that under the facts and circumstances disclosed by the record herein, there can be no question of discrimination.

[2] The conclusion we have reached as to plaintiffs' first contention necessarily poses the second question raised by them—that enactment of the ordinance was an impairment of the city's contract with them. The obvious error in such contention is the assumption by plaintiffs that a contract was entered into between their predecessors in interest and the city. Here the court specifically found that the city merely granted to plaintiffs' predecessors a continuing, revocable permit for the right to connect with the city's sewage system and use of the same upon payment of the sum charged by the city for the use thereof. This finding is amply sustained by the testimony of the mayor of the city of Sonora, the only witness who testified in this regard.

The judgment is affirmed.

VAN DYKE, P. J., concurs.



142 Cal.App.2d 225

Olga CULLEN, as Administratrix of the Estate of Luka Vujovich, Deceased, and Elena Vujovich, an Incompetent, by Olga Cullen, as Guardian ad litem, Plaintiffs, Cross-Defendants and Appellants,

v.

Risto J. SPREMO and Eleanor Spremo, his wife, Defendants, Cross-Complainants, and Respondents.

Civ. 16623.

District Court of Appeal, First District, Division 2, California.

June 14, 1956.

Action by daughter and incompetent mother to set aside deceased father's deed on grounds that property was community property, and that deed by father, was ineffective to convey title, that defendants held confidential relationship towards grantor and that they obtained deed without

consideration and by undue influence. Defendants denied allegations of complaint and cross-complained to quiet title. The Superior Court, Santa Clara County, Leonard R. Avilla, J., entered judgment upon defendants' motion for nonsuit, granted defendants' motion for summary judgment and to reform deed to correct error in description of property. Plaintiffs appealed. The District Court of Appeal, Devine, J. pro tem., held, in part, that where motion for nonsuit did not specify grounds, and, though record indicated that argument preceded motion, it could not be determined what specific grounds were stated in argument, which was not reported, judgment of nonsuit would be reversed, in view of rule that grounds for nonsuit must be stated in motion.

Judgment of nonsuit and judgment on cross-complaint reversed. Appeal from orders dismissed.

1. Dismissal and Nonsuit ⇦67

Grounds for nonsuit must be stated in motion requesting it.

2. Appeal and Error ⇦854(5)

Where motion for nonsuit did not specify grounds, and, though record indicated that argument preceded motion, it could not be determined what specific grounds were stated in argument, which had not been reported, judgment of nonsuit was improper and would be reversed on appeal, in view of rule that grounds must be stated in motion.

3. Appeal and Error ⇦241, 854(5), 856(4)

Ground not specified in motion for nonsuit will be considered on appeal only if it is clear that defect is one which could not have been remedied if it had been called to attention of plaintiff by motion.

4. Appeal and Error ⇦854(5)

Fact that plaintiffs, against whom judgment was entered on defendants' motion for nonsuit, had not moved to reopen, on ground that defendants had not specified grounds for nonsuit in motion, would not cure failure of defendants to specify grounds in motion, in absence of showing that asserted legal deficiencies of plaintiffs' cause were so described to plaintiffs' counsel on motion for nonsuit that he could make motion to reopen with view to remedying, if possible, stated inadequacies of the pleading or proof.

5. Appeal and Error ⇦866(1)

Upon review of judgment entered upon nonsuit, rules are same whether case was tried by court or by jury.

6. Mental Health ⇦371

If wife had been adjudicated, and was, an incompetent person, she would have been unable to dispose of any interest in property of community or to make any agreement with respect thereto. West's Ann.Civ.Code, § 172a.

7. Husband and Wife ⇦267(1)

If husband, since deceased, had conveyed community property to third persons, deed would have been ineffective to convey interest of wife, who had previously been adjudicated, and who was at time of conveyance, an incompetent person, though conveyance would be effective as to husband's interest in property. West's Ann. Civ.Code, § 172a.

8. Husband and Wife ⇦267(1)

Disposition of community property by husband who died after conveyance is equivalent to a valid testamentary disposition of husband's interest in property. West's Ann.Civ.Code, § 172a.

9. Husband and Wife ⇦251

Where husband, having incompetent wife, acquired inheritance from his brother, property so acquired was his separate property.

10. Husband and Wife ⇦258

If improvements on husband's separate property were made from community property, improvements would not become separate property of husband by his action alone, without consent or agreement of his wife.

11. Mental Health ⇦372

Where wife was incompetent, she could not assent or agree that improvements which husband had made to his separate property from community property funds would become husband's separate property.

12. Husband and Wife ⇐259

Where husband received pension from company for which he had worked during entire time he was married to wife, who was subsequently adjudicated incompentent, pension was community property.

13. Evidence ⇐230(1)

Statement by husband that community property pension went into improvements to his separate property was not hearsay, when related by daughter after death of her father, in her action to vacate father's deed of land on ground that property was community property, but it constituted declaration against interest in favor of his spouse made by deceased grantor, and was admissible against his successor in interest. West's Ann.Code Civ.Proc. §§ 1849–1853.

14. Evidence ⇐230(1)

A declaration against interest in favor of grantor's spouse would be admissible in evidence against grantor's successor in interest. West's Ann.Code Civ.Proc. §§ 1849–1853.

15. Husband and Wife ⇐249

Where life policy was paid for largely, if not completely, from community funds, policy was community property.

16. Appeal and Error ⇐837(1)

Upon review of judgment of nonsuit, even evidence which is legally inadmissible, whether objected to or not, if it is in record, is to be considered, if it is relevant, in favor of plaintiff.

17. Appeal and Error ⇐837(1)
Trial ⇐105(2)

Where daughter, in her action to set aside father's deed on ground that property was community property of father and incompetent mother, testified without objection that money for rebuilding house which had been destroyed by fire came from cashing community property life policy, though daughter admitted on cross-examination that she had not seen life insurance check cashed or disbursed, her testimony on direct examination would stand, and would be considered by Supreme Court in determining propriety of judgment of nonsuit.

18. Trial ⇐105(2)

Where daughter, in her action to set aside father's deed on ground that property was community property of father and incompetent mother, testified without objection in relation to proceeds of sale of home, which belonged to both spouses, that such proceeds went into father's separate property, though such testimony may have been weakened by cross-examination, it presented conflict which would have to be resolved by judgment, and judgment of nonsuit was improper.

19. Deeds ⇐211(4)

In action by daughter to set aside deceased father's deed on ground, inter alia, that defendants held confidential relationship toward grantor and that they obtained deed without consideration and by undue influence, in view of evidence that father was an elderly, almost illiterate person, and that defendants kept his books and advised him on his business and financial affairs, evidence was sufficient to establish that defendants were trustees by having assumed relationship of personal confidence. West's Ann.Civ.Code, § 2219.

20. Deeds ⇐211(4)

In action by daughter to set aside deceased father's deed on ground, inter alia, that defendants held confidential relationship toward grantor and that they obtained deed without consideration and by undue influence, in view of evidence that father was an elderly, semi-illiterate, and that defendants kept his books and advised him in his business and financial affairs, evidence was sufficient to establish prima facie case under rule that undue influence is presumed where trustee obtains an advantage. West's Ann.Civ.Code, § 2219.

21. Deeds ⇐196(3)

Undue influence upon grantor is presumed where trustee obtains an advantage.

22. Trial ⇐165

Presumptions which law affords are not available to party moving for and obtaining nonsuit. West's Ann.Civ.Code, § 1614.

23. Appeal and Error ⇐927(3)

Defendants, who obtained judgment of nonsuit against daughter seeking to vacate father's deed of land to defendants on ground, inter alia, of lack of consideration, were not entitled to presumption that written instrument is presumptive evidence of consideration; and, in any event, deed bore no revenue stamps. West's Ann.Civ. Code, § 1614.

24. Deeds ⇐78

Question of undue influence upon grantor is one to be decided on facts of each case.

25. Appeal and Error ⇐931(1)

If judgment for defendants were rendered by court in passing on weight of evidence, even though only evidence produced were that of plaintiffs, evidence would, on review, be viewed most favorably to defendants.

26. Appeal and Error ⇐1177(6)

Though court made findings and entered conclusions and judgment quieting title in cross-complainants, judgment could not take place of previously entered nonsuit and could not supply deficiencies of that proceeding; and in view of fact that trial court held no real trial on issues raised by cross-complaint and answer, and that trial court considered proceedings subsequent to nonsuit merely corollary thereto, upon reversal of judgment of nonsuit, judgment on cross-complaint would also be reversed. West's Ann.Code Civ.Proc. § 581d.

27. Judgment ⇐197

When granting of nonsuit was entered in minutes, it became a judgment. West's Ann.Code Civ.Proc. § 581d.

28. Trial ⇐388(3)

Defendants, who had obtained judgment of nonsuit, were not entitled to findings of fact on issues framed by complaint and answer; there would be no place for another judgment in so far as complaint and answer were concerned.

29. Dismissal and Nonsuit ⇐81(7)

A judgment of nonsuit may not be set aside except by same procedures available for setting aside any other judgment.

30. Pleading ⇐360(17)

Issues raised by cross-complaint and answer thereto remained after granting of dismissal of complaint.

31. Appeal and Error ⇐134(1)

Order granting summary judgment is not appealable.

32. Appeal and Error ⇐110

Order denying motion for new trial is not appealable.

Frank J. O'Brien, San Francisco, for appellants.

Vladimir Vucinich, Joseph A. Kiernan, San Francisco, for respondents.

DEVINE, Justice pro tem.

Olga Cullen is the administratrix of the estate of her deceased father, Luka Vujovich, and is guardian ad litem of her mother, an incompetent person. She is referred to herein as plaintiff, although the incompetent person herself also is a plaintiff, by her guardian. Plaintiff brought an action to set aside a deed made by her father on the grounds, first, that the property was community property, and that the deed by the single spouse, her father, was ineffective to convey title, and second, that the defendants held a confidential relationship towards the grantor and that they obtained the deed without consideration and by undue influence. By their answer, defendants generally denied these allegations and by cross-complaint, they alleged their ownership of the property and sought to have title quieted in them. The allegations of the cross-complaint, in turn, were met by general denial in answer to the cross-complaint. At the trial, upon conclusion of plaintiff's case, the court granted defendants' motion for nonsuit, granted a motion for summary judgment for cross-complainants, and granted their motion to reform the deed in question, which admittedly contained an error in description of the property.

[1–4] The first ground of appeal from the judgment of nonsuit is that no grounds were specified in defendants' motion. The grounds for nonsuit must be stated. Law-

less v. Calaway, 24 Cal.2d 81, 94, 147 P.2d 604. It is argued by respondents that the record shows that there was "argument" preceding the granting of the motion; that it must be inferred that the grounds were specified in the motion; that the defects in plaintiff's case were such that plaintiff could not have cured them even though they had been specifically stated; and that no motion to re-open was made between the time the motion for nonsuit was made and the time of the granting thereof. We cannot tell what specific grounds, if any, for the nonsuit were stated in the unreported argument, and because grounds not specified in a motion will be considered on appeal only if it is clear that the defect is one which could not have been remedied if it had been called to the attention of plaintiff by the motion, Lawless v. Calaway, supra, 24 Cal.2d at page 94, 147 P. 604, we believe the judgment of nonsuit must be reversed on this ground. The fact that plaintiff did not move to re-open does not help respondents in the absence of a showing that the asserted legal deficiencies of her cause were so described to her counsel on the motion for nonsuit that he could make the motion to re-open with a view to remedying, if possible, the stated inadequacies of his pleading or proof.

So far as the nonsuit is concerned, we might stop with the above, but we think that, the case being remanded, it is appropriate for us to observe that even if the grounds relied on by respondents on this appeal had been fully stated at the time of the motion for nonsuit and if plaintiff did not present any additional evidence, the judgment of nonsuit should not have been granted. This we do in part by way of giving an additional reason for our decision and in part for use at another trial.

[5] We proceed to a review of the evidence in the light of the law that the rules as to nonsuit are the same when a case is tried by the court as when it is tried by a jury. Szopieray v. West Berkeley, etc. Co., 194 Cal. 106, 109, 227 P. 720; Hale v. Safeway Stores, 129 Cal.App.2d 124, 131, 276 P.2d 118. However, we shall consider only the major items of claimed contributions of community property to the deeded estate.

[6–8] The mother of plaintiff and wife of decedent grantor had been adjudged incompetent since February 9, 1931, and was an incompetent person at all times relevant to this case. Thus, she was unable to dispose of any interest in the property of the community or to make any agreement with respect thereto, and if the property purportedly conveyed by the husband's deed to defendants was community property, it was ineffective to convey his spouse's interest, section 172a, Civil Code; although the disposition even of community property by a husband who has deceased since the conveyance is equivalent to a valid testamentary disposition of his interest therein, Britton v. Hammell, 4 Cal.2d 690, 52 P.2d 221.

[9–11] The land itself was acquired by the husband by inheritance from his brother, and was his separate property. If, however, improvements on the property were made from community property, they would not become separate property of the husband by his action alone, with no assent or agreement of his wife, Wheeland v. Rodgers, 20 Cal.2d 218, 222, 124 P.2d 816; Provost v. Provost, 102 Cal.App. 775, 780–781, 283 P. 842; Estate of Chandler's Estate, 112 Cal.App. 601, 604, 297 P.2d 636; Long v. Long, 88 Cal.App.2d 544, 548, 199 P.2d 47, and the wife was incompetent to make any agreement.

[12–14] Decedent received a pension from United States Steel Corporation, where he had worked for 30 or 35 years during all of which time he was married to Elena, now incompetent. The pension was community property. French v. French, 17 Cal.2d 775, 112 P.2d 235, 134 A.L.R. 366; Crossan v. Crossan, 35 Cal. App.2d 39, 94 P.2d 609. Plaintiff testified that this money "went into the land." When she was asked if she had knowledge of this herself she replied she had none except what her father told her. The statement "what he told (her)" was stricken upon a motion which was not accompanied by any stated reason, but the testimony that the pension went into the land remains in the record. Moreover, we believe it would not be hearsay (if that was the unrevealed basis of the motion to strike), be-

cause it would be a declaration against interest in favor of his spouse made by a deceased grantor, and thus admissible against his successor in interest. Sections 1849–1853, Code of Civ.Proc.; In re Estate of Hill, 167 Cal. 59, 65, 138 P. 690; Wright v. Best, 19 Cal.2d 368, 379, 121 P.2d 702.

[15–17] A life insurance policy was paid for largely, if not completely, it may be inferred, from community funds and, therefore, was community property. Union Mutual Life Ins. Co., v. Broderick, 196 Cal. 497, 238 P. 1034. This was paid up in 1943. In 1947, the house which had stood on the land was destroyed by fire, and was rebuilt by decedent in 1947. Plaintiff testified without objection that the money for rebuilding came from cashing the life insurance. Although she admitted on cross-examination that she did not see the life insurance check cashed nor disbursed, her testimony as given on direct examination stands, and here again, it may be that her conclusion thus testified to, is the result of statements made to her by her father. Even evidence which is legally inadmissible, whether objected to or not, if it is in the record is to be considered, if it is relevant, in favor of plaintiff on motion for nonsuit. Gregg v. Western Pacific Ry. Co., 193 Cal. 212, 216, 223 P. 553.

[18] The same holds true as to the proceeds of the sale of a home in San Francisco which belonged to both spouses. In presenting her case, plaintiff testified without objection that the proceeds went into the land. Although this may have been weakened by cross-examination nevertheless, a conflict remained which would have to be resolved by judgment.

[19–21] As to the second cause, the motion for nonsuit should have been denied. Decedent, an elderly man, was barely able to read or write. There was evidence that defendant Risto J. Spremo kept books for him and advised him in business affairs and that Mrs. Spremo had access to his safe deposit box. Plaintiff testified without objection that defendants "were (decedent's) complete advisors as to his finance and books." There was sufficient evidence that defendants were trustees by assuming a relationship of personal confidence. Section 2219, Civil Code; Estate of Rugani, 108 Cal.App.2d 624, 630, 239 P.2d 500. The deed was prepared by an attorney for defendants. It was not recorded until after decedent's death, and plaintiff was not told of the deed nor of the accident which caused her father's death until after he had died. A prima facie case had been established under the rule that undue influence is presumed where a trustee obtains an advantage. Cox v. Schnerr, 172 Cal. 371, 379, 156 P. 509.

[22–24] As to consideration, respondents cite section 1614 of the Civil Code which provides that a written instrument is presumptive evidence of consideration; but the presumptions which the law affords are not available to a party moving for and obtaining a nonsuit. Copeland v. Rabing, 110 Cal.App.2d 631, 636, 243 P.2d 119. Moreover, the deed bore no revenue stamps. The question of undue influence is one to be decided on the facts of each case. Sparks v. Sparks, 101 Cal.App.2d 129, 135, 225 P.2d 238. Nonsuit was improper.

[25–29] The next step to be considered is the judgment which followed. After a motion for new trial had been made, the court signed findings of fact, conclusions of law and judgment quieting title in cross-complainants. The findings state that the property was the separate property of decedent, that decedent conveyed to cross-complainant for good and adequate consideration and that he was not induced to convey by undue influence or fraud. If the judgment for the defendant were rendered by the court in passing on the weight of the evidence, even though the only evidence produced were that of the plaintiff, the evidence would, on review, be viewed most favorably to defendant. In re Estate of Jamison, 41 Cal.2d 1, 6, 256 P.2d 984. We cannot regard the judgment, however, as taking the place of the nonsuit and supplying the deficiencies of that proceeding. The granting of the nonsuit was entered in the minutes and became a judgment. Section 581d, Code of Civ.Proc.; McCol-

gan v. Jones Hubbard, etc., Co., 11 Cal.2d 243, 245, 78 P.2d 1010. Defendants, having obtained judgment of nonsuit, were not entitled to findings of fact on the issues framed by the complaint and the answer. Wood v. Ramond, 42 Cal. 643; City and County of San Francisco v. Brown, 153 Cal. 644, 96 P. 281. There is no place for another judgment in so far as complaint and answer are concerned. Finch v. Ekstrom, 115 Cal.App. 381, 1 P.2d 516. The judgment of nonsuit could not be set aside except by the same procedures available for setting aside any other judgment. Fisch & Co., Ltd. v. Superior Court, 6 Cal.App.2d 21, 43 P.2d 855.

[30] It is true that issues raised by a cross-complaint and the answer thereto remain after the granting of dismissal of the complaint, Pacific Finance Corp. v. Superior Court, 219 Cal. 179, 183, 25 P.2d 983, 90 A.L.R. 384, and even though the issues were substantially the same on the cross-complaint and answer thereto as on the complaint and answer, perhaps the whole case could have been reopened for trial on the cross-complaint.

However, no evidence whatever was produced in support of the cross-complaint, which asserted title in cross-complainants and alleged its claim of plaintiff and cross-defendant to be wrongful. The evidence adduced by plaintiff on the complaint was not before the court at this point. No evidence, not even the permissible conclusion as to ownership, was offered, save certain testimony as to misdescription in the deed. It seems clear that once the judgment of nonsuit was granted, whatever followed was deemed merely corollary thereto, for when the court made the order for summary judgment, an order which though improper, never was set aside, the court showed its conclusion to be that there were no triable issues.

[31, 32] It may well be that the complaint should include a cause for reimbursement of the asserted unauthorized disposition of community property. See, Dunn v. Mullan, 211 Cal. 583, 592, 296 P. 604, 77 A.L.R. 1015; In re Estate of Turner, 35 Cal.App.2d 576, 96 P.2d 363. There is an appeal from the orders made in the case of which there were two. The first was the order granting summary judgment, which is not appealable, Integral Land Corp. v. Anderson, 62 Cal.App.2d 770, 145 P.2d 364, and the second, an order denying a motion for new trial, which is also non-appealable. Hughes v. De Mund, 195 Cal. 242, 247, 233 P. 94.

The appeal from the orders granting summary judgment and denying new trial is dismissed. Judgment of nonsuit and judgment in favor of cross-complainants reversed. Appellants to recover costs on appeal.

NOURSE, P. J., and DOOLING, J., concur.



142 Cal.App.2d 467

M. ALLEN, Plaintiff,

v.

Mervin L. GARDNER and Continental Casualty Co., Defendants,

Mervin L. Gardner, Defendant, Cross-Complainant and Respondent,

E. K. Ferguson, Jr., as Administrator of the Estate of E. K. Ferguson, E. K. Ferguson, Jr., and Reed C. Ferguson, Copartners, doing business under the fictitious name and style of Ferguson Bros., a copartnership, Cross-Defendants and Respondents,

George Finster, Receiver and Respondent,

Brown and Smith, Intervener and Appellant.

Civ. 16782.

District Court of Appeal, First District, Division 1, California.

June 22, 1956.

Appeal from an order of the Superior Court, County of Alameda, Marvin Sherwin, J., modifying a previous order directing a receiver to take possession of certain property to satisfy a judgment and claims of other creditors. The District

Court of Appeal, Bray, J., held that where ground for appeal from order in question was that it established improper priority between judgment creditor and other creditors of judgment debtor, and parties at oral argument stipulated that the order did not establish priorities but that such question was still to be determined by the Superior Court, the order would be interpreted in accordance with such stipulation and affirmed.

Order affirmed.

1. Stipulations ⇐14(12)

Where ground for appeal from an order modifying a previous order directing a receiver to take possession of certain property to satisfy a judgment and claims of other creditors was that such order established improper priority between judgment creditor and other creditors of a judgment debtor, and parties at oral argument stipulated that order in question did not establish priorities but that such question was still to be determined by Superior Court, the order would be interpreted by District Court of Appeal in accordance with such stipulation and would be affirmed.

2. Costs ⇐233

Where on appeal a stipulation was entered into whereby a certain order in question was determined to leave open a question which was the ground for the appeal, in the interest of justice the District Court of Appeal would order each party to bear his own costs on affirmance. West's Ann. Rules on Appeal, rule 26(a).

Brown & Smith, Jacqueline Taber, Oakland, for appellant.

Royal A. Stewart, Richard W. Horton, Reno, Arguello & Giometti, San Francisco, for respondent Mervin L. Gardner.

Eugene K. Lawlor, Oakland, for respondent E. K. Ferguson, Jr.

Alden Ames, Redwood City, for respondent George Finster.

BRAY, Justice.

This appeal by intervener, appellant in propria persona, is from an order of the superior court "Memorandum Decision Order of Court Amending Original Order Appointing Receiver" dated February 3, 1955, and signed March 2, 1955, modifying a previous order instructing the receiver appointed to take possession of the property of cross-defendants to satisfy a judgment, see Allen v. Gardner, 126 Cal.App.2d 335, 272 P.2d 99, in favor of cross-complainant and claims of other creditors of cross-defendants.

The grounds of the appeal are that the modifying order improperly established priorities as between the judgment creditor (claimed by appellant to be a creditor only of the individual partners and not of the partnership) and creditors of the partnership.

[1] At the oral argument, the parties stipulated that said modifying order does not establish priorities of any kind and that the question of priorities is still to be determined by the superior court, including the question of whether or not said judgment is on an equality with, ahead of, or behind, the claims of any other creditors. Pursuant to said stipulation, said order is hereby interpreted as above expressed.

[2] The order is affirmed. In the interests of justice, under Rule 26(a), Rules on Appeal, each party shall bear its own costs.

PETERS, P. J., and FRED B. WOOD, J., concur.

142 Cal.App.2d 534

Kenneth D. HOLLAND and Sue Holland, Plaintiffs and Respondents,

v.

Beth PADDOCK, also known as Beth Cummer, Defendant and Appellant.

Beth PADDOCK, also known as Beth Paddock Cummer, Plaintiff and Appellant,

v.

Kenneth D. HOLLAND and Sue Holland, Defendants and Respondents.

Civ. 21419.

District Court of Appeal, Second District, Division 1, California.

June 26, 1956.

Action, commenced in municipal court to recover on installment note, wherein defendants filed cross-complaint, was transferred to superior court and consolidated with action commenced therein by defendants in action on note against plaintiff in that action for declaratory relief. From a judgment of the Superior Court of Los Angeles County, Joseph W. Vickers, J., and from order denying her motion for new trial, plaintiff in action on note appealed. The District Court of Appeal, Fourt, J., held, inter relia, that holder, having refused tender of amount then due on installment note, could not claim attorney's fees and costs in action on note.

Judgment affirmed and appeal from order denying motion for new trial dismissed.

1. Bills and Notes ⇐129(2)

Option under acceleration clause of installment note to declare all unpaid principal immediately due and payable upon default in payment of principal or interest must be exercised within a reasonable time and was waived by holder's failure to exercise option until approximately 11 months after last payment of monthly installments on note.

2. Courts ⇐169(8)

Declaratory Judgment ⇐316

Complaint, seeking a declaration as to whether charges made by one of the plaintiffs for attorney's fees and expenses were reasonable, whether defendant was liable for such fees and expenses, and whether plaintiffs were liable for any of the items claimed in statement for more than $3,000 allegedly due defendant from plaintiffs, stated a cause of action for declaratory relief, and defendant's waiver and offer of judgment that plaintiffs were not indebted to her for any part of claim contained in such statement could not deprive court of jurisdiction to render judgment on such claim in favor of plaintiffs.

3. Bills and Notes ⇐534

Where, at time holder first attempted to exercise option under acceleration clause of installment note and demanded payment of note in full, all installments then due on note had been paid by setting off against them holder's indebtedness to makers for attorney's fees and expenses, and holder rejected tender of all sums due on note thereafter made by makers and informed makers that she would accept no payments except in full without credit for attorney's fees and expenses due makers, holder, having refused such tender, could not claim attorney's fees and costs in subsequent action on note, though note expressly provided for attorney's fee. West's Ann.Civ. Code, § 1504.

4. Costs ⇐42(1)

Interest ⇐50

After rejection of a tender made in good faith, creditor loses his right to collect further interest, costs and attorney's fees. West's Ann.Civ.Code, § 1504.

5. Declaratory Judgment ⇐347

In consolidated actions, in which holder sought to recover on installment note all unpaid principal and attorney's fee and makers sought declaratory judgment determining whether charges made by one of the makers for legal services and expenses were reasonable, whether holder was liable for such charges and whether makers were liable for any of the items claimed in statement for money allegedly due holder from makers in addition to balance unpaid on note, the evidence supported findings in favor of makers and such findings supported judgment.

6. Appeal and Error ⇨110

Appeal would not lie from order denying motion for new trial in consolidated actions for declaratory relief and to recover on a note.

Erb, French, Picone & Griffin, by John A. Griffin, Beverly Hills, for appellant Paddock.

Martin, Hahn & Camusi, Los Angeles, for respondents Holland.

FOURT, Justice.

This is an appeal from a single judgment rendered in two cases involving substantially the same facts, the cases having been consolidated for trial by order of the court upon stipulation of the parties.

Apparently the parties hereto had, for several years, been close personal friends engaging in social activities together and Kenneth Holland had also been employed by Beth Paddock as her attorney.

A fair résumé of the facts is hereinafter set forth. In December, 1950, Beth Paddock called Kenneth Holland in Beverly Hills from her home in Palm Springs and asked him to represent a friend of hers who had been charged with a violation of section 480, Vehicle Code (felony hit and run driving), and stated that she would pay all fees and expenses. Mr. Holland went to Palm Springs and investigated the matter and agreed to represent the person charged with the offense for $500, if a plea of guilty was made, or if the cause was submitted on the transcript of the preliminary hearing. Beth Paddock paid $250 on the account at the time. After court appearances and two trips to Palm Springs the defendant in the criminal case was found guilty and granted straight probation. A settlement of the personal injury claim in connection with the same matter was arranged for by Mr. Holland at a later date and for this service there was an added charge of $250. A charge of $150 was made for travel and telephone expenses.

In another matter, Beth Paddock employed Mr. Holland to collect certain rent and damages from a tenant of hers. Mr. Holland prepared a complaint against the tenant wherein $1,000 damages and $125 rent was sought. Mr. Holland had conferences with the attorney for the tenant and arranged for and had a joint inspection of the house in question and viewed the alleged damaged property. Mr. Holland advised Beth Paddock, after such view, that in his opinion she could only collect one month's rent and $200 or $300 damages, and that he could probably settle the case for that amount.

Beth Paddock thereupon became quite wrathy toward Mr. Holland and accused him of favoring the tenant, being neglectful and incompetent. Mr. Holland's charges for his services in that matter were $150 for fees and $9.50 for costs.

On March 1, 1951, Kenneth Holland and Sue Holland made a promissory note in favor of Beth Paddock in the sum of $2,000, payable in installments of $50 per month, commencing April 1, 1951, and continuing until paid, the installments to be applied against the principal and interest in the sum of 5% per annum. The note provided that in the event a default occurred, the holder could, at her option, declare all unpaid principal immediately due and payable, and further that in the event an action were commenced to collect the note, the signers thereof would pay a reasonable attorney's fee. The plaintiffs paid $50 during each of the months of April, May, June and July of 1951.

On October 1, 1951, Beth Paddock gave Mr. Holland a check for $250, the balance of his fee in the criminal case. The Hollands made no further payments on the promissory note at that time because Mr. Holland had services and expenses to offset and he wanted to wait before billing her to ascertain if the defendant in the criminal case would pay anything on the account.

In June, 1952, Beth Paddock wrote Mr. Holland demanding full payment of the note. Mr. Holland replied that he would like to apply his fees and expenses against the note. Beth Paddock replied that she demanded full payment. On September 19, 1952, Mr. Holland wrote Beth Paddock wherein he set forth in detail the past re-

lationships and transactions between the parties and then enclosed an itemized statement for services and expenses and a cashier's check for $140.50 which, with the offset, brought the payment on the note up to date. Beth Paddock refused to cash the check or apply it on the note, and again demanded full payment.

On March 17, 1953, Beth Paddock's then attorney wrote to Mr. Holland enclosing a statement for money purportedly due Beth Paddock from the Hollands totaling $3,611.-05, not including the note.

On Friday, May 21, 1954, Beth Paddock filed an action on the promissory note in the Municipal Court, Beverly Hills Judicial District, against the Hollands, and on Monday, May 24, 1954, the Hollands filed an action in the Superior Court in declaratory relief. The action in declaratory relief set forth the promissory note and matters relating to the previous employment. The Hollands sought a declaration whether his charges for fees and expenses were reasonable; whether Beth Paddock was responsible for the same and whether the Hollands were liable for any of the items claimed in Beth Paddock's statement of March 17, 1953, for $3,611.05.

The Hollands filed a cross-complaint in the municipal court action identical with their superior court complaint which brought the case into the superior court. Beth Paddock filed an offer to compromise wherein she offered to allow the court to adjudicate that the Hollands were not indebted to her for any part of the $3,611.05.

At the time the matter came on for trial the following was stated in open court:

"The Court: * * * There is no question about the jurisdiction of the Court and its right to proceed with the Superior Court case, the one that originated here. As counsel and the Court have discussed, there is some question about the right to proceed with the Municipal Court case which was transferred to this court. But, as I understand it, you both wish now to stipulate that these two cases be consolidated for all purposes and be tried as one case; is that correct?

"Mr. Griffin (Counsel for Defendant): That's correct, your Honor.

"Mr. Camusi (Counsel for Plaintiffs): That's correct, your Honor.

"The Court: Then there will be but one judgment and we need not concern ourselves so much about the pleadings, since apparently the parties agree that the $2,000 note was executed for good and sufficient consideration in March of 1951, that some cash has been paid upon it, and the only question between the parties is as to whether or not Mr. Holland, as attorney for Mrs. Paddock, rendered services at her instance and request for others and also for her, for which he is entitled to a credit of some $559.50.

"That is substantially correct?

"Mr. Camusi: And, your Honor, with respect to this other bill of $3,611, our position would be if Mrs. Paddock stipulates that there was never any obligation, then there is no issue of that; otherwise we would want to litigate that matter.

"The Court: Well, I gathered from what Mr. Griffin says that Mrs. Paddock does not desire to press that and makes no claim for it in this action.

"Mr. Griffin: That's right, your Honor.

"The Court: Then we will not pay any attention to it, the same as though it was not in the pleading. As a matter of fact, I think it might be well if that portion was stricken.

"Mr. Camusi: We feel we would like judgment on that matter, your Honor."

Appellant, Beth Paddock, contends that the complaint for declaratory relief fails to state facts sufficient to constitute a cause of action for the reason that the Hollands had an adequate remedy at law because all of said matters constituted accrued causes of action.

[1] At the time the suit was filed several monthly payments on the note were not yet due. In June, 1952, when Beth Paddock demanded full payment, the Hollands had

made no payments on the note since July, 1951, a period of about eleven months. It would appear that she had waived her rights to declare the whole amount due by using the acceleration clause, by reason of her failure to act reasonably and promptly. It was held in Kinsel v. Ballou, 151 Cal. 754, 91 P. 620, that an option to declare the entire principal due on default of a payment of principal or interest must be exercised within a reasonable time.

The court in Columbia Pictures Corp. v. De Toth, 26 Cal.2d 753, at page 761, 161 P.2d 217, 221, 162 A.L.R. 747, said: "The remedies provided by the statute are cumulative and declaratory relief may be asked alone or with other relief, Code Civ.Proc., §§ 1060–1062. Hence a plaintiff's right to proceed is not barred by the fact that the contract sued upon may have already been breached and that traditional or statutory * * * alternative remedies are available."

[2] We are of the opinion that the complaint stated a cause of action in declaratory relief and that Beth Paddock's waiver and offer of judgment in reference to the $3,611.05, claim could not deprive the court of jurisdiction. The Hollands were obviously entitled to a judgment on the claim, and only the superior court could render such a judgment.

[3, 4] Beth Paddock's contention that she was entitled to attorney's fees and costs on the note is also without merit. She first demanded payment in full in June, 1952, but, crediting the Hollands with the setoff, the note was paid through June, 1952. In September, 1952, the Hollands tendered all sums due on the note, namely the sum of $140.50, and offered to pay all future sums due. This tender was rejected by Beth Paddock and she informed the Hollands that she would accept no payments except in full without credits. Having refused the tender, she cannot now claim attorney's fees and costs. After rejection of a tender made in good faith the creditor loses his right to collect further interest, costs and attorney's fees. Civ.Code, § 1504; 8 Cal.Jur.2d 552.

[5] Beth Paddock contends that the court erred in making and entering its findings of fact and conclusions of law under the circumstances. Suffice it to say that although the evidence was conflicting, the court decided the matter in the Hollands' favor. There was ample evidence to support the findings, and the findings support the judgment.

We are of the opinion, for the reasons heretofore set forth, that the judgment should be affirmed.

[6] It is the order of the court that the judgment be, and the same is hereby affirmed. The appeal from the order denying the motion for a new trial, being a non-appealable order, is hereby dismissed.

WHITE, P. J., and DORAN, J., concur.



142 Cal.App.2d 263

KELLEY KAR COMPANY, a corporation, Plaintiff and Respondent,

v.

MARYLAND CASUALTY COMPANY, a corporation; James D. Holland; Farmers National Bank of Erick, Oklahoma, a corporation; Doe One, Two, Three, Four, Defendants.

Maryland Casualty Company, a corporation, Appellant.

Civ. 21618.

District Court of Appeal, Second District, Division 2, California.

June 15, 1956.

Action, wherein automobile seller sought possession of automobile which it had sold on a conditional sales contract to one who had given as partial consideration therefor funds which he had allegedly stolen from bank and another automobile purchased with stolen funds, and wherein subrogee of bank sought to recover from automobile seller the value of such automobile and identifiable stolen money. The Superior Court, Los Angeles County, Lloyd S.

Nix, J., entered judgment awarding possession of automobile to seller, and defendant appealed. The District Court of Appeal, Moore, P. J., held that where automobile seller was in good faith at time of making sale on conditional sales contract, seller was entitled to act on face of contract regardless of any information that it later acquired, and when buyer defaulted on contract, seller was within its rights in foreclosing on contract and repossessing automobile.

Judgment affirmed.

1. Money Received ⇐9

One who receives stolen money in good faith and for good consideration will prevail over unfortunate victim of the thief. West's Ann.Civ.Code, § 1744.

2. Evidence ⇐5(2)

It is common knowledge that not every businessman can delve into how or where or with what funds a chattel offered him for purchase was acquired. West's Ann. Civ.Code, § 1744.

3. Sales ⇐234(1)

Even though seller purchased chattel with stolen funds, so long as buyer bought it in good faith and exercised all precautions as to title that reasonable man would exercise and so long as he was not put on notice of seller's purchase with stolen funds by an unreasonably low price, it must be deemed that sale was valid and in normal course of business. West's Ann.Civ.Code, § 1744.

4. Sales ⇐234(1)

Only bad faith on part of buyer of chattel purchased by seller with stolen money can deprive buyer of ownership thereof. West's Ann.Civ.Code, § 1744.

5. Sales ⇐479(17)

Where automobile seller was in good faith at time of making sale on conditional sales contract and had no knowledge that buyer gave, as part of consideration, travelers' checks and automobile which buyer had purchased with stolen funds, from that point forward, seller was entitled to act on face of contract regardless of any information that it later acquired, and when buyer defaulted on contract, seller was within its rights in foreclosing on contract and repossessing automobile and was not liable to subrogee of bank from which funds were stolen for identifiable stolen money and value of automobile given as part of consideration, in view of fact that bank was bona fide purchaser of automobile and holder in due course of travelers checks. West's Ann.Civ.Code, §§ 1744, 3133, 3138, 3140.

Everett H. Smith, Los Angeles, for appellant.

R. F. Neuman, Allan M. Carson, Los Angeles, for respondent.

MOORE, Presiding Justice.

The judgment herein awarded the Kelley Kar Company possession of a Mercury automobile which it had sold on a conditional sale contract. The vehicle was allegedly purchased with money stolen from an Oklahoma bank and the trade-in of a Buick automobile. Appellant, insurer of the bank and now its subrogee by virtue of having paid the loss, demands the value of the Buick which was traded in on the Mercury, and the identifiable stolen money in order to recoup its loss as insurer of the bank.

On July 29, 1954, one James D. Holland robbed the Farmers National Bank of Erick, Oklahoma, taking therefrom $22,158. On August 2, 1954, Holland purchased from respondent a Mercury. He paid cash $1,000.80 and turned in a Buick which evidently had been purchased with the stolen funds, leaving due on the conditional sale contract for the Mercury a balance of $1,582.80. On or about August 4, 1954, the Federal Bureau of Investigation impounded the Mercury and $800 of the purchase price as being identifiable money from the bank robbery. Thereafter, respondent, having declared Holland's default on the conditional sale contract, asserted claim to the Mercury and the $800. Appellant also claimed them. From the judgment in favor of respondent, Maryland Casualty Company appeals, demanding (1) return of $800 as identifiable loot money; (2) return of the

Buick automobile which appellant contends was purchased with the stolen money.

[1] One who receives stolen money in good faith and for good consideration will prevail over the unfortunate victim of the thief. State National Bank v. United States, 114 U.S. 401, 5 S.Ct. 888, 29 L.Ed. 149; 25 L.R.A.,N.S., 632; 36 Am.Jur. 460, 461, sec. 6, note 6; Porter v. Beha, D.C., 8 F.2d 65, 75.

[2–4] Appellant contends that one who purchases stolen property has no greater right than he who stole the property and cites the case of Hilliard v. Bank of America, 102 Cal.App.2d 730, 228 P.2d 327. That case is distinguishable. It involved a stolen vehicle. Of course no title of a stolen chattel can pass from the thief. However, the instant action does not involve a stolen chattel. The Buick automobile taken by respondent in trade was not stolen by Holland. It was purchased by him with stolen funds. Section 1744 of the Civil Code provides: "Where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith, for value, and without notice of the seller's defect of title." It is common knowledge that not every business man can delve into the problem of how or where or with what funds a chattel offered him for purchase was acquired. So long as he buys in good faith and exercises all the precautions as to title that the reasonable man would exercise and so long as he is not put on notice by an unusually low price, it must be deemed that the transaction was valid and in the normal course of business. Only bad faith on the part of such purchaser of a chattel purchased with stolen money can deprive him of ownership of the chattel.

Of course, if such purchaser should have paid an unreasonably low price for the article acquired, or if he was put on such notice as a reasonably prudent man would have interpreted to be tantamount to a declaration by the thief that the chattel had been purchased with stolen money, he cannot retain the movable against the innocent victim of the robber. But such is not the situation at bar. Respondent paid a substantial value for the Buick.

[5] Appellant contends that respondent declared the conditional sale contract delinquent after the first payment was defaulted, but after knowledge had been gained of its purchase with stolen funds. The law does not require a man to sit idly by and not protect his investments. Respondent was within its rights to foreclose the contract upon its becoming delinquent. Its contract had been entered into in good faith and it had parted with ample consideration for the Buick. From that point forward, respondent was entitled to act on the face of the contract regardless of any information that might have come to its attention at a later date.

Appellant contends that stolen identifiable money must be returned, citing Baxter v. King, 81 Cal.App. 192, 253 P. 172. In the Baxter case, the money which belonged to a partnership of which Mrs. King's deceased husband had been a member, was allegedly converted by his widow; whereupon the administratrix of the King estate sued the widow, contending that she had represented herself as the administratrix of the estate of King and had acquired certain assets of the partnership which belonged to the plaintiff as the sole surviving partner. It was merely an alleged fraudulent conversion. No fact involved is concerned with the right to recover from one who in due course acquired a chattel that had been purchased with stolen money.

Los Angeles Drug Co. v. Superior Court, 8 Cal.2d 71, 63 P.2d 1124, involved a conspiracy to convert goods to money. Knapp v. Lyman, 44 Cal.App. 283, 186 P. 385, involved a conspiracy where a bad check was given for title to a car. The car was then delivered to a supposed bona fide purchaser. The court there held that mere delivery was given to the bona fide purchaser. No title was passed: merely a sales receipt and the car was far under-priced. It was not a purchase in good faith. Neither is McKinley v. Smith, 128 Cal.App. 591, 17 P.2d 1032, applicable. An assignment of stolen money was made to the thief's attorney, the latter having had knowledge of the robbery. Furthermore, the serial numbers on

the money rendered it identifiable. The court correctly found that the attorney did not take the money in good faith, having knowledge of the robbery and from where the money came.

Appellant asserts that it is the subrogee of the insured bank and therefore is entitled to all the rights and privileges of such bank. However, its demands against respondent, a bona fide purchaser, in due course, of the Buick car which the thief later exchanged for the Mercury cannot prevail in view of the quoted principle and cited authorities. There is absolutely no showing of bad faith or of previous knowledge on the part of respondent; it was holder in due course of the traveler's checks and a bona fide purchaser of the Buick car. Civil Code, secs. 3133, 3138, 3140.

Judgment affirmed.

FOX and ASHBURN, JJ., concur.



142 Cal.App.2d 360

Norman CHESIN, Petitioner,

v.

The SUPERIOR COURT OF The State of CALIFORNIA, IN AND FOR the COUNTY OF LOS ANGELES, Respondent,

Margie Logan, Zetta Wright, James Wright, S. E. Wright, Jr., S. E. Wright, Sr., Mildred Johnson, Effie May Bell, Myrtle Little, Chester Wright, Eugene Wright and Margie Logan, as Guardian ad litem of Opal Wright and Roscoe Wright, Minors, Real Parties in Interest.

Civ. 21801.

District Court of Appeal, Second District, Division 1, California.

June 18, 1956.

Original petition for writ of prohibition to prevent superior court from proceeding further in action against petitioner for wrongful death, or, in the alternative, for writ of mandate to compel superior court to quash service of summons in such action made upon petitioner in another state. The District Court of Appeal, Nourse, J. pro tem., held that under West's Ann.Vehicle Code, §§ 404.1, 404.2, jurisdiction to render personal judgment against a former resident of state in action for wrongful death allegedly resulting from negligent operation of automobile by him in the state while domiciled therein could not be predicated on service of summons on him in another state, where cause of action accrued and former resident had ceased to be a resident of or domiciled in the state before such statutes became effective.

Peremptory writ of mandate issued requiring respondent court to quash service of summons.

1. Mandamus ⇐34

Petition for writ of mandate would lie to compel superior court to quash service of summons made upon nonresident defendant in another state. West's Ann. Code Civ.Proc., §§ 412, 413, 416, 416.3, 417.

2. Automobiles ⇐235

Jurisdiction to render personal judgment against a former resident of state for wrongful death allegedly resulting from negligent operation of automobile in the state while domiciled therein could not be predicated on personal service of summons and complaint on him outside the state under statutes providing that acceptance by a resident of state of certificate of ownership or registration of automobile or operator's or chauffeur's license should constitute consent to such service outside the state, where cause of action accrued and defendant ceased to be a resident of or domiciled in state prior to effective date of such statutes. West's Ann.Code Civ. Proc., § 417; West's Ann.Vehicle Code, §§ 404.1–404.4.

3. Automobiles ⇐235

Statute providing that acceptance by a resident of certificate of ownership or registration of automobile should constitute consent by such person that personal serv-

ice of summons might be made upon him in any action brought in courts of the state upon a cause of action arising in the state out of ownership or operation of automobile, wherever such owner or registrant might be found and regardless of whether he was then a resident of state, was not retrospective in operation so as to make acceptance of certificate of ownership or registration before enactment of statute a consent to such service of summons upon owner or registrant of automobile. West's Ann.Vehicle Code, §§ 404.1, 404.2.

4. Statutes ⇐263

Unless the wording of a statute clearly indicates intent of legislature that it should be retrospective in operation, the statute will not be so construed.

5. Automobiles ⇐235

Under statute providing acceptance by resident of state of certificate of ownership or registration of an automobile or renewal thereof should constitute consent by such person that personal service of summons might be made upon him in any action brought in courts of state upon a cause of action arising in the state out of ownership or operation of automobile, wherever he might be found and regardless of whether he was then a resident of state, renewal by a former resident of the registration of his automobile in the state after he had ceased to be a resident thereof would not constitute a consent by him to service of process outside the state, since statute by its very terms provides that it is only the acceptance by a resident of the state of a certificate of ownership or registration or renewal thereof which has such effect. West's Ann.Vehicle Code, § 404.1.

6. Automobiles ⇐235

Failure to surrender operator's license upon ceasing to be a resident of state would not constitute consent by licensee to service of process outside the state, since by the very wording of statute, it was only the retention of such license by a resident of the state that would operate as his consent to service of process outside the state. West's Ann.Vehicle Code, § 404.2.

7. Automobiles ⇐235

Statutes providing that acceptance by a resident of certificate of ownership or registration of automobile or operator's or chauffeur's license should constitute consent by such person to personal service of summons outside the state applied only to persons who were residents of state at time statutes became effective and not to former residents of state who, at time statutes became effective, were domiciled in and residents of other jurisdictions. West' Ann. Vehicle Code, §§ 404.1–404.4.

8. Automobiles ⇐235

Power of the legislature to provide for service of summons outside the state on any person domiciled within the state at time cause of action arose against him would not justify construing as expressly so providing, statutes which expressly based the right to obtain jurisdiction in personam by service of process outside the state upon consent to such service manifested by acceptance of certificate of ownership or registration or operator's or chauffeur's license, particularly in view of statute limiting power of court to render personal judgment against a person served by publication to persons who were residents of state at time of commencement of action or at time of service. West's Ann.Code Civ.Proc., §§ 412, 413, 416, 417; West's Ann.Vehicle Code, §§ 404.1, 404.2.

Hunter & Liljestrom, C. R. Liljestrom, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, Los Angeles, David Mix, Deputy County Counsel, Granda Hills, Thomas H. Carver, Deputy County Counsel, Los Angeles, for respondent.

William B. Rodiger, Los Angeles, for real parties in interest.

NOURSE, Justice pro tem.

[1] By his original petition filed herein, petitioner sought a writ of prohibition to prevent the respondent court from taking any further proceedings in an action for wrongful death in which petitioner is the defendant. By amendment to his petition,

he seeks in the alternative a writ of mandate to compel the superior court to quash the service upon him of the summons in the subject action, the service of that summons having been made upon him in the state of Arizona. Petitioner's remedy, if any, is a writ of mandate, Code Civ.Proc., sec. 416.3 as enacted in 1955.

The relevant facts, as established by the record before us, are: In March, 1954, petitioner was a resident of and domiciled in the county of Los Angeles, state of California. On the 22nd of March of that year, while driving an automobile owned by him and registered in this state in his name on a public highway in said county, he was involved in an accident in which one Zetta Wright sustained injuries which resulted in her death. On or about the 15th of September, 1954, petitioner became a resident of and domiciled in the city of Tucson, state of Arizona, and has at all times since been a resident of and domiciled in Arizona. On the 21st of March, 1955, the heirs of Zetta Wright (real parties in interest here) commenced the subject action against petitioner. By their complaint in that action they alleged the occurrence of the accident on March 22, 1954, and alleged that that accident and the death of Zetta Wright were proximately caused by the negligence of petitioner herein. The summons in this action was served upon petitioner on March 16, 1956, in the city of Tucson, state of Arizona.

The sole question presented for determination here is: Did respondent court obtain jurisdiction of the person of petitioner by the service upon him in Arizona of the summons and complaint in the subject action?

The answer to this question depends upon the interpretation to be placed upon sections 412, 413, 416, and 417 of the Code of Civil Procedure, and sections 404.1, 404.2, and 404.3 of the Vehicle Code of this state.

Section 412 of the Code of Civil Procedure provides, so far as relevant here, that where a person on whom service is to be made resides out of the state, that service may be made upon him by the publication of the summons. Section 413 provides that where the residence of a nonresident is known, the court must direct a copy of the summons and complaint to be forthwith deposited in the post office, directed to him at his place of residence, and that personal service outside of the state is equivalent to publication and deposit in the post office. Section 416 provides that from the time of service the court is deemed to have acquired jurisdiction of the person of the party served.[1]

Prior to 1940 it had been uniformly held that the courts of this state could not acquire jurisdiction of the person of a defendant by the service of summons by publication, or by actual service upon him outside of the state of California, Frey & Horgan Corp. v. Superior Court, 5 Cal.2d 401, 55 P.2d 203; De la Montanya v. De la Montanya, 112 Cal. 101, 44 P. 345, 32 L.R.A. 82; Merchants' Nat. Union v. Buisseret, 15 Cal.App. 444, 115 P. 58; Pinon v. Pollard, 69 Cal.App.2d 129, 158 P.2d 254.[2] These decisions were founded upon the decision of the Supreme Court of the United States in Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565.

In 1940 the Supreme Court of the United States handed down its decision in Milliken v. Meyer, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278. In this decision the court limited the application of the rule laid down in Pennoyer v. Neff, and in applying a statute of the state of Wyoming similar in effect to sections 412 and 413 of the Code of Civil Procedure of this state, held that the courts of Wyoming obtained jurisdiction to render a personal judgment against the defendant, who was domiciled in Wyoming at the time the action against him was commenced, but who was a resident of Colorado when served with process in that state.

While in Milliken v. Meyer, Meyer was a domiciliary of Wyoming at the time of

1. These sections have remained substantially unchanged insofar as the questions here are concerned, since their enactment in 1872.

2. This case was decided in 1945, but the court refused to apply the decision of the Supreme Court of the United States in Milliken v. Meyer, supra.

the commencement of the action, the language used by the Supreme Court of the United States was so broad that it might be interpreted as applying to a case where the defendant was domiciled in the state where the action was commenced at the time the cause of action arose, although he was not so domiciled at the time of the commencement of the action.

In order to clarify and make definite the rule in California, and to make it clear that residence in the state at the time the cause of action arose did not make a resident of the state subject to service of process outside the state in an action commenced after he left the state even though California was the state of his domicile, the State Bar of California sponsored,[3] and in 1951 the Legislature enacted, section 417, Code of Civil Procedure. This section in substance provides that a court of this state shall only have power to render a personal judgment against a person served by publication in accordance with sections 412 and 413, Code of Civil Procedure, if he is personally served with a copy of the summons and complaint, and *"was a resident of this State at the time of the commencement of the action or at the time of service."* [Emphasis added.] This was the state of the law at the time petitioner ceased to be a resident or domiciliary of this state, and this was the law at the time of the commencement of the subject action.

In 1935 the Legislature enacted section 404 of the Vehicle Code of this state, which provides for substituted service upon a nonresident of the state against whom a cause of action has arisen by reason of his operation of a motor vehicle upon the highways of this state.

After the enactment of section 417, Code of Civil Procedure, it became apparent that a resident of this state who left the state after a cause of action had arisen against him because of his negligent operation of an automobile upon the highways of the state, but before any action was commenced against him, was in a more advantageous position than a nonresident, inasmuch as he was not, but a nonresident driver was, subject to service of process outside the state. To remedy this situation, the State Bar sponsored, and the Legislature in 1955 enacted, sections 404.1 through 404.4, both inclusive, of the Vehicle Code.[4]

It is upon the basis of the provisions of sections 404.1 and 404.2, Vehicle Code, that respondent and the real parties in interest respondent here, contend that the service upon petitioner in Arizona of the summons and complaint in the subject action gave the respondent court jurisdiction of petitioner's person.

[2] Keeping in mind that at the time the accident in question occurred,[5] and that at the time petitioner left the state of California and ceased to be domiciled therein or a resident thereof, he did not, by registering his automobile in this state or by obtaining or retaining a license to drive an automobile in this state, give any consent that process might be served upon him outside the boundaries of the state, a reading of the sections of the Vehicle Code in question makes it evident that they do not furnish any basis upon which jurisdiction of the person of the defendant may be acquired by service of process upon him outside of California.

[3, 4] Section 404.1 provides that the acceptance by *a resident of this state* of a certificate of ownership or a certificate of registration of any motor vehicle or a renewal thereof shall constitute a consent by such person that personal service of summons may be made upon him at any place "whether or not he is then a resident of this State." Certainly the section does not purport to be retrospective, so as to make the acceptance of registration before the enactment of the statute a consent to the service of process upon the owner or registrant of the automobile; so we need not consider whether such a retrospective

3. See report of the State Bar Committee for the Administration of Justice, 23 State Bar J. 196, 25 State Bar J. 287; and Allen v. Superior Court, 41 Cal.2d 306, 313, 259 P.2d 905.

4. See 30 State Bar J. 304, 305.

5. We presume for the purposes of this decision that petitioner had obeyed the law and held a California driver's license at the time of the accident in question.

provision would be constitutional. Unless the wording of a statute clearly indicates the intent of the Legislature that it should be retrospective in operation, the courts will not so construe it 11 Cal.Jur.2d sec. 225, p. 643; Pignaz v. Burnett, 119 Cal. 157, 160, 51 P. 48; Aetna Casualty & Surety Co. v. Industrial Accident Comm., 30 Cal.2d 388, 393, 182 P.2d 159.[6]

[5] The record here does not negative the fact that after he left the state petitioner renewed in this state the registration of his automobile; but if we assume that he did so, still that act would not constitute a consent by him that he might be served with process outside the state, for by the very wording of the section it is only the acceptance "by a resident of this State" of a certificate of ownership or registration which has that effect. Certainly it could not constitute a consent to such service in an action commenced after he left the state and before the enactment of the statute.

[6] What we have just said as to the provisions of section 404.1 is equally applicable to section 404.2; and while the facts here do not negative the fact that petitioner did not surrender his operator's license upon ceasing to be a resident of the state, still by the very wording of the statute it is only the retention of a license by a *resident of this state* that constitutes consent to the service of process outside the state.

[7] By their very terms, sections 404.1 through 404.4 of the Vehicle Code apply only to persons who were residents of the state at the time the statutes became effective. They do not apply, and cannot be interpreted so as to apply, to former residents of the state who, at the time the statute became effective, were domiciled in and residents of other jurisdictions.

[8] Respondents argue that the Legislature had power to provide for the service of summons outside the state on any person domiciled within the state at the time the cause of action arose against him, and that therefore we should construe this legislation as if it expressly so provided. There is no merit in this argument, and the simple answer to it is that the Legislature did not so enact. The Legislature did not amend section 417 of the Code of Civil Procedure, but left the limitations, of that section, upon the right to secure a judgment *in personam* where process was served outside the state in full effect, and expressly based the right to obtain jurisdiction *in personam*, in actions arising out of the operation by a resident of a vehicle upon the highways of the state, upon a consent by the resident to such service manifested in the manner set forth in the statute.[7]

Let a peremptory writ of mandate issue, requiring respondent court to enter its order quashing the service of summons upon the petitioner in action No. 641786 in that court.

WHITE, P. J., and FOURT, J., concur.

6. Vehicle Code sections 404.1 through 404.4 were adopted by the same act of the Legislature, Stats.1955, chap. 796, and each section is a part of a scheme of legislation. Section 404.2 makes it clear that it was the intent of the Legislature that the legislation should not operate retrospectively; for it expressly provides that it is only the acceptance of an operator's or a chauffeur's license after the effective date of the act that shall constitute a consent.

7. A strong argument could be made that an amendment of section 417, Code of Civil Procedure, which made residence at the time a cause of action arose the basis for securing jurisdiction of the person by service outside the state, but which limited that part of the section to actions arising out of the operation of an automobile on the highways of the state, would contravene the 33rd paragraph of section 25 of article 4 of the Constitution of this state.

142 Cal.App.2d 350

O. G. CARTER, Petitioner,

v.

SUPERIOR COURT of the State of California, IN AND FOR the COUNTY of LOS ANGELES, Respondent.

Sam Greenwood, Real Party in Interest.

Civ. 21753.

District Court of Appeal, Second District, Division 1, California.

June 18, 1956.

Proceeding upon petition for writ of prohibition or writ of mandate. The District Court of Appeal, Nourse, J. pro tem., held that an employee upon whom an employer had intentionally inflicted injury had made a binding election of remedy by filing a claim with the Industrial Accident Commission upon which a settlement had been made with approval of the commission, and that the employee was thereafter precluded from suing for damages for assault and battery.

Writ of mandate issued.

1. Workmen's Compensation ⇐2093

Employee who sustains an injury intentionally inflicted by his employer is not relegated to claim for compensation before Industrial Accident Commission, but may treat his injury as not having arisen out of and in course of his employment and may maintain action at law to recover damages both compensatory and exemplary. West's Ann.Labor Code, §§ 3600, 3700 et seq.

2. Workmen's Compensation ⇐2093

An employee who during course of his employment sustains injury intentionally inflicted on him by his employer has choice of remedies and may assert that injury occurred by reason of risk or conditions incident to employment and seek compensation before Industrial Accident Commission, or he may assert that injury did not arise out of risk or conditions incident to his employment and seek damages in an action at law. West's Ann.Labor Code, §§ 3600, 3700 et seq.

3. Workmen's Compensation ⇐1177, 2090

If employee establishes that injury occurred by reason of risk or condition incident to employment, only Industrial Accident Commission has jurisdiction to grant him relief, but if he establishes that injury did not arise out of such a risk or condition, then only courts have jurisdiction to award him relief. West's Ann.Labor Code, §§ 3600, 3700 et seq.

4. Workmen's Compensation ⇐2106

Where employee upon whom employer had intentionally inflicted injury filed claim with Industrial Accident Commission and a settlement was made with approval of Commission, employee was bound by his election of remedies and was precluded from prosecuting in court any civil action for damages for assault and battery. West's Ann.Labor Code, §§ 3600, 3700 et seq., 5002, 5003, 5803.

5. Workmen's Compensation ⇐2103

If injured employee is in doubt as to whether his cause of action is one for workmen's compensation or one for damages, he may submit this question either to Industrial Accident Commission or courts, and if tribunal to which he submits it holds that it does not have jurisdiction, he is free to proceed before other tribunal, but if it rules that it does have jurisdiction, then it and it only can proceed. West's Ann.Labor Code, §§ 3600, 3700 et seq., 5000–5002.

6. Workmen's Compensation ⇐2103

Where injured employee is in doubt as to whether his cause of action is one for workmen's compensation or one for damages, there is nothing to preclude filing of claim before second tribunal, court or Industrial Accident Commission, while question of jurisdiction yet remains undetermined in tribunal whose jurisdiction is first invoked and which alone has right to proceed. West's Ann.Labor Code, §§ 3600, 3700 et seq., 5000–5002.

7. Workmen's Compensation ⇐1137

Industrial Accident Commission's approval of settlement in employee's proceeding for workmen's compensation necessarily entailed implied finding that injury arose out of employment, and barred, on principle of res judicata, employee's action

in court against employer for damages for assault and battery. West's Ann.Labor Code, §§ 3600, 3700 et seq., 5000–5002.

8. Election of Remedies ⇐16
Judgment ⇐948(1)

In civil action for damages for assault and battery by employer, whether facts concerning proceedings before Industrial Accident Commission constituted defense of election of remedies or defense of res judicata, either defense had to be affirmatively pleaded and proved. West's Ann. Labor Code, §§ 3600, 3700 et seq., 5000–5002.

9. Prohibition ⇐3(1)

Plaintiff in civil action for damages for assault and battery was entitled to avoid defense of election of remedies or defense of res judicata, arising out of proceedings before Industrial Accident Commission, by proof of facts constituting waiver of such defense or which would estop the defendant-employer from asserting such defense, and defendant-employer was therefore not entitled to writ of prohibition to prevent court from proceeding with the case after striking such defense. West's Ann.Labor Code, §§ 3600, 3700 et seq., 5000–5002.

10. Mandamus ⇐39

In civil action for assault and battery, defense of election of remedies or of res judicata had to be pleaded in order to be proved, so defendant was entitled to writ of mandate to compel trial court to reinstate defense consisting of pleading of facts sufficient to constitute defense of election of remedies or res judicata. West's Ann. Code Civ.Proc. § 597.

11. Mandamus ⇐26

Ordinarily, writ of mandate will not lie to correct an error committed by another court.

12. Trial ⇐3

Parties to an action have right to have all issues in that action tried at one time rather than piecemeal, and a defendant has right to assert, at trial, all of his meritorious defenses.

13. Mandamus ⇐4(1)

Though defendant in civil action for damages for assault and battery could have trial court's error in striking his defense reviewed upon appeal from an adverse judgment, he had no appeal from the order striking the defense, and remedy by appeal was neither speedy nor adequate, and he was entitled to writ of mandate to compel reinstatement of his defense in answer.

Eugene S. Ives, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, Thomas Carver, Deputy County Counsel, Los Angeles, for respondent.

NOURSE, Justice pro tem.

Petitioner is the defendant in an action to recover damages for an alleged assault and battery, commenced by one Greenwood, the real party in interest.[1]

The relevant facts established by the record before us are:

Petitioner is the owner and manager of a restaurant in the city of Long Beach. In August of 1955, Greenwood was in petitioner's employ as a dishwasher, and while he was engaged in the performance of his duties petitioner assaulted him. This assault occurred on the 27th of August, 1955.

On September 13, 1955, Greenwood filed with the Industrial Accident Commission an application for hearing by which he sought compensation pursuant to the provisions of division 4 of the Labor Code (Workmen's Compensation and Insurance) for the injuries sustained in the assault. In this application Plantation Room, the fictitious name under which petitioner was engaged in business, was named as the employer; the New Amsterdam Casualty Company was named as petitioner's compensation insurance carrier, and it was alleged that the assault was committed by Greenwood's foreman, who was not identified by name.

On December 22, 1955, Greenwood on the one hand, and petitioner and his compensa-

1. The respondent court has made a return and filed a brief in this matter, but the real party in interest has made no appearance.

tion insurance carrier on the other, entered into an agreement of compromise and release on a form supplied by the Industrial Accident Commission, and which conformed to section 5003 of the Labor Code. By the terms of this agreement the parties agreed "to settle any and all claims on account of" the injuries sustained by the plaintiff in the above-mentioned assault in consideration of the payment to Greenwood of the sum of $850. Greenwood further agreed that said agreement, upon being approved by the Industrial Accident Commission and payment being made, should constitute a release and discharge of all claims and causes of action which might arise out of his injuries.

After the filing of the agreement with the Industrial Accident Commission it, pursuant to the provisions of section 5002 of the Labor Code, approved the agreement and made its award in accordance with the terms thereof. By this award it ordered that of the sum of $850, $100 be paid to the applicant's attorney; $58 to one Ealey, a lien claimant; $69.43 to the State of California, Department of Employment, Division of Disability and Hospital Benefits; certain amounts to the City of Long Beach and to doctors who had rendered services to Greenwood for his injuries, and the balance $490.07, to Greenwood. Payments were made by petitioner's insurance carrier in accordance with the award and the award is final, subject only to the continuing jurisdiction of the Commission pursuant to section 5803 of the Labor Code.

On November 21, 1955, Greenwood commenced an action in the respondent court against petitioner to recover damages both compensatory and punitive, the cause of action being based upon the same assault and upon the same injuries as was his application for compensation filed with the Industrial Accident Commission. To this complaint petitioner filed an answer in which, as a 3rd separate defense, he pleaded the fact that Greenwood had filed the claim above mentioned before the Industrial Accident Commission and that that claim had been determined by the Commission by approval of the settlement agreement; that the Industrial Accident Commission had assumed jurisdiction, and by so doing had deprived the superior court of jurisdiction.

Upon motion of Greenwood, respondent court struck this defense from petitioner's answer upon the ground that it was sham and irrelevant. The superior court will, unless restrained by this court, proceed to try the subject action.

Petitioner here seeks a writ of prohibition commanding the respondent court to desist from further proceedings in this action. In the alternative, he seeks a writ of mandate to compel the respondent court to set aside its order striking petitioner's 3rd separate defense from his answer, and to reinstate said defense.

[1] It is now settled in this state that an employee who sustains an injury which is intentionally inflicted by his employer is not relegated to a claim for compensation before the Industrial Accident Commission, but may treat his injury as not having arisen out of and in the course of his employment; and he may, therefore, maintain an action at law to recover damages both compensatory and exemplary. Conway v. Globin, 105 Cal.App.2d 495, 233 P.2d 612. We do not understand petitioner to assert that Greenwood might not have commenced and maintained this action in the superior court, but rather as asserting that Greenwood could elect either to maintain an action at law or to seek workmen's compensation, and that having invoked the jurisdiction of the Industrial Accident Commission and prosecuted his claim there to final judgment, he cannot maintain the subject action in the respondent court.

In Conway v. Globin, supra, 105 Cal.App. 2d at page 497, 233 P.2d at page 614, Mr. Justice Peek, speaking for the court, said in part: "* * * the weight of authority is that 'where an employer inflicts the intentional injury upon his employee, the injured person may sue at common law for damages *or* accept the benefits under Workmen's Compensation Law. * * *'" [emphasis added], and in support of this he cites numerous decisions from other jurisdictions. This statement was, however, clearly dictum, inasmuch as in the case before the court the plaintiff had not, nor had

the defendant, his employer, commenced any proceedings before the Industrial Accident Commission, and the question as to whether or not the plaintiff had a choice of remedies was not involved or in any wise before the court for decision. An examination of the cases cited by the court, and which are relied upon by petitioner here, shows that in each of them in which the rule quoted by the cited case is announced, the statement was dictum, inasmuch as in none of them was the question of whether the plaintiff had a choice of remedies either involved or necessary to the decision.

[2] It seems to us, however, that an employee who during the course of his employment sustains an injury which is intentionally inflicted on him by his employer, does have a choice of remedies. He may assert that the injury occurred by reason of a risk or condition incident to the employment, and seek compensation before the Industrial Accident Commission; or he may assert that his injury did not arise out of a risk or condition incident to his employment, and seek damages in an action at law. In neither case would it lie in the mouth of his employer, who had intentionally inflicted the injury, to assert the contrary of that which is asserted by the employee.

[3] This does not mean, however, that the employee may pursue both remedies and recover both compensation and damages; for if he establishes that the injury occurred by reason of a risk or condition incident to the employment, then only the Industrial Accident Commission has jurisdiction to grant him relief, while if he establishes that it did not arise out of such a risk or condition, then only the courts have jurisdiction to award him relief, Lab.Code, sec. 3600; Scott v. Industrial Accident Comm., 46 Cal.2d 76, 293 P.2d 18.

[4] Plaintiff having had a choice of remedies he, by pursuing his remedy before the Industrial Accident Commission to judgment and accepting the fruits of that judgment, made a binding election of a remedy and precluded himself from prosecuting the subject action in the respondent court, 18 Am.Jur., sec. 20.

[5, 6] We do not wish to be understood as holding that the mere filing of a claim for compensation with the Industrial Accident Commission would bar the subsequent filing of an action at law for damages, or that the mere filing of an action at law for damages would preclude the subsequent filing of a claim for compensation. Undoubtedly an injured employee who is in doubt as to whether his cause of action is one for compensation or one for damages, and therefore in doubt as to which tribunal —that is, the Industrial Accident Commission on the one hand or the courts on the other—has jurisdiction of his cause of action, may submit this question to either tribunal. If the tribunal to which he submits it holds that it does not have jurisdiction, then he is free to proceed before the other tribunal; but if it rules that it does have jurisdiction, then it and it only can proceed, Scott v. Industrial Accident Comm., supra, and there is nothing to preclude the filing of a claim before a second tribunal while the question of jurisdiction yet remains undetermined in the tribunal whose jurisdiction is first invoked and which alone has the right to proceed, Scott v. Industrial Accident Comm., supra.

The facts pleaded in the defense stricken by the respondent court were sufficient to have permitted petitioner to have proved this election of remedies as a bar to the action.

[7] There is another reason why the facts pleaded in the stricken defense constituted a meritorious defense to the action. The question of whether or not an injury is one which arises out of the employment, and is therefore one which is within the exclusive jurisdiction of the Industrial Accident Commission, is a question of fact. Greenwood, by filing his application with the Commission and by requesting the Commission to approve the agreement for compromise and release and to enter its award thereon, submitted this question of fact to the Commission. In acting upon the application and approving the

agreement for compromise and release, the Commission impliedly and necessarily found that the injury did arise out of the employment, for otherwise it could not have found that it had jurisdiction to make its award, Aetna Life Ins. Co. v. Industrial Accident Comm., 38 Cal.2d 599, 602–604, 241 P.2d 530; Silva v. Industrial Accident Comm., 68 Cal.App. 510, 515, 229 P. 870; Lab.Code, secs. 5000–2. Its award was therefore an adjudication of the fact that the injury occurred by a risk or condition incident to Greenwood's employment and that the injury was one falling within the exclusive jurisdiction of the Commission; and being final, it is res judicata of that fact, and if proven at the trial of the action would preclude the respondent court from further exercising jurisdiction in the subject action, Scott v. Industrial Accident Comm., supra, 46 Cal.2d at page 190, 293 P.2d at page 26; Williams v. Southern Pac. Co., 54 Cal.App. 571, 580, 202 P. 356.

The facts pleaded in the defense stricken were sufficient to have permitted petitioner to prove the proceedings before the Commission and its award as res judicata in the subject action, and the court was clearly in error in striking petitioner's 3rd separate defense from its answer.

This brings us to the question as to whether petitioner is entitled to either a writ of prohibition or a writ of mandate. Petitioner interprets the decision of the Supreme Court in Scott v. Industrial Accident Comm., supra, as holding that a writ of prohibition is the proper remedy under facts such as those involved here.

We do not believe that the language used by the Supreme Court in the cited case is subject to that interpretation.

In the cited case the plaintiff had first commenced an action for damages in the superior court. Thereafter, the defendant, his employer, filed an application, as it was entitled to do, before the Industrial Accident Commission. Both the court and the Commission denied motions which would have held the proceedings before them in abeyance until the other tribunal had determined the question of jurisdiction. The plaintiff employee then sought prohibition to compel the Industrial Accident Commission to hold the proceedings there in abeyance until the question of jurisdiction had been determined by the superior court. At the time the petition for the writ of prohibition was filed, and at the time the Supreme Court rendered its decision, there had not been a final determination of the question of jurisdiction in the superior court action. The Supreme Court held that the superior court and the Commission had concurrent jurisdiction to determine jurisdiction; that jurisdiction once having been determined, it would be exclusive and not concurrent, and that the decision of either tribunal as to jurisdiction would be res judicata in all subsequent proceedings in the other tribunal. It further held that the tribunal whose jurisdiction was first invoked retained that jurisdiction to the exclusion of the other for the purpose of determining the question of jurisdiction; and that the second tribunal might be restrained from proceeding *until* the question of jurisdiction had been finally determined by the tribunal whose jurisdiction was first invoked. The court in the cited case did not have the question before it of a defense of election of remedies or of res judicata, and upon that ground distinguished the case of Goodman Bros. v. Superior Court, 51 Cal.App.2d 297, 124 P.2d 644, saying, "We do not here have * * * a question of res judicata; we have only the question as to whether the tribunal whose jurisdiction was subsequently invoked shall be barred from proceeding *before final determination of the controlling jurisdictional question by the tribunal which first took jurisdiction.*" [46 Cal.2d 88, 293 P.2d 25.] [Emphasis added.]

The Supreme Court did not by its opinion in Scott v. Industrial Accident Comm. overrule the decision of the District Court of Appeal in Goodman Bros. v. Superior Court, supra. That case is practically upon all fours with the case at bar. In Goodman Bros. v. Superior Court an employee had received an injury arising out of his employment. He filed an application with the Industrial Accident Commission, naming Goodman Bros. as his employer and a

casualty company as its compensation insurance carrier. He also alleged that there was a controversy as to whether the employer was in fact insured and as to whether a penalty should be imposed against the employer for being willfully uninsured. The Commission made its finding and award and found that Goodman Bros. was insured at the time of the accident and made an award in favor of the employee as against the insurance carrier. Thereafter, the employee commenced an action against Goodman Bros. in the superior court to recover damages, alleging that it was uninsured for compensation and that therefore he had a right under section 3707 of the Labor Code to prosecute the action. Goodman Bros. then sought a writ of prohibition from the District Court of Appeal, but that court held that while the prior final decision of the Commission that Goodman Bros. was insured was res judicata in the superior court action, it did not deprive the superior court of jurisdiction, but constituted a defense to the action which if affirmatively pleaded and proved must be found on by that court. It therefore denied the writ sought.

[8, 9] In the case at bar, whether the facts shown by the petition as to the proceedings before the Industrial Accident Commission constitute the defense of an election of remedies, or the defense of res judicata,[2] either defense must be affirmatively pleaded and proved, Goodman Bros. v. Superior Court, supra; Karapetian v. Carolan, 83 Cal.App.2d 344, 346, 188 P.2d 809, 1 A.L.R.2d 1075, and the plaintiff would be entitled to avoid the defense by proof of facts constituting a waiver of it or which would estop the defendant from asserting it. We must, therefore, hold petitioner is not entitled to a writ of prohibition.

[10] We believe, however, that petitioner is entitled to a writ of mandate to compel the respondent court to entertain the defense which, by its order, it has stricken. As we have pointed out, the facts pleaded, if proven, constitute an absolute defense to the action, unless plaintiff proves facts which would estop petitioner from asserting the defense pleaded or establish a waiver of it. Inasmuch as either defense falling within the facts pleaded must be pleaded in order to be proved, the action is now in a state where the petitioner cannot assert his defense by proving the proceedings before the Industrial Accident Commission.

These defenses are such that it would be an abuse of discretion by the trial court to deny a motion on behalf of the petitioner, pursuant to section 597 of the Code of Civil Procedure, to first try the issue tendered by the defense.

[11] Ordinarily, a writ of mandate will not lie to correct an error committed by another court, but here it is clear that the trial court did err in striking petitioner's 3rd separate defense; and it is further clear that petitioner will not, under the present state of the proceedings, be able to assert his defenses, and that the court's error, if judgment were rendered in favor of the plaintiff, would necessarily result in reversal upon an appeal.

[12, 13] The parties to an action have the right to having all of the issues in that action tried at one time rather than piecemeal. Here the defendant has the right to, at the trial of this action, assert his meritorious defenses. He has no appeal from the order striking his 3rd separate defense from his answer, and while the court's error could be reviewed upon appeal from an adverse judgment, this remedy is neither speedy nor adequate; for as we have pointed out, the defense stricken, if sustained by the proof, would terminate the action without any trial of the issues tendered by the complaint; while if he is prevented from making his defense he will have to go through with the trial of the action and

2. As a practical matter there is little difference between the two defenses, as both constitute merely an application of equitable estoppel, Kemp v. Enemark, 194 Cal. 748, 230 P. 441; Roullard v. Rosenberg Bros. & Co., 193 Cal. 360, 224 P. 449; Horton v. Goodenough, 184 Cal. 451, 194 P. 34; Koehler v. Holt Manufacturing Co., 146 Cal. 335, 80 P. 73; Bernhard v. Bank of America Nat. Trust & Savings Ass'n, 19 Cal.2d 807, 122 P. 2d 892.

then appeal and then go back for a further trial to have his defense, which now exists, determined. The trial court has not determined that defense upon its merits. Its error is one of law.

We believe that this case falls within the rules laid down in Sampsell v. Superior Court, 32 Cal.2d 763, 770, 197 P.2d 739; Nelson v. Superior Court, 97 Cal.App.2d 78, 217 P.2d 119; and Marr v. Superior Court, 30 Cal.App.2d 275, 86 P.2d 141.

Let a peremptory writ of mandate issue, requiring the respondent court to reinstate petitioner's 3rd separate defense set forth in his amended answer filed in action No. LBC 21905 in the respondent court.

WHITE, P. J., and FOURT, J., concur.



142 Cal.App.2d 473

In the Matter of the ESTATE of Mario L. FERRERO, Deceased.

Kathryn E. FERRERO, Appellant,

v.

Aldo FERRERO, Respondent.

Civ. 16957.

District Court of Appeal, First District, Division 2, California.

June 22, 1956.

Rehearing Denied July 20, 1956.

Probate proceeding. The Superior Court, Santa Clara County, W. W. Jacka, J., entered order adverse to decedent's widow, and widow appealed. The District Court of Appeal, Kaufman, J., held that, where insurer, which had issued policy on decedent's life was not before the probate court as a party, probate court's order was beyond probate court's jurisdiction and void insofar as it directed insurer to pay over proceeds of policy to decedent's executor.

Order modified, and, as modified, affirmed.

Dooling, J., dissented.

1. Contracts ⇐245(1)

Later agreement will supersede an earlier agreement if inconsistent therewith.

2. Insurance ⇐199

An insurance policy is property which may be assigned. West's Ann.Insurance Code, § 10130.

3. Partnership ⇐94

Where agreement between partners provided that policies on lives of partners were to be paid to the estate in event of a purchase by surviving partner, agreement would be regarded as an assignment by one partner to other partner of each policy for purpose of purchasing deceased partner's interest in the partnership, and therefore fact that other beneficiaries were named in policies was not fatal to the agreement, especially in view of provision in agreement for payment of policy proceeds to named beneficiaries upon designated conditions. West's Ann.Insurance Code, § 10130.

4. Partnership ⇐94

Where agreement between partners required that each pay premium of policy on other's life, such provision was substantially complied with where all but last premium were paid from rental account from property which was owned equally by the partners and the last premium was paid from store account which was also owned in equal shares by the partners.

5. Partnership ⇐254

Partnership agreement provision that, upon dissolution of partnership by death of partner, surviving partner should have right to purchase deceased partner's interest in the partnership business by paying value of such interest as determined from the last annual inventory or accounting, meant the last annual accounting of partnership prior to dissolution by death since, after one

partner's death, the business is no longer a partnership.

6. Partners ⇐254

Partnership agreement provision that surviving partner should have right to purchase interest of other partner by paying value of such interest and that, upon such purchase, partner purchasing the interest of other partner should do so by paying one-third of purchase price down and remaining two-thirds in designated installments at stated interest, did not mean that an election to purchase could only be made by the actual payment of one-third of the purchase price.

7. Partnership ⇐254

Where policies on partners' lives were taken out by partners in order that, upon death of one partner, surviving partner could purchase the partnership business, deceased partner's wife, who had prevented surviving partner from having access to funds from policy on deceased partner's life by reason of widow's claim to such insurance funds, would not be heard to complain that surviving partner had not made payment for deceased partner's interest; a tender of performance was unnecessary as far as widow was concerned. West's Ann. Corp.Code, § 15042; West's Ann.Civ.Code, §§ 1440, 3532.

8. Judgment ⇐243

Where insurer which had issued policy on decedent's life was not before the probate court as a party, probate court order was beyond probate court's jurisdiction and void in so far as it directed insurer to pay over proceeds of policy to decedent's executor.

Moerdyke, Anderson & Evans, Stanley R. Evans, Palo Alto, for appellant.

Manny C. Gomez, John H. Machado, San Jose, for respondent.

KAUFMAN, Justice.

This is an appeal from an order for instructions made by the Superior Court of Santa Clara County in response to a petition for instructions filed by the executor of the estate of Mario Ferrero, deceased. Aldo Ferrero, the executor, is the brother and former business partner of deceased in a retail grocery business in San Jose, California.

The petition alleged that the partners during their lifetime had entered into a written agreement that in the event of death of one of the partners the surviving partner would become the owner of the grocery business and continue said business as his sole and absolute property, that policies of life insurance were taken out by the brothers in order that such a purchase might be consummated, that the value of the interest of deceased in said business was to be determined by the last annual inventory or accounting, and that the purchase price was to be paid one-third down, the remainder in two annual installments of one-third each.

The trial court found that certain written agreements of the partners dated April 15, 1948, January 12, 1949, and June 1, 1950, were valid and existing agreements, and that the agreement of June 1, 1950 was merely a modification of the agreement of April 15, 1948; that the value of deceased's interest in the partnership is the sum of $49,921.15 as of March 31, 1953; that this sum is to be paid by Aldo Ferrero to the estate, one-third down, and one-third per year with interest of 4% on the deferred payments; that in event of purchase by the petitioner, the proceeds of a certain insurance policy, No. 1509559 of the Bankers Life Company, issued on the life of Mario Ferrero shall be paid to the executor as a payment on account of said purchase price. The court further found that the agreements between the partners had been made for a valuable consideration and were binding upon Kathryn Ferrero, surviving wife of Mario, and upon his children, David, Philip, Michele and Kathryn, and that they had no interest in the policy.

Mario and Aldo Ferrero had been engaged as partners in the grocery business known as "Ferrero Bros." since 1936 until the death of Mario on November 5, 1953. Neither was married at the time the partnership was formed. Mario married on October 13, 1948, and Michele and Kathryn Ferrero are the children of this marriage.

Mario had been married previously, and the children David and Philip, are the children of this prior marriage.

On May 18, 1949, Mario executed a will, bequeathing $5,000 to his widow Kathryn, and the remainder of his estate in trust to his brother Aldo for all of testator's surviving children. The principal asset of the estate is the 50% interest in "Ferrero Bros."

Three different writings were executed by Mario and Aldo relating to the purchase of the interest of the deceased partner by the survivor. The first agreement, executed April 15, 1948, entitled "Form of Purchase Agreement", stated as its purpose that "it is the desire of both parties hereto that in the event of the death of the first to die the estate of the deceased partner shall be assured one hundred cents on the dollar for his interest and the surviving partner be enabled to continue the business as his sole and absolute property without danger of interference or interruption." The principal provisions of this agreement pertinent here read as follows:

"(Disposition of Interests)

"One: That each party hereto for himself, binding his heirs, executors, administrators, and assigns shall release, transfer, and sell into the surviving partner to this agreement, and the said surviving partner agrees to purchase all the right, title, and interest which the deceased partner may at the time of his death have in the said Ferrero Brothers Company in consideration of the surviving party to this agreement paying to the estate of the one so to die the value of such interest which shall be ascertained, by the methods hereinafter set forth.

"(Insurance of Parties)

"Two: That in order to guarantee that the means necessary to consummate the purchase shall be available when needed, each of the parties hereto has had policies of life insurance issued on his life in the companies and in the amounts as set forth in 'Schedule I' hereto attached, and made payable to his estate.

"(Payment of Premium—Reservation of Rights)

"Three: That the premium deposits on the policies issued on the life of each party to this agreement shall be paid by the other party, thereby evidencing ownership on the part of the one so paying the premiums and shall be turned over to him by the insured when received by him from the insurance company.

"Four: That all policies of life insurance on the life of either party hereto shall be retained by the party paying the premiums thereon.

"(Valuation of interests)

"Five: That the value of a decedent partner's interest in the partnership shall be that proportion of the net worth of the partnership which his fractional interest represents. The net worth of the partnership shall be ascertained by preparing a balance sheet as of the date of the partner's death in the same manner and form as is customary at the end of the fiscal year, using the same basis of depreciations and other charge-offs as are permitted to be made for income tax purposes, and including in the assets the item of 'good will', which, until further modified by amendment, shall be set at Fifty Thousand Dollars ($50,000.00).

"(Determination of Values)

"Six: As soon as possible after the death of the first of the said partners to die the value of the interest of the deceased shall be ascertained as set forth in Paragraph Five hereof.

"(Proceeds of Policies)

"Seven: After the executor or administrator for the estate of the deceased partner shall have been fully qualified and after the value of the interest of the deceased partner shall have been ascertained as set forth in paragraph five hereof, the surviving partner shall turn over to the executor or administrator of the deceased the policy which he has in his possession on the life of the deceased and for which he paid the premiums. The proceeds of the policy so turned over by him to the executor or ad-

ministrator of the deceased shall be regarded for all of the purposes of this agreement as a payment by him on account or in full, as the case may be, of the said purchase price.

"Eight: That in the event that the insurance proceeds shall not be sufficient to purchase the entire interest of the partner so to die and the surviving partner after having exercised every available means of raising the cash necessary to pay the amount by which the interest of the deceased partner exceeds the insurance proceeds is unable to so do, then the said deficit may be paid in a series of 6 per cent interest-bearing notes payable monthly over a period of one, two or three years as may be agreed upon between the surviving parties hereto and the executor or administrator of the estate."

A subsequent provision of this agreement provided that it should terminate upon the written agreement of both parties, upon the lapse of all insurance policies without value or upon liquidation of the business.

On January 12, 1949, the partners executed a written modification of paragraphs Five and Eight of the foregoing agreement, substituting "No value" instead of $50,000 for the value of the good will, and extending the time allowed for payment of the balance of the purchase price in excess of the proceeds of the insurance policy, to ten years, and substituting 4% interest bearing notes for 6% notes.

On June 1, 1950, the partners entered into a formal partnership agreement covering all phases of the business. It contained no reference to the two prior agreements.

Paragraph XIV of the agreement provided as follows:

"Upon the dissolution of the partnership by reason of the death, withdrawal or other act of any partner, or by operation of law, the remaining partner may, if he so desires, continue the business and he shall have the right to purchase the interest of such other partner in the business, assets, and good will by paying the value of such interest as determined by the last annual inventory or accounting. Upon such purchase, the partners hereby agree that the partner purchasing the interest of the other shall do so by paying one-third the purchase price down and the remaining two-thirds in installments of 33⅓% of the balance per year with interest thereupon at 4%. Upon such payment in full of the purchase price, the retiring partner or his representative shall execute and deliver to the remaining member all necessary conveyances of interest. The continuing member shall assume all of the existing firm obligations and hold the seller harmless from all liability thereon. The continuing partner may use the former firm name."

[1] Appellant herein contends that the agreement of June 1, 1950, should govern the rights of the parties since it was the latest and is inconsistent with the prior agreements. It is true, as appellant says, that a later agreement will supersede an earlier agreement if inconsistent therewith. San Diego Construction Co. v. Mannix, 175 Cal. 548, 166 P. 325. The cited case, however, construed two agreements, a contract of sale and a declaration of trust, together, stating that they were to be construed as parts of one contract, "the later superseding the earlier one wherever it is inconsistent therewith." Appellant argues that the partnership agreement of June 1, 1950, is a new and complete agreement differing in many respects from the preceding agreements, that it touches on matters not involved in the prior agreements, and deals differently with subjects which were covered in the earlier agreements. The partnership agreement covers every phase of the partnership business. The purchase agreement of April 15, 1948, deals chiefly with one subject, providing a method of purchase of the deceased partner's interest in the partnership from his estate, and providing funds therefor through insurance. The purpose was clearly stated at the beginning of the earlier agreement, showing that it was to protect the estate of the deceased partner and to assure the survivor that he could continue the business. The purpose of the partnership agreement of June 1, 1950, appears from the introductory paragraph to have been to reduce to a formal agreement their existing general partnership relationship. The

partnership agreement makes no reference to the prior agreement concerning the insurance policies.

It is urged that Paragraph One of the earlier agreement bound the survivor to buy and the estate of deceased to sell, whereas Paragraph XIV (quoted above) provides that the survivor has the option to purchase. This appears to be a correct interpretation of these paragraphs, and the later would therefore be effective. But since the survivor has in fact elected to purchase, the estate is compelled to sell to him under the partnership agreement also. Appellant says that Aldo Ferrero had not tendered any amount as yet toward the purchase of Mario's interest although it is nearly two years since Mario's death, and that it was almost one year before Aldo asked for instructions. While it is true that the petition for instructions was filed about eleven months after Mario's death, the reporter's transcript shows that at a hearing on May 18, 1954, of appellant's petition for removal of executor, respondent's counsel made it clear that respondent wished to exercise the right of purchase, but appellant's counsel stated that he wished the right of purchase to be restrained until after an audit of the partnership had been made. He believed that this was necessary in order to determine the sources from which the premiums on the policies had been paid to ascertain whether appellant had any community property interest in the proceeds. Therefore, it appears that respondent within at least six months after decedent's death indicated that he would exercise the right to purchase. The record also shows that on November 16, 1953, only eleven days after Mario's death, appellant filed a claim on the proceeds of the insurance policy here involved, thus preventing respondent's use of the policies for the payment of the purchase price.

Appellant points out certain particulars in which she asserts the parties to the first agreement did not adhere to its terms. The agreement in Paragraph Two recites that each of the parties has had a policy of life insurance issued on his life "in the companies and in the amounts set forth in 'Schedule I' hereto attached, and made payable to his estate. Schedule I states "The following policies issued by Banker's Life Company, Des Moine, Iowa. M. L. Ferrero 1509559—$25,000. Aldo Ferrero 1507822–25.000."

[2, 3] The agreement therefore makes it very clear what policies are to be paid to the estate in event of a purchase by the survivor. However, the partners did not actually designate their estates as beneficiaries on the policies, Aldo making Mario the beneficiary of his, and Mario designating his sons David and Philip, as beneficiaries. Since an insurance policy is property which may be assigned, the agreement in regard to these policies may be regarded as an assignment by one partner to the other of each policy for the purpose of purchasing the deceased partner's interest. Section 10130 of the Insurance Code provides that a life policy may pass by transfer, will or succession to any person. And, see, Cook v. Cook, 17 Cal.2d 639, 644, 111 P.2d 322; Sullivan v. Union Oil Co. of California, 16 Cal.2d 229, 237, 105 P.2d 922. No particular form is required for an assignment of an insurance policy, Mahony v. Crocker, 58 Cal.App.2d 196, 136 P.2d 810. Therefore the fact that other beneficiaries were named is not fatal to the plan. In fact, the final provision of the first agreement provided that in event of the simultaneous death of the partners or the death of the survivor before he could complete the purchase, the proceeds of the policies should be paid "to the beneficiaries named therein or to the estate as the case may be."

[4] Appellant contends that each partner did not have possession of the policy on the other's life as provided in paragraph Four of the agreement. However, since Aldo Ferrero produced these policies in court it appears that he had possession of the policy here in question. It is also claimed that provision Three of the agreement was not carried out in that each did not pay the premium on the other's policy. The record shows that all but the last premium were paid from a rental account from property owned prior to Mario's marriage,

and which was owned equally by the brothers in partnership. Each had an undivided half interest in these funds. The last premium was paid from the store account which was also owned in equal shares by the assureds. It may therefore be said that this provision was substantially complied with.

[5] It is next urged that the purchase price of the deceased partner's interest should have been determined by the last annual inventory or accounting before the right to purchase is exercised by actual payment. Paragraph XIV of the partnership agreement provides that upon dissolution by death, the survivor shall have the right to purchase the decedent's interest in the business by paying "the value of such interest as determined by the last annual inventory or accounting." The trial court correctly interpreted this phrase to mean the last annual accounting of the partnership prior to dissolution by death, for after one partner's death the business is no longer a partnership. It is to be noted that the earlier agreement and the first amendment thereto had both provided that the value was to be determined at the date of the deceased partner's death.

[6] Appellant maintains that the above noted provision in paragraph XIV that the survivor shall have the right to purchase the interest of the other "by paying the value of such interest as determined by the last annual inventory or accounting" also requires that an election to purchase can only be made by the actual payment of one-third of the purchase price. That paragraph further provides: "Upon such purchase, the partners hereby agree that the partner purchasing the interest of the other shall do so by paying one-third of the purchase price down and the remaining two-thirds in installments of 33⅓% of the balance per year with interest thereupon at 4%." This sentence appears to simply outline the method of paying the purchase price. It would be just as logical to contend that the survivor must pay the entire purchase price in order to effect the election to purchase, for in the sentence preceding that just quoted, it is stated that he shall have the right to purchase "by paying the value of such interest", that is the entire purchase price. The trial court clearly adopted the most reasonable interpretation of the language.

Finally, it is contended that where the surviving partner has the right to purchase the interest of the deceased, the estate is entitled to share in the profits until the survivor's election to purchase becomes effectual. In Keyes v. Hurlbert, 43 Cal.App. 2d 497, 111 P.2d 447, the partnership agreement provided that upon the death of one partner, the surviving partners should have the option to purchase his interest, the purchase price being the appraised value at the date of death. The surviving partners continued the business, not electing to exercise the option until nine months after the deceased partner's death, and more than two months after the appraisal. It was held that they were accountable to the heirs and legatees of the deceased partner for a share of the profits earned up to the time the election to purchase was made. The court said that it would be unreasonable to construe the provision therein regarding the appraisal so as to allow the surviving partners to wait until they saw fit to elect to purchase and allow them to retain all of the profits for until the right of election was exercised the estate's interest in the business was continued. The above decision and cases therein cited are in harmony with section 15042, California Corporations Code, which gives the estate the right to interest or at the option of the representative, a share in the profits.

[7] The court in the present case found this allegation of respondent's petition to be true: "That your petitioner has been at all times herein willing and ready to comply with said agreement and has offered to comply therewith heretofore." Respondent testified that he had been so ready and willing since the date of his partner's death, but had been prevented from having access to the insurance funds which had been provided for the payment of the purchase price by reason of appellant's claim to them, asserted eleven days after decedent's death. Appellant is therefore not in a position to

complain that payment for the deceased partner's interest was not made at an earlier date. A tender of performance was therefore unnecessary as far as this appellant is concerned. Woods-Drury Inc., v. Superior Court, 18 Cal.App.2d 340, 348, 63 P.2d 1184; Civil Code, sections 1440, 1511, 3532. No other heirs of the estate are parties to this appeal. The principle enunciated in Keyes v. Hurlbert, supra, is not applicable to a situation of this kind.

[8] It appears from the record that the Bankers Life Company which issued the policy in question was not before the Court as a party, hence, insofar as the order of the Probate Court directs the insurance company to pay over the proceeds of the policy to the executor it would be beyond the jurisdiction of the court and void. In all other respects the order is valid and binding on all parties before the Probate Court. Spencer v. Crocker First Nat. Bank, 86 Cal.App.2d 397, 194 P.2d 775.

Order affirmed as modified.

NOURSE, P. J., concurs.

DOOLING, Justice.

I dissent. The order appealed from purports to adjudicate title between the respondent, Aldo Ferrero, and the beneficiaries of an insurance policy issued by Bankers Life Company on the life of the decedent. It determines that the proceeds belong to respondent and directs that they be applied toward the purchase price of decedent's interest in the business.

The probate court has no jurisdiction over the subject matter of this part of the order and the order to this extent is void. Capital Bond & Inv. Co. v. Hood, 218 Cal. 729, 24 P.2d 765; Rogers v. Cady, 104 Cal. 288, 38 P. 81; Burnett v. Hoover Ball & Bearing Co., 51 Cal.App.2d 613, 125 P.2d 572; In re Keck, 75 Cal.App.2d 846, 171 P.2d 933; 15 Cal.Jur., Judgments, § 141, p. 52. Being void the order can be attacked at any time by the beneficiaries. Andrews v. Superior Court, 29 Cal.2d 208, 214–215, 174 P.2d 313; In re Estate of Pusey, 180 Cal. 368, 374–375, 181 P. 648.

The proceeds of the insurance policy are no part of the estate and the probate court has attempted to adjudicate title to property to which the estate has, and makes, no claim. Since the court in probate has no jurisdiction of this property it clearly has no jurisdiction to adjudicate title to it. Even where the estate claims title its power to adjudicate adverse claims to property is limited to claims by an executor or administrator and a few other special cases and it cannot generally adjudicate the adverse claims of others. Central Bank v. Superior Court, 45 Cal.2d 10, collecting and reviewing the authorities at pages 15–17, 285 P.2d 906, 908–910.

It is true that the minor beneficiaries have not appealed. They are not bound to do so but can attack the order as void whenever it is attempted to be enforced against them. Even the affirmance on appeal on other grounds does not validate an order void on its face. Andrews v. Superior Court, supra, 29 Cal.2d 208, 174 P.2d 313; Pioneer Land Co. v. Maddux, 109 Cal. 633, 42 P. 295; Pennell v. Superior Court, 87 Cal.App. 375, 262 P. 48; In re Cavitt, 47 Cal.App.2d 698, 118 P.2d 846; 15 Cal.Jur., Judgments, § 140, p. 51, note 3. The adjudication of jurisdiction on this appeal by others, in which the minor beneficiaries have not joined, could not bind them.

Since the appellants here have an interest in the estate they are adversely affected by the order that the proceeds of the policy are applicable to the purchase price. They did not raise this point until oral argument but it would only promote future litigation to ignore it since the beneficiaries can still attack the order at any time thereby confusing the rights of the parties under it.

Selim KAUKONEN, Plaintiff and Appellant,

v.

Andrew ARO et al., Defendants and Respondents.

Civ. 16804.

District Court of Appeal, First District, Division 2, California.

June 25, 1956.

Rehearing Denied July 25, 1956.

Hearing Denied Aug. 21, 1956.

Action for injuries sustained by plaintiff when struck by a jeep on a mountain road predicated on negligent operation of the jeep on the road at the place of a rock slide so as to place plaintiff in the path of a second slide. Judgment of nonsuit in the Superior Court, County of Santa Clara, W. W. Jacka, J., entered on defendant's motion on the opening statement of plaintiff and plaintiff appeals. The District Court of Appeal, Per Curiam, held that the granting of the motion of nonsuit on the plaintiff's opening statement was error.

Judgment reversed.

1. Trial ⇐109

Action of the court on a motion for nonsuit based upon the opening statement is akin to that on a request that a demurrer to a complaint be sustained without leave to amend and the granting thereof is not favored and should be avoided unless the opening statement clearly shows that no cause of action in plaintiff exists.

2. Negligence ⇐1, 62(3), 63

A "negligent act" may be one which starts a force, continuous operation of which involves an unreasonable risk to another, or creates a situation which involves an unreasonable risk to another because of expectable action of a third person, or a force of nature.

See publication Words and Phrases, for other judicial constructions and definitions of "Negligent Act".

3. Negligence ⇐1

One having a choice between methods of doing an act which are equally available, who chooses more dangerous one is ordinarily deemed negligent, in the absence of a showing of the existence of an emergency, sudden peril, or other circumstances justifying such choice.

4. Negligence ⇐10

If actor's conduct had created a situation, which is harmless if left to itself but is capable of being made dangerous by some subsequent action of a human being or operation of a natural force, the actor's negligence depends upon whether he as a reasonable man should recognize such action or operation as probable.

5. Negligence ⇐10

If an actor knows or should perceive circumstances which would lead a reasonable man to expect a particular operation of a natural force, he must provide against it, although, but for such circumstances, it would be so extraordinary that he would be entitled to ignore the possibility of its occurrence.

6. Trial ⇐109

In action for injuries sustained when rock slide on a mountain road struck jeep in which plaintiff and others were returning from defendant's ranch and threw the jeep against plaintiff, where plaintiff contended that taking the route over the mountain at night and under the circumstances existing was negligence by the defendant and that the late departure from the ranch was relevant in that driving the mountain road was more dangerous at night, action of the court in granting defendant's motion for nonsuit on the opening statement on ground that no cause of action in plaintiff existed was error under the evidence.

7. Trial ⇐109

The drawing of adverse inferences from the opening statement of plaintiff is for the jury after trial and not for the court on a motion for nonsuit. West's Ann.Code Civ.Proc. § 469 et seq.

8. Pleading ⇐229

A party will not be allowed to amend so as to contradict an admission made by him in his original pleadings but to prevent undue limitation on the privilege of amending, "admissions" must be taken in a restricted meaning and will not include evidentiary details involved in a variance

between proof and opening statement of counsel.

See publication Words and Phrases, for other judicial constructions and definitions of "Admissions".

9. Trial ⇐109

In action for injuries that facts and opening statement of plaintiff varied to some extent from those alleged in the complaint and which could not have actually mislead the defendant and were not so radical as to replace the action alleged in the complaint by a completely different one, did not justify the trial court in granting defendant's motion for nonsuit on the plaintiff's opening statement.

10. Trial ⇐109

Where first cause of action was predicated on negligent operation of a jeep on a certain part of a mountain road the place of a first slide, so as to place plaintiff in the path of the second slide and the second cause was predicated on negligence in operating the ranch of defendant in that defendant continued to work there until dark, although the roads were in dangerous condition and he had been warned, dismissal by plaintiff of the second cause of action did not justify the trial court in granting defendant's motion for nonsuit on the plaintiff's opening statement.

11. Trial ⇐109

In action for injuries sustained by plaintiff when struck by jeep on a mountain road previously struck by a rock slide, evidence did not establish as matter of law that the plaintiff was contributorily negligent or assumed the risk so as to justify the granting of defendant's motion for nonsuit on the opening statement of plaintiff.

Bledsoe, Smith, Cathcart & Phelps, Leighton M. Bledsoe, J. Barton Phelps, San Francisco, for appellant.

Ropers & Majeski, Harold Ropers, Redwood City, Campbell, Custer, Warburton & Britton, Austen D. Warburton, San Jose, W. R. Dunn, Burlingame, of counsel, for respondents.

PER CURIAM.

[1] This is an appeal from a judgment of nonsuit entered on the opening statement of counsel for plaintiff as amended and added to by statements of said counsel in chambers. "The action of the court on a motion for nonsuit based upon the opening statement is akin to that on a request that a demurrer to a complaint be sustained without leave to amend." Rodin v. American Can Co., 133 Cal.App.2d 524, 534, 284 P.2d 530, 536. The granting of such a nonsuit is not favored, Bonetti v. Double Play Tavern, 126 Cal.App.2d Supp. 848, 853, 274 P.2d 751, and should be avoided unless the opening statement clearly shows that no cause of action in plaintiff exists. Emmerson v. Weeks, 58 Cal. 382, 385; Noble v. Cavalier Restaurant, 106 Cal.App.2d 518, 525, 235 P.2d 396; Mendez v. Pacific Gas & Electric Co., 115 Cal.App. 2d 192, 196, 251 P.2d 773. Characteristic examples of circumstances justifying such nonsuits are found in Wrightson v. Dougherty, 5 Cal.2d 257, 262, 54 P.2d 13 (action barred on its face by the statute, no statement of any fact taking it out of the bar); Larsson v. Cedars of Lebanon Hospital, 97 Cal.App.2d 704, 707, 218 P.2d 604 (express repudiation by plaintiff of her incompetency alleged to toll the statute); Mendez v. Pacific Gas & Electric Co., supra (refusal to state evidence that dangerous wires which caused injury were responsibility of defendant as against judicial notice that they were operated by the United States Government). We have concluded that in the case before us no such clear impossibility to make out a cause of action appears.

The basic facts which according to the opening statement would be shown by the evidence were in substance as follows: Defendant, who owned a ranch in a remote mountainous area near Mt. Hamilton, engaged plaintiff, a carpenter, to assist him in the laying out of a bath house thereon. In the early morning of January 18, 1952, defendant took plaintiff there in defendant's open jeep. A neighboring rancher, a Mr. Arnold, went along. There had been one of the heaviest snowfalls on the mountain on record. Of two roads

available, one a narrow mountain road over Mt. Hamilton, another a lower one over Livermore, defendant took the latter, which he and plaintiff had agreed was the safest way. Arnold told defendant that they should not be in the mountains by night. When they were still at the ranch when dusk was falling Arnold told them to get out of there, but defendant still dallied at his ranch and left only when it was getting dark and he then took the road over Mt. Hamilton which was somewhat shorter. They had climbed eight miles of that icy road when in the dark on the side of the mountain they came to a landslide where the bank had caved in and had covered part of the road. Both plaintiff and Arnold told defendant at that point to turn around and go back the safe way (turning would have been possible), but defendant refused and said "we can get through here." Under defendant's direction plaintiff and Arnold started to remove rocks from the slide. When they had cleared some space between the bank and a boulder at the outside of the road defendant tried to get the jeep through, notwithstanding plaintiff's warning that the jeep would not get through. It got stuck between the bank and the boulder. Defendant said they would build up so as to permit the jeep to get out. When they were doing that they heard "the ominous sound of another landslide." Rocks of it struck the jeep and threw it into plaintiff, injuring him.

Of the discussion of the motion for a nonsuit the last part only (after a continuance because of illness of one of defendant's attorneys) has been reported. At that time plaintiff's counsel further stated in substance that, although he had no expert evidence to that effect, the jury would be entitled to infer from the evidence that the rocking back and forth of the jeep against the side of the mountain was one of the causes of the (new) slide, but that plaintiff's claim of negligence was not solely predicated on that point, but its cornerstone was defendant's conduct in subjecting plaintiff to the danger of that road especially when one landslide had occurred. It was his position that staying on the ranch late was not in itself a proximate cause of the injury, but that taking the route (over the mountain) at the time and under the circumstances then existing was. The late departure was in so far relevant that driving the mountain road was more dangerous at night. The court granted the nonsuit after proposing that the further statements of counsel should be considered an offer of proof to which counsel assented.

[2] It cannot be said that on the above facts if proved clearly no valid negligence claim in favor of plaintiff can be predicated. "A negligent act may be one which:

"(a) starts a force, the continuous operation of which involves an unreasonable risk to another, or

"(b) creates a situation which involves an unreasonable risk to another because of the expectable action of a third person, an animal or a force of nature." § 302 Restatement, Torts.

[3] The causing of the second slide by the rocking of the jeep would, if considered to have involved an unreasonable risk, come under clause (a), supra. It is, however, doubtful whether plaintiff's counsel after conceding that he had no expert evidence as to the factual casual relation between the rocking of the jeep and the slide should not have given some further statement concerning the evidence available with respect to surrounding circumstances, like the place from which the slide came, before it could be said that there was any probability of the slide having been caused by the rocking of the jeep, although it cannot be said that counsel's statement clearly negatived the existence of such evidence. But even if it should be held that counsel's statement showed that the causation of the slide by the action of the jeep would be a matter of speculation and conjecture only and that the slide must be considered as an independent force of nature, then the facts stated could still be the basis of a negligence action under clause (b), supra. It could certainly be found under said facts that defendant negligently brought plaintiff in the situation in which he was injured. In Stricklin v. Rosemeyer,

61 Cal.App.2d 359, 362, 142 P.2d 953, 954, we quoted the following rule from 38 Am. Jur. 873: "'One having a choice between methods of doing an act which are equally available, who chooses the more dangerous of the methods, is ordinarily deemed negligent, in the absence of a showing of the existence of an emergency, sudden peril, or other circumstance justifying such choice. The fact that the less dangerous method takes longer and is inconvenient and attended with difficulties furnishes no excuse for knowingly encountering the peril.'" The rule is subject to the proviso that under the circumstances ordinary care would lead to the correct choice; its application to the facts would clearly be for the jury. With respect to the question whether an unreasonable risk of a slide was to be expected the following comments of section 302 Restatement, Torts, are in point:

[4] "c. *Probability of intervening action.* If the actor's conduct has created a situation, which is harmless if left to itself but is capable of being made dangerous to others by some subsequent action of a human being or animal or the subsequent operation of a natural force, the actor's negligence depends upon whether he as a reasonable man should recognize such action or operation as probable. The actor as a reasonable man is required to know the habits and propensities of human beings and animals and the normal operation of natural forces in the locality in which he has intentionally created such a situation or in which he knows or should realize that his conduct is likely to create such a situation (see § 290). In so far as such knowledge would lead the actor as a reasonable man to recognize a particular action of a human being or animal or a particular operation of a natural force as customary or normal, the actor is required to anticipate and provide against it. The actor is negligent if he intentionally creates a situation, or if his conduct involves a risk of creating a situation, which he should realize as likely to be dangerous to others in the event of such customary or normal act or operation (see § 303)."

"d. *Meaning of 'normal.'* The actor as a reasonable man is required to anticipate and provide against the normal operation of natural forces. And here the word 'normal' is used to describe not only those forces which are constantly and habitually operating but also those forces which operate periodically or with a certain degree of frequency. * * *"

"f. *Abnormal conditions of nature.* The actor is not required to anticipate or provide against conditions of nature or the operation of natural forces which are of so unusual a character that the burden of providing for them would be out of all proportion to the chance of their existence or operation and the risk of harm to others involved in their possible existence or operation. It is therefore not necessary that a particular operation of the natural force be unprecedented. The likelihood of its recurrence may be so slight that in the aggregate the burden of constantly providing against it would be out of all proportion great as compared with the magnitude of the risk involved in the possibility of its recurrence. * * *"

[5] "g. If the actor knows or should perceive circumstances which would lead a reasonable man to expect a particular operation of a natural force, he is required to provide against it, although, but for such circumstances, it would be so extraordinary that he would be entitled to ignore the possibility of its occurrence."

[6] It could reasonably be found that slides happen with a certain degree of frequency in steep California mountains; that the burden of returning along the road which the parties considered safer was slight; that the weather conditions and the fact that the parties came across one slide were circumstances indicating to a reasonable man danger of slides or further slides; and possibly also that darkness increases the danger from slides, because it diminishes the chance of timely perception and escape. It could then reasonably be held that the danger of slides was one of the dangers which caused defendant's choice of the mountain road and a fortiori his refusal to turn back at the first slide to be

negligent. Hence the facts stated by plaintiff's counsel presented a factual question of negligence liability. It cannot be said that in retrospect it would be so highly extraordinary that a second slide came down on the steep mountainside where defendant allegedly forced plaintiff to remain for some time, that the court was entitled to hold as a matter of law that defendant could not be liable for the injury so caused, or, stated in another way, that the slide must necessarily be considered a superseding cause. Cf. § 435, clause 2, Restatement, Torts, 1948 Supp., comment c thereon, and cases holding that a rainstorm of unusual intensity is not a superseding cause, e. g., Southern Pacific Co. v. City of Los Angeles, 5 Cal.2d 545, 549, 55 P.2d 847.

[7-9] Defendant tries to defend the nonsuit by showing that the facts in the opening statement vary to some extent from those alleged in the complaint, and by drawing inferences adverse to plaintiff from the allegations and the statement. We need not state said argument in detail because it runs counter to the principle embodied in our Code of Civil Procedure section 469 et seq. which minimizes the importance of variances and liberally permits amendment, to conform to proof and otherwise, and because the drawing of adverse inferences is for the jury after trial not for the court on motion for nonsuit. The possible variances contained in the opening statement cannot have actually misled respondent and are not so radical as to replace the action alleged in the complaint by a completely different one. We are mindful of the authorities which hold that a party will not be allowed to amend so as to contradict an admission made in his original pleadings, Tognazzi v. Wilhelm, 6 Cal.2d 123, 127, 56 P.2d 1227; Treager v. Friedman, 79 Cal.App.2d 151, 172, 179 P.2d 387; Rhode v. Bartholomew, 94 Cal.App.2d 272, 278, 210 P.2d 768, but to prevent undue limitation of the privilege of amending, "admissions" for this purpose must be taken in a restricted meaning, and will not include the evidentiary details involved in the variances in this case.

[10] Respondent's contention that the fact that plaintiff dismissed the second cause of action of his complaint prevented him from proving negligence of defendant in taking the mountain road or in not turning back at the first slide is without merit. The first cause of action was predicated on the negligent operation of the jeep on a certain part of Lick Road (the place of the first slide), so as to place plaintiff in the path of the second slide; the second cause of action was predicated on negligence in operating the ranch in that defendant continued work there until after sunset and failed to depart before nightfall, although the roads were in dangerous condition and he had been warned. Plaintiff's counsel explained the dismissal as based on the ground that the staying late at the ranch alone was not the proximate cause of the injury and that the driving on the mountain road, the action at the first slide and the failure to return could be proved under the first cause of action as negligent operation of the jeep. If the allegation that the negligent operation happened on a certain part of Lick Road would prevent him from proving the said more general negligence that allegation would be eliminated by amendment. Plaintiff's contention that under the allegation of negligence in the operation of the jeep a wide range of negligence in any way involving the operation of the jeep could be proved finds support in Brooks v. E. J. Willig Truck Transp. Co., 40 Cal.2d 669, 680, 255 P.2d 802, where it was held that under such negligent operation failure to stop and render aid to a victim could be proved. At any rate plaintiff's counsel made it clear that he did not intend to abandon the basis of the action here under discussion and the first cause of action could certainly be amended so as to include said issues.

Neither do we find any merit in the contention that respondent was under no duty to guard appellant from landslides and that their positions in that respect were equal. The opening statement makes it clear that respondent as owner and driver of the jeep had power over the only means

of transportation which appellant lacked and the fact that he provided the transportation to the man who worked for him clearly shows a duty of care for the safety of said transportation, also as to the choice of the route.

[11] Evidently the facts stated by plaintiff's counsel did not as a matter of law show contributory negligence or assumption of risk of plaintiff, the less so as it is stated that plaintiff expressed the wish to turn back at the first slide and that defendant refused.

Judgment reversed.



142 Cal.App.2d 540

George S. SMITH, as Executor of the Estate of Hazel H. Wise, Deceased, Plaintiff and Appellant,

v.

Riley Wilson WISE, Defendant and Respondent.

Civ. 21451.

District Court of Appeal, Second District, Division 1, California.

June 26, 1956.

Hearing Denied Aug. 21, 1956.

Action by wife's executor against husband to quiet title to realty which had been conveyed to husband and wife as joint tenants. The Superior Court of Los Angeles County, Beach Vasey, J., rendered judgment for defendant and plaintiff appealed. The District Court of Appeal, Fourt, J., held that evidence sustained finding that property was held in joint tenancy.

Affirmed.

1. Husband and Wife ⇐249

In determining whether property owned by husband and wife is held in joint tenancy or as community property, in a case involving rights of third parties, much significance should not be attributed to casual references to the property as community property, but more weight should be given to expressions of intent as to incidents of ownership, such as respective rights of parties in management and disposition of the property and power of testamentary disposition as contrasted with right of survivorship.

2. Husband and Wife ⇐249

In determining whether property was held by husband and wife in joint tenancy or as community property, form of deed to spouses cannot be lightly disregarded.

3. Evidence ⇐313

In action by wife's executor against husband to quiet title to realty conveyed to husband and wife as joint tenants, evidence that wife had stated in divorce proceeding that property was community property, and that husband under mistake as to meaning of the term made similar statement, merely created a conflict in evidence, and court properly found that property remained in joint tenancy, especially in view of evidence that spouses so treated it in negotiating for insurance.

Glenn R. Watson and Robert G. Beverly, Los Angeles, for appellant.

Forno & Umann, Joseph T. Forno, Harry M. Umann and Burton Marks, Los Angeles, for respondent.

FOURT, Justice.

This is an appeal by the plaintiff as the executor of the estate of Hazel H. Wise, deceased, from a judgment in favor of the defendant, Riley Wilson Wise.

In an action commenced by the plaintiff to quiet title to certain real property, the complaint alleged that Hazel H. Wise died testate on February 23, 1952; that the plaintiff was the duly appointed executor of her estate, and at the time of her death she and the defendant were husband and wife and co-owners of the real property in question. The complaint further alleged that by the terms of the will of decedent, one-half of all community property owned by her and her husband was devised to George S. Smith; that such realty was

community property and he was therefore entitled to an undivided one-half interest therein; that the same was subject to administration in the decedent's estate.

The defendant denied that the real property was part of the community at the time of Hazel Wise's death.

It was stipulated at the trial that decedent and the defendant acquired title to the property under a deed wherein they were named grantees "as joint tenants"; also that Hazel Wise died February 23, 1952, and her estate was then the subject of probate proceedings.

The facts are substantially as follows: Hazel H. Wise and defendant married on January 12, 1938, and the real property in question was acquired by them after marriage. They lived together as husband and wife for about thirteen years. In November, 1951, Hazel Wise filed an action for divorce against the defendant in which action, among other things, she filed an affidavit for an order to show cause wherein she set forth that the property in question was the community property of the parties; a copy of the affidavit was served upon the defendant and thereafter he filed the usual "husband's questionnaire" in which he did not dispute his wife's allegation concerning the property. Defendant filed a verified cross-complaint wherein he alleged the property in question to be the community property of the plaintiff and the defendant. The wife filed an answer to the cross-complaint wherein she admitted the truth of the allegation as to the community nature of the property.

After the divorce case was set for trial, but before being heard, Hazel Wise died. The wife's will and the various divorce proceedings were introduced into evidence without objection. Among other witnesses sworn was the defendant who testified in substance as follows:

"Q. (By Mr. Arak [Counsel for defendant]) Mr. Wise, what was your understanding as to the difference between community and joint tenancy property at the time you filed your cross-complaint for divorce? A. As long as she was alive, it would belong to the two of us. But if I passed away, the property would go to her. If she passed away, the property was to go to me. But as we were both alive, it belonged to the two of us.

"Q. Now, under which was this, community property or joint tenancy property? A. Joint tenancy. If I passed away, the property would be hers. If she passed away, the property would be mine. And under community: we were both alive, and we would share alike and alike in it. It belonged to both of us.

"Q. Then at the time you filed this cross-complaint for divorce, your understanding was that there was no difference, while the two of you were still living, between the two types of holding property or two manners of holding property? A. I don't quite get that.

"Q. Well, going back now to the time that you filed the cross-complaint for divorce,—A. Yes.

"Q. —was it your understanding at that time that so long as both you and your wife were alive, there was no difference in which manner the property was held, joint tenancy or community? A. Well, it was held in community property. We were both alive then; and if one of us should die, it would automatically go to the other."

He further testified with reference to what was said on an occasion when he and his wife were negotiating with an insurance agent for the placing of insurance on the property in question, as follows:

"The Witness: —the coverage. And we discussed it, and we decided 'No,' we would leave it right at 10,000 for the house. And then he said, 'You still want this? The house is still in joint tenancy?' And we both said, 'Yes,' it was.

"The Court: Now, that was the statement made to him at your home, was it?

"The Witness: Yes.

"The Court: In negotiating for the placing of the insurance?

"The Witness: Yes, sir.

"The Court: And Mrs. Wise was present?

"The Witness: Yes, sir.

"The Court: What did she say about it?

"The Witness: When he said, 'You still want this? The house is still joint tenancy?' and we both said, 'Yes,' and then she asked him again, she said, 'That joint tenancy, does that mean that it will go to me if he dies or it goes to him if I die?' And he said, 'Yes.' Well, she said, 'That's the way that we wanted it when we bought the house, and that's the way I want it now.'"

The pertinent parts of the will, so far as this case is concerned, provided as follows:

"*Fourth:* All the rest, residue and remainder of my estate either real, personal or mixed, of whatsoever kind or character, and wheresoever situated, of which I may die possessed, or to which I may in any manner be entitled to, including but not limited to all of my right, title and interest in and to the real property located at 1822 West 76th Street, Los Angeles, California, and such other property which is now in the possession of my husband, Riley Wilson Wise, and in which I *may* have a community interest, to my brother George S. Smith who is now residing at 1822 West 76th Street, Los Angeles, California." (Emphasis added.)

It is admitted that the defendant did not know of the will until after the death of his wife.

The appellant's contention is that the property must be held to have been the community property of the parties on the date of Hazel H. Wise's death and that the evidence is insufficient to support the trial court's conclusion that the real property was, on the date of her death, owned by the decedent and respondent as joint tenants.

A reading of the testimony discloses nothing as to what was said or done between Mr. and Mrs. Wise to transmute the property to community property. The wife died before the divorce case was tried and gave no testimony by deposition or otherwise as to how, when, where or in what manner the alleged transmutation took place. The husband's testimony shows that he had a complete misunderstanding of the terms used in his cross-complaint.

[1] It was appropriately stated in the Journal of the State Bar of California, Vol. XXVIII, page 180, as follows: "The truth of the matter, as all lawyers can testify, is that laymen do not ordinarily understand the differences between joint and community property and commonly use the latter term to refer to all property equally owned by husband and wife. It would be a mistake, in a case involving the rights of third parties, to attribute much significance to casual references to property as community property. Much more weight should be given to expressions of intent as to incidents of ownership, such as the respective rights of the parties in management and disposition of the property and the power of testamentary disposition as contrasted with the right of survivorship."

[2, 3] The form of the deed cannot be lightly disregarded. True it is that the wife stated in the divorce proceeding that the property was community property, and defendant, under a mistake as to the meaning of the terms, also stated that it was community property, but all this did was to create a conflict in the evidence. The trial court believed that the evidence offered to rebut the presumption created by the form of the deed was not sufficient to rebut the same. The fact that the deed was taken in joint tenancy established a prima facie case that the property was in fact held in joint tenancy.

The question is one of fact and the deed alone supports the finding. Cox v. Cox, 82 Cal.App.2d 867, 871, 187 P.2d 23. In this case, however, there was additional evidence that the husband and wife told an insurance agent that the property was to be in joint tenancy. The court apparently believed the husband in his testimony that any allegations made to the effect that the property was community property was done so mistakenly.

The trial court, at the conclusion of the testimony, said: "I am inclined to think that the parties here are like most laymen dealing with this problem. The only aspect of community property that most laymen seem to know is the rights of survivorship,

and that is the one in which they are primarily interested in an attempt to avoid the expense of probate proceedings. With the exception of the allegations in the cross-complaint for divorce, most of the evidence is as consistent with a layman's conception of joint tenancy as it is with community property, or vice versa, and I can't give to the allegations in the cross-complaint the dignity and effect of a change in the holding of the title of property.

"I think that the evidence here is insufficient to overcome the effect of the deed. And, therefore, it is my finding that the property was joint tenancy, and, therefore, my judgment would be for the defendant."

Judgment affirmed.

WHITE, P. J., and DORAN, J., concur.



142 Cal.App.2d 510

ESTATE of Paul MASSON, Deceased.

Ludwig A. EMGE and Josephine Martin, Executors of the last will and testament of Adele Masson, deceased, Appellants,

v.

WELLS FARGO BANK AND UNION TRUST COMPANY, a corporation, and S. L. Weston, trustees of the trust created by the terms of the last will and testament of Paul Masson, deceased, Respondents.

Civ. 16872.

District Court of Appeal, First District, Division 2, California.

June 25, 1956.

The Superior Court, County of Santa Clara, John D. Foley, J., rendered an order and decree settling the final account of certain trustees and instructing them. An appeal was taken. The District Court of Appeal, Dooling, J., held that under a will whereby the donee of a general or unrestricted power of appointemnt "bequeathed" the property "to whichever American society, which, in the discretion of my executors, does best research into the diseases of old age (geriatrics)," the donee intended to appoint the property to her estate to be therein administered and distributed by her executors in exercise of the discretion conferred upon them, and did not merely intend to confer on them the mere naked power of appointment to a member of a designated class.

Order reversed with directions to enter order in conformity with opinion.

1. Wills ⇦589

As a general rule, where property is placed in trust for life of beneficiary and beneficiary is given power of appointment to dispose of corpus by will, persons appointed by donee take directly from trustees and not through estate of donee.

2. Powers ⇦19

Donee of a general, i. e., unrestricted, power of appointment may appoint the property to his estate to be therein administered and distributed by his executors in manner designated in his will.

3. Wills ⇦589

Under will whereby donee of general or unrestricted power of appointment "bequeathed" the property "to whichever American society, which, in the discretion of my executors, does best research into the diseases of old age (geriatrics)," donee intended to appoint property to her estate to be therein administered and distributed by her executors in exercise of discretion conferred upon them, and did not merely intend to confer on them the mere naked power of appointment to member of designated class.

4. Executors and Administrators ⇦271

Where donee with testamentary power of appointment appointed the trust property to her own estate, such trust property would be liable only for such portion of debts of her estate as could not be paid from her personal estate.

5. Trusts ⇦282

Where donee of testamentary power of appointment appointed trust property

to her own estate, to be therein administered and distributed, it was duty of trustee to deliver the property to her executors.

Joseph A. Brown, San Francisco, for appellants.

Rea, Frasse & Anastasi, Irvin A. Frasse, San Jose, for respondents.

DOOLING, Justice.

This appeal is taken by the executors of the last will and testament of Adele Masson, deceased, from an order and decree of the Superior Court of Santa Clara County settling the eighth and final account of certain trustees and instructing those trustees.

Respondents, Wells Fargo Bank and Union Trust Company and S. L. Weston, are the trustees of a testamentary trust created by the terms of the last will and testament of Paul Masson, deceased, father of Adele Masson, deceased.

The fourth clause of Paul Masson's will provided that the residue of his estate should be held by the respondents in trust. Respondents as trustees were directed to pay to Paul Masson's daughter, Adele Masson, the sum of $500 per month out of the net income of the trust. It was further provided in this clause:

> "(b) This trust shall cease and terminate upon the death of my daughter, Adele Masson, who shall have the power of disposing of the corpus of this Trust after her death by her Last Will and Testament and upon her death the corpus shall vest as designated by her in her said Will."

Paul Masson died October 22, 1940, domiciled in Santa Clara County where his will was admitted to probate.

Adele Masson, deceased, by her holographic will dated November 22, 1952, together with certain codicils thereto, exercised the power of appointment given to her by her father. In paragraph five of her will she provided:

> "My father's estate, now in charge of Wells Fargo Bank, I bequeath to whichever American society, which, in the discretion of my executors, does best research into the diseases of old age (geriatrics)."

On February 20, 1954, a codicil was added to the will to the effect that:

"Codicil: Instead of bequeathing my father's entire estate to research in geriatrics, according to the original behest, I wish to abstract ten thousand dollars therefrom in order (1) to pay * * *"

certain specified amounts to named beneficiaries.

Respondents-trustees filed in the Superior Court of Santa Clara County their final account and petition for instruction. They alleged that they had been advised by their counsel that they should distribute the remainder of the corpus of the trust in their hands directly to the persons and institutions mentioned in the will and codicils of Adele Masson but that the appellants, executors of the will of Adele Masson, deceased, insisted and demanded that the "corpus of said trust, or at least the sum of Forty-eight Thousand Two Hundred and Six Dollars ($48,206.00) thereof, be paid to said executors for the purpose of paying debts of said estate, executors fees, back income taxes, back and current state income taxes, and the compromise of a disputed claim; * * *." Respondents further alleged that they were in doubt as to the proper distribution to be made of the corpus of the trust and asked for the direction of the court with reference to this matter.

The court made its order providing that the trust corpus was not subject to the claims of the donee's creditors and that the trust corpus should not be delivered to the executors of the will of Adele Masson but should be paid directly by the trustees to the persons and in the amounts as provided in the will of Adele Masson, the residue to be distributed as designated by the executors of said will, such designation to be first confirmed and approved by the court probating Adele Masson's will.

[1, 2] We may take it as the general rule that where property is placed in trust for the life of a beneficiary and the beneficiary is the donee of a power of appointment to dispose of the corpus by will, the

persons appointed by the donee take directly from the trustees and not through the estate of the donee of the power. In re Estate of Baird, 120 Cal.App.2d 219, 227–229, 260 P.2d 1052; In re Estate of Baird, 135 Cal.App.2d 343, 345, 287 P.2d 372. The court in this case so determined. However the donee of a general, i. e. unrestricted, power of appointment such as that contained in the will of Paul Masson may appoint the property to her estate to be therein administered and distributed by her executors in the manner designated in her will. Garfield v. State Street Trust Co., 320 Mass. 646, 70 N.E.2d 705, 711, 169 A.L.R. 719; Fiduciary Trust Co. v. Mishou, 321 Mass. 615, 75 N.E.2d 3; In re Camp's Estate, Sur., 64 N.Y.S.2d 755; Pennsylvania Co. For Insurance On Lives, etc., v. Kelly, 134 N.J.Eq. 120, 34 A.2d 538, 545; Morgan v. Commissioner, 309 U.S. 78, 81, 626, 60 S.Ct. 424, 84 L.Ed. 585; 72 C.J.S., Powers, § 24 b (1), p. 415.

[3] By paragraph five of her will Adele Masson "bequeathed" this property "to whichever American society, which, *in the discretion of my executors,* does best research into the diseases of old age (geriatrics)." The question is presented whether she thus intended to appoint the property to her estate to be therein administered and distributed by her executors in the exercise of the discretion conferred upon them, or whether she intended as found by the probate court to confer on them the mere naked power of appointment to a member of the designated class. It seems to us to be the more reasonable construction of this provision that she intended the property to become a part of her estate to be therein dealt with by her executors in the manner provided. She conferred the discretion not upon individuals by name but upon her executors, as executors, i. e., upon those whose duty it was to administer the estate disposed of by her will. It is the reasonable conclusion that in exercising the discretion conferred upon them she intended them tc exercise it as executors and not as individuals.

[4] This conclusion makes it unnecessary to consider other questions presented. The trust property when made a part of her estate will be liable only for such portion of the debts of her estate as cannot be paid from her personal estate. In re Howald's Trust, 65 Ohio App. 191, 29 N.E. 2d 575, 583.

[5] Since we have determined that Adele Masson appointed the trust property to her estate, to be therein administered and distributed, it is the duty of the trustees to deliver the property to her executors.

The order is reversed with directions to the court to enter an order in conformity with this opinion.

NOURSE, P. J., and KAUFMAN, J., concur.



142 Cal.App.2d 445

Howard L. METTS, Plaintiff and Respondent,

v.

CENTRAL STANDARD LIFE INSURANCE COMPANY OF ILLINOIS, Defendant and Appellant.

No. 16798.

District Court of Appeal, First District, Division 1, California.

June 21, 1956.

Hearing Denied Aug. 16, 1956.

Action against insurer for refusal to perform family polio insurance contract. The Superior Court, Alameda County, Thomas J. Ledwich, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Bray, J., held that application form for polio policy constituted an offer of coverage to take effect immediately upon the signing and posting of application and that failure to answer question in application as to whether any member of family had polio during preceding 90 days did not prevent coverage from taking effect immediately upon the signing and posting of application.

Judgment affirmed.

1. Insurance ⇐80

Agent appointed by insurer to sell polio insurance was under no duty as such agent to call to attention of insurer, when he applied for polio policy covering his own family, that child living across the street had polio or to immediately notify insurer of son's illness, where son's condition was at first diagnosed as tonsilitis.

2. Insurance ⇐130(1)

Whether contract of polio insurance arose when application therefor was signed depended upon whether application form constituted offer by insurer to insure immediately upon application being signed and posted, and, if so, whether applicant met terms of such offer.

3. Insurance ⇐130(1)

In determining effect of language of application form for polio policy, established rules for construction of insurance policies must be borne in mind.

4. Insurance ⇐146(3)

Since insurance contracts are generally drawn by insurer, any uncertainties or ambiguities therein are resolved most strongly in favor of insured.

5. Insurance ⇐146(1, 3)

Insurance policy, like any other contract, is to be interpreted according to intention of the parties as expressed in instrument in the light of circumstances surrounding its execution, and where policy contains no ambiguity, courts will indulge in no forced construction against insurer.

6. Insurance ⇐146(3)

Where two interpretations of policy equally fair may be made, that which gives the greater protection to insured will prevail.

7. Insurance ⇐130(1)

Application for insurance must be construed as it would be construed by ordinary applicant.

8. Insurance ⇐130(7)

Application form for polio policy constituted an offer of coverage to take effect immediately upon the signing and posting of application, in view of statements, "Immediate First Day Coverage Automatically Covers Entire Family" and "Pays from first day that poliomyelitis manifests itself," appearing on reverse side of form.

9. Insurance ⇐136(1)

Where valid parol contract of insurance has been entered into, the policy to be issued thereon is simply the memorial of prior parol contract, and even though policy is not delivered until after loss occurs, the insurance is deemed effective from the time agreed upon in parol agreement, regardless of any delivery of policy.

10. Insurance ⇐130(7)

Failure to answer question in application for family polio policy as to whether any member of family had polio during preceding 90 days did not prevent the coverage from taking effect immediately upon the signing and posting of application, where application form constituted an offer of such immediate coverage and no member of insured family had polio during designated period. West's Ann.Insurance Code, § 334.

11. Contracts ⇐22(1)

Ordinarily, in order to accept an offer and make a binding contract, offeree must comply with all the conditions of offer, but substantial compliance with such conditions is sufficient.

12. Insurance ⇐130(7), 291(4)

Contract for family polio insurance arose upon signing and posting of application therefor, notwithstanding failure to answer question in application as to whether any member of family had polio during preceding 90 days, where application form constituted an offer of such immediate coverage, but such contract was subject to avoidance should it develop that any member of family had polio during designated period. West's Ann.Insurance Code, § 334.

13. Insurance ⇐141(4)

Where coverage under family polio policy became effective immediately upon the signing and posting of application therefor, the cashing of check for premium returned after a member of insured family had contracted polio and insurer had denied coverage did not constitute acknowl-

edgment by insured that no contract of insurance had been entered into or bar recovery for refusal to perform insurance contract.

Hardin, Fletcher, Cook & Hayes, Oakland, Lewis P. May, Oakland, of counsel, for appellant.

Schofield & Hannegan, Louis F. Schofield, Oakland, for respondent.

BRAY, Justice.

Defendant appeals from a judgment granting plaintiff $5,000 for refusal to perform an insurance contract insuring plaintiff and his family against poliomyelitis.

Question Presented.

Did a contract of insurance arise? (a) Was the application an offer of immediate insurance coverage? (b) If so, did plaintiff meet its terms?

Facts.

On October 18, 1951, plaintiff Howard L. Metts was appointed by defendant Central Standard Life Insurance Company as an agent to sell polio insurance policies. Defendant furnished Metts with application forms. On November 8, 1951, plaintiff mailed an application in behalf of one Hutchinson and his family to the company for polio insurance. When Hutchinson's policy was received it showed November 8, 1951, the same date as the application, as the effective date.

On May 15, 1952, plaintiff filled out and mailed two applications, together with his personal check for the premiums on both, to the company. One of these applications was for himself and family, the other for a neighbor and family. On his application plaintiff failed to answer the question: "Have you or any members of your family had polio (Poliomyelitis) within the last 90 days? (Answer Yes or No)." Plaintiff testified that his failure to answer this question was "just an oversight on my part," and that no member of his family had had polio within 90 days of the application. The applications were received by the company May 23rd. The neighbor's policy was sent to plaintiff for delivery but no policy for plaintiff or his family was ever written. The company returned plaintiff's application (when does not appear).

Before plaintiff mailed his application, a child in his neighborhood had contracted polio. On May 18, 1952, plaintiff's 16½-month-old son began running a fever. He was taken to the hospital and examined that evening. The diagnosis was acute tonsilitis. The doctor felt that there was no sign of polio. On May 21, 1952, the diagnosis was, for the first time, polio.

Plaintiff notified the company on May 28, 1952, that his son had polio.

On June 13, 1952, the company answered, denying coverage because of the failure to answer the question and because "in any event" the policy would have been dated subsequent to May 21st. The company wrote plaintiff again on July 24, 1952, asking for a reply, and refunding his premium by check, which plaintiff cashed. Plaintiff replied to this letter.

Plaintiff filed a complaint for damages on June 12, 1953. At the trial, plaintiff testified that he received no instructions from the company to the effect that he had authority as an agent to bind the company. And he presumed that an agent had no authority to bind the company unless given such authority by the company. He stated that the words "no waiting period," which were on the application, meant to him that any person who made an application was insured as of that date. He also said he knew that the company, not the agents, issued the policies.

Plaintiff had received no instructions from the company as to when its policies were to take effect.

The court found that the company agreed to insure plaintiff and his family as of May 15, 1952; that plaintiff's son thereafter contracted polio and that plaintiff incurred expenses for the treatment of the son in the sum of $5,000; that plaintiff had performed all the conditions of the agreement and that plaintiff's failure to answer the key question on the application was an oversight and that defendant there-

by suffered no prejudice because the answer would have been "no."

The application form, on its reverse side, stated: "Infantile Paralysis. Immediate First Day Coverage Automatically Covers Entire Family." "No Waiting Period." "Pays from *First Day* that poliomyelitis manifests itself and thereafter, as provided * * *."

Plaintiff contends that the application form itself was an offer to contract which was accepted by him; that the above mentioned wording on the back of the form caused him to believe that when he mailed the completed form and premium payment the contract was then in effect and that he was immediately covered.

Defendant contends that there was no representation that the policy would take effect as of the date of the application, and that the application was an offer by the insured not accepted until policy issued. Defendant further contends that as the application states "Please issue to me your Special Polio (Infantile Paralysis) Insurance Policy *based upon the statements I am giving you herein*" (emphasis added) and the question concerning whether any member of the family had polio within the last 90 days was unanswered, there could be no contract. Inasmuch as the court found (and the finding is supported by the evidence) that the answer to the question would truthfully have been in the negative, the real question in the case becomes when, if the question had been so answered, the policy would take effect.

[1] Plaintiff testified that on the date of the application he knew that a little girl living across the street from plaintiff's family had polio. When asked if that was not the reason for his signing the polio application he said, "Any time a person is in danger * * * I would have taken out insurance regardless, but that would prompt a person to take out insurance." We see no violation of plaintiff's duty as an agent of the company to call this fact to the company's attention, nor in plaintiff's failure to notify the company when his son first became ill, inasmuch as his condition was diagnosed as tonsilitis. If the policy took effect on completing the application, what happened to the son thereafter (the evidence showing he was hale and hearty on that day) could not affect the policy.

1. Was There a Contract of Insurance?

(a) Effect of the Application.

[2] Whether a contract of insurance arose upon plaintiff's signing the application depends (a) upon whether the language of the application form constituted an offer by defendant to insure immediately upon its being signed and posted, and (b) if so, whether plaintiff met the terms of the offer.

[3] In determining the effect of the language of the application form the established rules for the construction of insurance policies must be borne in mind.

[4, 5] "Because contracts of insurance are not the result of negotiation and are generally drawn by the insurer, any uncertainties or ambiguities therein are resolved most strongly in favor of the insured. Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 213 P. 42, 26 A.L.R. 123; 14 Cal.Jur. 443–445. Where there is no ambiguity, however, courts will indulge in no forced construction against the insurer, and the insurance policy, like any other contract, is to be interpreted according to the intention of the parties as expressed in the instrument in the light of the circumstances surrounding its execution [citations]." Blackburn v. Home Life Ins. Co., 19 Cal.2d 226, 229, 120 P.2d 31, 32.

[6] "Where two interpretations equally fair may be made, that which affords the greatest measure of protection to the assured will prevail." Fageol T. & C. Co. v. Pacific Indemnity Co., 18 Cal.2d 731, 747, 117 P.2d 661, 669.

Our first task is to determine, then, whether there is any uncertainty or ambiguity in the language of the application form. The face of the application form contains merely a request for the issuance of the "Special Polio Insurance Policy," data concerning the applicant and his family and the question mentioned above as being unanswered. The only language important here is that above quoted appear-

ing on the reverse side: "*Immediate* First Day Coverage *Automatically* Covers Entire Family." (Emphasis added.) The use of the words "immediate" and "automatically" in these phrases is difficult to explain as having any meaning other than that the coverage commences from the date of the application. At least, a reasonable conclusion is, that did these phrases apply to the first day of sickness rather than the first day of coverage, there would be no need for the words "immediate" and "automatically." The policy when issued would state that it covered illness from the first day of illness and covered the entire family. The form further states: "Pays from *First Day* that poliomyelitis manifests itself * * *." In view of that statement, what is the meaning of the words "immediate First Day Coverage" if not coverage immediately upon signing?

[7–9] Under the rules above mentioned such words are fairly capable of an interpretation which would afford the greatest measure of protection to the insured. A layman could hardly be expected to give any other interpretation. It is at least a reasonable interpretation. "* * * an application must be construed as it would be taken by the ordinary applicant * *." Ransom v. Penn Mutual Life Ins. Co., 43 Cal.2d 420, 424, 274 P.2d 633, 635. We are therefore required to hold that the application form constituted an offer by defendant of coverage to take effect immediately upon the signing and posting of the application. There need not be a written policy. "Where a valid parol contract of insurance has been entered into, the policy to be issued thereon is simply the memorial of the prior parol contract, and, even though the policy be not delivered until after the loss occurs, the insurance is deemed effective from the time agreed upon in the parol agreement, irrespective of any delivery of the policy [citation]." Marderosian v. National Casualty Co., 96 Cal.App. 295, 303, 273 P. 1093, 1096. In that case, the insurance circular stated concerning an insurance policy to be issued by a newspaper as a subscription premium, "'Do not wait until the accident happens. Do it to-day! Avail yourself of the opportunity to protect yourself before and not after.'" 96 Cal.App. at page 299, 273 P. at page 1095. The court held that although the application for the policy provided that the policy to be issued would be effective at noon "'of the day following the date'", 96 Cal.App. at page 301, 273 P. at page 1096, the application was received by the newspaper, the policy actually took effect as soon as received by the newspaper. Linnastruth v. Mutual Benefit, etc., Ass'n, 22 Cal.2d 216, 137 P.2d 833, holding that coverage did not take effect until the policy was issued, is not in point for the reason that the application expressly stated "'this application shall not be binding upon the Association until the policy is issued to me.'" 22 Cal.2d at page 217, 137 P.2d at page 833. This brings us to the question

(b) Did Plaintiff Meet the Terms of the Offer?

[10–12] He obviously did in all respects except that he did not answer the question as to whether there had been polio in the family in the preceding 90 days. The court found, and the evidence shows, that there had been none and hence the truthful answer, if given, would have been "no." Was the failure to answer fatal to the taking effect of the coverage? We do not think so. While ordinarily, it is the law that to accept an offer and make a binding contract the offeree must comply with all the conditions of the offer, substantial compliance is all that is required. No one would suggest that defendant wanted just *any* answer to the medical history question as a prerequisite to creation of the contract. Instead, it obviously demanded that plaintiff and his family actually not have had polio within the designated period. Merely answering in the negative was not what defendant required in exchange for its promise to insure. Rather, the demand that there not have been polio was a prerequisite which, if the answer were false, would have avoided the contract. Whether plaintiff answered the question was unimportant. Whether polio had existed was the important thing. The contract arose on signing, but such contract was subject to avoidance if it developed that there had

been polio in the designated period. That the failure to answer the question under the circumstances was not fatal to the taking effect of the contract is illustrated by analogy by the case of Ransom v. Penn Mutual Life Ins. Co., supra, 43 Cal.2d 420, 274 P.2d 633, where the applicant erroneously answered "no" to a medical question. As to that fact the court said, 43 Cal.2d at page 427, 274 P.2d at page 637: "An incorrect answer on an insurance application does not give rise to the defense of fraud where the true facts, if known, would not have made the contract less desirable to the insurer." See also how "materiality" is to be determined. Insurance Code § 334.

Moreover, there is some indication that the company itself placed little importance on plaintiff's failure to answer the question. Plaintiff sent the application to the office of defendant's Pacific Coast manager in Pasadena, the person who appointed him agent and sent him his instructions and kit, and on May 23rd the office manager wrote him thanking him for sending it to that office and informing him that she had forwarded it to defendant's "A. & H. Dept." at Monmouth, Illinois.[1] Presumably she examined the application, and if she did, must have noticed that the question was unanswered. It was received at Monmouth on May 23rd. The check accompanying the application was cashed May 24th. Defendant did nothing about the omission until June 13th. In the meantime, and on May 28th, plaintiff wrote to defendant's head office at Chicago informing it that his son had contracted polio. On June 13th the manager of defendant's accident and health department wrote that the department was in the process of writing plaintiff when his letter of May 28th was referred to it, and stated, "Additional information was required for the reason that" the medical question had not been answered. On June 24th, defendant wrote plaintiff referring to the unanswered question and stating, "Of course we now know that an affirmative answer is the correct answer but we are wondering if we should proceed with the issuance of the policy to provide coverage for other members of the family," and yet the question was not even then answered! In the case of the Hutchinson policy, the company dated that policy when issued back to the date of Hutchinson's application.

[13] Under the circumstances of this case, the cashing of the check for the returned premium did not constitute an acknowledgment by plaintiff that no contract of insurance had been entered into nor did it bar him from bringing this action.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



Dorothy GLANE and Winifred Snyder, Plaintiffs-Appellants,

v.

GENERAL MILLS, Inc., a Delaware Corporation, et al., Defendants-Respondents.*

Civ. 21336.

District Court of Appeal, Second District, Division 3, California.

June 14, 1956.

Hearing Granted Aug. 8, 1956.

Action for alleged breach of contract and for an accounting. The Superior Court, Los Angeles County, A. Curtis Smith, J., dismissed plaintiffs' second amended complaint without leave to amend, and plaintiffs appealed. The District Court of Appeal, Shinn, P. J., held that plaintiffs' complaint for damages and an accounting based on defendant's alleged acceptance and use eight years after rejection of plain-

1. Actually, the letter only refers to the application for insurance for one Otten which accompanied plaintiff's application. However, it is obvious that the office manager followed the same procedure as to both applications. Plaintiff's check accompanying covered both.

* Appeal Dismissed by Stipulation of the Parties Jan. 10, 1957.

tiffs' offer for plaintiffs' idea as to sale of a children's baking kit, did not state a cause of action based either on express or implied contract.

Judgment affirmed.

1. Literary Property ⇐9

In order for plaintiffs' complaint to state a cause of action for misappropriation of literary property and infringement of common-law copyright, plaintiffs were required to allege their ownership of a protectible property interest, unauthorized copying of their material by defendant, and damage resulting to them through the unauthorized copying.

2. Literary Property ⇐9

In order for plaintiffs alleging a cause of action for misappropriation of literary property and infringement of common-law copyright to show that they owned a protectible property interest, it was necessary for them to show the originality of their idea and format, and that the protectible portions of their idea for a proposed junior baking kit, and the kit manufactured by defendant were similar.

3. Literary Property ⇐9

Questions of originality, similarity and copying are questions of law, in the first instance, and may be determined by a court upon demurrer. West's Ann.Code Civ.Proc. § 426, subd. 3.

4. Contracts ⇐16

Preliminary negotiations do not, of themselves, give rise to contractual liability.

5. Contracts ⇐16

Where plaintiffs sent defendant a letter offering them use of their idea as to sale of a children's baking kit and letter concluded with the request to hear from defendant if it was interested in the idea, such letter could not be construed as an express contract between the parties because it was purely a unilateral act of the plaintiffs. West's Ann.Civ.Code, §§ 1550, subd. 2, 1565.

6. Appeal and Error ⇐768

Admissions by plaintiffs in their brief, that their alleged offer to defendant of use of their idea as to sale of a children's baking kit was rejected, was binding upon plaintiffs on appeal.

7. Contracts ⇐22(1)

An offer, unless it provides otherwise, must be accepted within a reasonable time.

8. Contracts ⇐16

While an express contract is one the terms of which are stated in words, one party may use the words and the other may accept, either in words or by his actions or conduct.

9. Contracts ⇐4

An "implied contract" is one that is inferred from the conduct, situation, or mutual relation of the parties and enforced by the law on the ground of justice. West's Ann.Civ.Code, § 1621.

See publication Words and Phrases, for other judicial constructions and definitions of "Implied Contract".

10. Pleading ⇐34(2)

Specific facts pleaded control general allegations as to existence of an implied-in-fact contract between parties.

11. Literary Property ⇐2

Rights in commonplace ideas may not be appropriated merely by offering the idea to persons or corporations, and by attempting to bar them from selling a product based upon such idea unless they pay original offerors for the privilege.

12. Literary Property ⇐9

Plaintiffs' complaint for damages and an accounting based on defendant's alleged acceptance and use eight years after rejection of plaintiffs' offer for plaintiffs' idea as to sale of a children's baking kit, did not state a cause of action based either on express or implied contract.

Shacknove & Goldman, Los Angeles, for appellants.

Gibson, Dunn & Crutcher, Henry F. Prince, Richard H. Wolford, Los Angeles, for respondents.

SHINN, Presiding Justice.

Plaintiffs appeal from a judgment of dismissal based on an order sustaining, with-

out leave to amend, defendant General Mills' demurrer to their second amended complaint. We are of the view that said complaint does not state a cause of action against General Mills and that the court did not err in denying leave to amend.

What happened is as follows: Prior to 1945, plaintiffs were employed by General Mills. On November 12, 1945, plaintiff Glane wrote to an employee of General Mills a letter which is the basis of the instant action. The letter stated that both plaintiffs were working on a promotional idea directed to girls between the ages of 9 and 14 years. The purposes of the idea were to teach good health habits, stimulate girls' interest in cooking, give girls actual cooking experience and to promote the sale of General Mills' products. Plaintiffs proposed to prepare a packaged kit which would contain a cooking apron, kit and potholders, an illustrated recipe book which would be written by plaintiffs, and small packages of various products manufactured by General Mills, such as flour, Bisquick, pancake flour, cake mix, etc. Plaintiff Glane also suggested that the kit might contain a square pan, a muffin tin, a set of plastic graduated measuring cups and measuring spoon, a signed membership card which the girls could mail to Martha Meade and Betty Crocker in order to get further recipes, and a membership emblem the girls could wear on their aprons. Plaintiff Glane estimated the cost of the kit at $2.40 and suggested a selling price of $2.95. The letter concluded: "If you are interested in this idea we would naturally expect to have a conference with you personally on this matter. We would be glad to send you a sample kit which we are now working up if you would like to have us do so."

Nothing further happened for at least seven years, until 1953 and 1954, when General Mills began manufacturing, distributing and selling a Betty Crocker Junior Baking Kit which, plaintiffs contend, copies and uses the original format and idea outlined in the above-mentioned letter sent to General Mills by plaintiff Glane. Whereupon plaintiffs filed the present action.

[1-3] Plaintiff's original complaint attempted to state causes of action for misappropriation of literary property, infringement of common law copyright, for breach of contract and for an accounting. Under the misappropriation and infringement theory, which sounds in tort, plaintiffs were required to allege their ownership of a protectible property interest, unauthorized copying of their material by General Mills, and damage resulting to them through the unauthorized copying. Golding v. R.K.O. Pictures, Inc., 35 Cal. 2d 690, 221 P.2d 95. It was necessary for plaintiffs, in order to show that they owned a protectible property interest, to show the originality of their idea and format; Golding v. R.K.O. Pictures, Inc., supra, 35 Cal.2d 695, 700, 221 P.2d 97, 100; Stanley v. Columbia Broadcasting System, 35 Cal.2d 653, 663, 221 P.2d 73, 23 A.L.R.2d 216; and that the protectible portions of their proposed kit and the kit manufactured by General Mills were similar. Stanley v. Columbia Broadcasting System, supra. Proof of substantial similarity between the two would give rise to an inference of both General Mills' access to plaintiffs' format (though this is not in question here) and copying by General Mills. Kovacs v. Mutual Broadcasting System, 99 Cal.App. 2d 56, 221 P.2d 108. The questions of originality, similarity and copying are questions of law, in the first instance, and may be determined by the court upon demurrer. Code Civ.Proc. § 426(3); Weitzenkorn v. Lesser, 40 Cal.2d 778, 256 P.2d 947.

After a demurrer to the complaint was sustained, plaintiffs abandoned the tort theory of misappropriation and infringement, and filed a first amended complaint which attempted to state causes of action for breach of contract and for an accounting. It is not clear whether plaintiffs were alleging an express or an implied contract.

After a demurrer to their first amended complaint was sustained, plaintiffs filed a second amended complaint (to be referred to as the complaint), which likewise attempted to state causes of action for breach of contract and for an accounting. It alleged that in 1945 plaintiffs prepared an original format, reduced to writing, for the manufacture and sale of a children's baking kit containing prepared and packaged

baking mixes, baking pans, a cookbook, etc. It also alleged that prior to November 12, 1945, plaintiffs wrote to General Mills, informing General Mills that they had originated an idea and format which could be valuable to General Mills; that negotiations were entered into between the parties, and that "in furtherance thereof, plaintiffs submitted to defendants the aforesaid original format incorporating plaintiffs original ideas; said submission to defendants by plaintiffs was under and pursuant to an implied agreement, and it was so understood by plaintiffs and defendants, that if defendants used plaintiffs' format * * * defendants would pay to plaintiffs the reasonable value thereof * * *." It further alleged that during the years 1953 and 1954 General Mills did use plaintiffs' format "which had been submitted to the said defendants at their special instance and request" and that "although plaintiffs did not know that defendants had decided to accept plaintiffs' offer with respect to said idea by making use of said idea, plaintiffs expected, intended and understood that any use made by defendants of plaintiffs' idea was to be made pursuant to the implied agreement reached between plaintiffs and defendants."

Plaintiffs contend that they have stated sufficient facts to constitute a cause of action against General Mills on either of two theories, namely, an express contract and an implied-in-fact contract. There are a number of reasons why the first of these contentions is without merit. Although the complaint refers to plaintiff Glane's letter, albeit somewhat ambiguously, as "the agreement under which the aforesaid format was submitted to defendants", it is clear from the language which we have already quoted that the complaint does not allege an express contract. It alleged that plaintiffs' format and idea were submitted to General Mills at its special instance and request, that the letter of November 12, 1945 was sent to General Mills in furtherance of negotiations between plaintiffs and General Mills, and that plaintiffs submitted their idea and format "under * * * an implied agreement * * * that if defendants used plaintiffs' format * * * defendants would pay to plaintiffs the reasonable value thereof * * *." This language strongly suggests an attempt to state a cause of action against General Mills based upon a common count. But even if this were not the case, there are several insuperable objections to plaintiffs' theory of express contract.

[4–7] It was alleged that plaintiff Glane's letter was sent to General Mills in the course and furtherance of negotiations between the parties. And the so-called negotiations consisted only of plaintiffs' attempt to interest General Mills. Preliminary negotiations do not, of themselves, give rise to contractual liability. As the court said in Dillingham v. Dahlgren, 52 Cal.App. 322, 329, 198 P. 832, 835: "'The preliminary negotiations leading up to the execution of a contract must be distinguished from the contract itself. There is no meeting of the minds of the parties while they are merely negotiating as to the terms of an agreement to be entered into.'" See, also, Van Hoosen v. Briscoe, 85 Cal.App. 746, 749–750, 259 P. 1115. The letter itself cannot be construed as an express contract between the parties because it was the purely unilateral act of the plaintiffs. The letter concluded with a request to hear from General Mills if General Mills was interested in the idea and format. At most it was a vague offer to General Mills to enter into some business arrangement. But, assuming for the moment that it was an offer of the essentials of a contract, the letter imposed no obligation unless accepted according to its terms. Civ.Code, § 1550 (2); Civ.Code, § 1565. There was no acceptance of the offer by General Mills. This is admitted by plaintiffs in their opening brief, in which they state: "Respondents evinced great interest in the kit, but informed Appellants that they could not use it at that time. Appellants heard nothing further from Respondents until they were shocked to find that Respondents were using the aforesaid format in the same manner as outlined by Appellants to Respondents, without notification by Respondents to Appellants of such use." This admission is binding upon plaintiffs and we must assume that plaintiffs' offer was rejected by

General Mills. This is confirmed by plaintiffs' admission that there was no further negotiation between the parties, and by the eight years' lapse of time between the letter of November 12, 1945 and the appearance of the Betty Crocker Junior Baking Kit. It is elementary that an offer, unless it provides otherwise, must be accepted within a reasonable time. Bogart v. George K. Porter Co., 193 Cal. 197, 223 P. 959, 31 A.L.R. 1045. There is language in the complaint to the effect that the alleged use of plaintiffs' format and idea constituted an acceptance of their offer, but this language is, at best, conclusory, and is refuted both by plaintiffs' own admissions and by the lapse of time between plaintiffs' offer and the appearance of General Mills' own kit. We have therefore concluded that the complaint cannot be sustained on the theory that it states a cause of action for the breach of an express contract.

[8, 9] Plaintiffs' second contention, that the complaint states a cause of action on the theory of an implied-in-fact contract, is likewise without merit. "An implied contract is one, the existence and terms of which are manifested by conduct." Civ. Code, § 1621. "While an express contract is one, the terms of which are stated in words (Treadwell v. Nickel, 194 Cal. 243, 228 P. 25), one party may use the words and the other may accept, either in words or by his actions or conduct. Lane v. Superior Court, 104 Cal.App. 340, 285 P. 860. An implied contract is one that 'is inferred from the conduct, situation, or mutual relation of the parties and enforced by the law on the ground of justice'. Jennings v. Bank of California, 79 Cal. 323, 21 P. 852, 853, 5 L.R.A. 233, 12 Am.St.Rep. 145. 'The making of an agreement may be inferred by proof of conduct as well as by proof of the use of words.' Dunham, Carrigan & Hayden Co. v. Thermoid Rubber Co., 84 Cal.App. 669, 258 P. 663, 664. 'In general an implied contract, in no less degree than an express contract, must be founded upon an ascertained agreement of the parties to perform it, the substantial difference between the two being in the mere mode of proof by which they are to be respectively established. The law will imply that a party did make such a stipulation as under the circumstances disclosed, he ought, upon the principles of honesty, justice, and fairness to have made.' Smith v. Moynihan, 44 Cal. 53, at page 62. Of course, both kinds of contracts must be supported by adequate considerations. § 1605, Civ.Code." Grant v. Long, 33 Cal. App.2d 725, 736–737, 92 P.2d 940, 947.

[10–12] In this connection, plaintiffs rely on Weitzenkorn v. Lesser, supra, 40 Cal.2d 778, 256 P.2d 947, and Kurlan v. Columbia Broadcasting System, 40 Cal.2d 799, 256 P.2d 962. In those cases, the Supreme Court reversed judgments based on orders sustaining, without leave to amend, demurrers to counts predicated upon the theory of implied-in-fact contracts. We are of the view that the Kurlan and Weitzenkorn cases are not controlling as to the facts pleaded by plaintiffs herein. The complaint in the instant case, as well as the complaints in Kurlan and Weitzenkorn, contained allegations to the effect that material was submitted at the request of the defendants under an implied agreement that if the material were used by defendants, plaintiffs would be paid the reasonable value thereof. In our case, however, the letter which was incorporated into the complaint contradicts those allegations. It requested an expression of opinion as to whether General Mills was interested in plaintiffs' idea and format and indicated that plaintiffs would prepare and submit a kit and a cookbook to General Mills if plaintiffs received a favorable answer. No favorable answer was received, and the kit and cookbook were never submitted to General Mills for the good reason that General Mills was not interested. The specific facts pleaded control the general allegations as to the existence of an implied-in-fact contract between the parties. Wall v. State of California, 73 Cal.App.2d 838, 842, 167 P.2d 740; Sutton v. Walt Disney Productions, 118 Cal.App.2d 598, 258 P.2d 519. When General Mills declined to consider any business arrangement plaintiffs' proposal became a nullity and the plan could have been submitted far and wide in an effort to interest someone in it. General Mills would have had no right to

object if some competitor had contracted for the use of the plan. Under plaintiffs' theory anyone to whom the plan was submitted would be forever barred from putting out a children's baking kit without paying plaintiffs for the privilege. Rights in commonplace ideas may not be appropriated in this manner.

It is unnecessary to discuss the contention raised by General Mills that in any event there is no substantial similarity between the things suggested in plaintiffs' letter and the Betty Crocker Junior Baking Kit.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.



142 Cal.App.2d 404

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Phillip G. TILLMAN, Defendant and Appellant.

Cr. 3190.

District Court of Appeal, First District, Division 2, California.

June 19, 1956.

Defendant was convicted on two counts of selling narcotics in violation of Health and Safety Code. The Superior Court, Alameda County, Charles Wade Snook, J., entered judgment and defendant appealed. The District Court of Appeal held that evidence was sufficient to sustain verdict of guilty.

Judgment affirmed.

1. Poisons ⇐9

In prosecution for selling narcotics in violation of Health and Safety Code, evidence was sufficient to sustain verdict of guilty. West's Ann.Health & Safety Code, § 11500; West's Ann.Vehicle Code, § 503.

2. Criminal Law ⇐1159(2)

Although an appellate court will not uphold judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category.

3. Criminal Law ⇐260(11)

To warrant rejection of statements given by witness who has been believed by trial court, there must exist either physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions.

4. Criminal Law ⇐260(11), 1159(3)

Conflicts and even testimony which is subject to justifiable suspicion do not justify reversal of judgment, for it is exclusive province of trial judge or jury to determine credibility of witness and truth or falsity of facts upon which determination depends.

5. Criminal Law ⇐1159(4)

Where on appeal from conviction of selling narcotics in violation of Health and Safety Code, no ground for suspicion in regard to testimony of police officer was presented unless the District Court of Appeal accepted as true tesitmony that witness who testified was known as police officer or informer, which testimony was disbelieved by jury in trial court, testimony of such police officer would not be rejected on appeal as inherently incredible. West's Ann.Health & Safety Code, § 11500; West's Ann.Vehicle Code, § 503.

6. Criminal Law ⇐814(8)

In prosecution for selling narcotics in violation of Health and Safety Code, failure to give instruction on entrapment was not error in view of fact defendant took stand at trial and expressly testified that acts charged had not been committed and as a result such defense was not in issue. West's Ann.Health & Safety Code, § 11500; West's Ann.Vehicle Code, § 503.

7. Criminal Law ⇐37

Defense of entrapment is a positive defense imposing upon accused burden of showing that he was induced to commit act for which he is on trial and to invoke the

defense it must necessarily be assumed that act charged as public offense was committed.

Philip Knox, Jr., Oakland, for appellant.

Edmund G. Brown, Atty. Gen. of the State of California, Clarence A. Linn, Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., J. Frank Coakley, Dist. Atty. of Alameda County, Robert L. Anderson, Deputy Dist. Atty., Oakland, for respondent.

PER CURIAM.

Appellant was found guilty by a jury on two counts of selling narcotics, marihuana, § 11500 of the Health and Safety Code, and was sentenced to San Quentin, the sentences to run concurrently. He had admitted a prior conviction charged (violation of § 503, Vehicle Code), for which he had received probation. His appeal is based on insufficiency of the evidence to sustain the verdict and failure to instruct on entrapment. We have concluded that both grievances are wholly devoid of merit.

The main evidence of the prosecution was the testimony of Officer Brooks of the Oakland Police Department, who testified in substance that being on duty in plain clothes as a member of the Vice Detail, Special Service Bureau, he at approximately 1:30 a. m. on April 7, 1955 asked defendant in the Bamboo Club in Oakland whether he could make a buy, get some stuff, 3 sticks, and that for two dollars defendant sold and delivered to him three cigarettes, which were stipulated to have proved to consist of marihuana, and that again at 11:30 p. m. of the same day (the following evening), he and defendant repeated the transaction. The next evening (April 8th) they talked again about a transaction in marihuana but they did not come to an agreement.

Defendant, testifying in his own defense, denied that he had any such transaction with Officer Brooks and stated that shortly before April 7th he had been told that Brooks was a police officer. He testified that he had had a conversation with Brooks on April 8th only, in which he denied all knowledge of obtaining marihuana. The defense witness Sutton testified that early in April, 1955, when defendant and witness were both in the Bamboo Club, somebody said that Brooks, who was coming to the club, was an informer.

[1–5] The above shows sufficient though conflicting evidence, the conflict having been resolved by the jury against defendant. His contention that the evidence of Brooks must be rejected as inherently incredible, because Brooks was known as a police officer or an informer and because of the direct manner in which the illegal transactions had been concluded according to his testimony is answered by the following quotation from People v. Huston, 21 Cal.2d 690, 693, 134 P.2d 758, 759: "Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category [citation]. To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]" Moreover, no ground for suspicion is here presented if we do not, with appellant, incorrectly accept as true the testimony that Brooks was known as a police officer or informer, which testimony was evidently disbelieved by the jury.

[6, 7] No instruction on entrapment was required because the defense of entrapment was not an issue in the case. "[T]he defense of entrapment is a positive defense imposing upon an accused the burden of showing that he was induced to commit the act for which he is on trial [Citation]. To invoke the defense it must necessarily be assumed that the act charged as a public offense was committed." People v. Schwartz, 109 Cal.App.2d 450, 455, 240 P.2d 1024,

1027. In the instant case appellant took the stand and expressly testified that the acts charged had not been committed. Accordingly no reference to entrapment or request to instruct on it appears in the record.

Judgment affirmed



142 Cal.App.2d 563

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Douglas Rickland CLUCHEY, Defendant and Appellant.

Cr. 5591.

District Court of Appeal, Second District, Division 3, California.

June 26, 1956.

Rehearing Denied July 11, 1956.

Hearing Denied July 24, 1956.

Defendant was convicted of having kidnapped rent collector to commit robbery and of having subjected rent collector to bodily harm and of robbery. The Superior Court, Los Angeles County, Allen T. Lynch, J., entered judgment of conviction and order denying new trial, and defendant appealed. The District Court of Appeal, Vallée, J., held that, where defendant forced rent collector at gunpoint to drive around for several blocks until convenient place for robbing him was found and ordered rent collector to stop at place where robbery took place, there were two separate and distinct offenses committed—the transportation or kidnapping for obvious purpose of robbery and the robbery at place where rent collector was ordered to stop, and, therefore, judgment, which sentenced defendant for the two offenses, did not constitute double punishment for one offense.

Judgment and order affirmed.

1. Kidnapping ⇦1

Mere detention of victim during armed robbery is not "kidnapping" for purpose of robbery within meaning of Penal Code provision that any one who kidnaps or carries away any individual to commit robberies shall suffer death or shall be punished for life without possibility of parole where person subjected to such kidnapping suffers bodily harm. West's Ann.Pen.Code, § 209.

See publication Words and Phrases, for other judicial constructions and definitions of "Kidnapping".

2. Kidnapping ⇦1

Where victim is, by threat of force, transported or carried away to commit robbery, offense of "kidnapping for purpose of robbery" is committed. West's Ann.Pen. Code, § 209.

See publication Words and Phrases, for other judicial constructions and definitions of "Kidnapping for Purpose of Robbery".

3. Kidnapping ⇦1

It is the fact, not the distance of forcible removal, which constitutes kidnapping.

4. Criminal Law ⇦29

Kidnapping for purpose of robbery is a separate and distinct offense from the robbery. West's Ann.Pen.Code, §§ 209, 211.

5. Criminal Law ⇦1209

Where defendant forced rent collector at gunpoint to drive around for several blocks until convenient place for robbing him was found and ordered rent collector to stop at place where robbery took place, there were two separate and distinct offenses committed—the transportation or kidnapping for obvious purpose of robbery and the robbery at place where rent collector was ordered to stop, and, therefore, judgment, which sentenced defendant for the two offenses, did not constitute double punishment for one offense. West's Ann. Pen.Code, §§ 209, 211, 654.

6. Criminal Law ⇦738

Person's intention is manifested by circumstances connected with the offense and is a question of fact. West's Ann.Pen.Code, § 21.

7. Kidnapping ⇦5

Fact that rent collector, whom defendant had kidnapped and robbed, was shot by defendant after defendant had told rent collector that he would give rent collector something to remember defendant by was

enough to show defendant's intention to subject rent collector to bodily harm. West's Ann.Pen.Code, §§ 209, 211.

8. Kidnapping ⇐5

In prosecution for having kidnapped rent collector to commit robbery and for having subjected him to bodily harm, rent collector's opinion as to whether he thought defendant's shooting him was intentional was immaterial upon question of defendant's intent. West's Ann.Pen.Code, §§ 209, 211.

Gladys Towles Root, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Patrick T. McCormick, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

Defendant was convicted, first, of having kidnaped Robert Spencer to commit robbery and of subjecting him to bodily harm, Pen. Code, § 209, and, second, of robbery, Pen. Code, § 211. He was sentenced to state prison without possibility of parole. He appeals from the judgment and an order denying a new trial.

On February 2, 1955, Spencer, a rent collector, emerged from a hotel in Los Angeles with $850 on his person. He got into his car. As he did so defendant got into the rear of the car. Defendant pulled a revolver and ordered Spencer to drive. As Spencer was driving defendant jabbed him in the back of the neck with the gun. After Spencer had driven several blocks, defendant ordered him to stop and to give him his diamond ring and billfold, which Spencer did. Defendant then ordered him to drive for some time, during which he (defendant) had the gun in his hand. He finally told Spencer to stop, turn off the ignition, and give him the car key. He put the gun in front of Spencer's face and said, "I'll give you something to remember me by," and shot him in the right side. Defendant then fled.

The specifications of error are: 1. The convictions of kidnaping and robbery constitute double punishment for one offense. 2. The evidence is insufficient on which to base the implied finding that Spencer suffered bodily harm.

The argument with respect to the first point is that punishment for robbery and kidnaping for the purpose of robbery are inconsistent because the robbery is an essential element of the kidnaping for the purpose of robbery, and the conviction of the two offenses amounts to double punishment, forbidden by Penal Code, section 654. This section says "an act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other." Defendant implies he should have been convicted and punished for robbery only.

[1–5] Section 209 provides in material part:

> "Any person * * * who kidnaps or carries away any individual to commit robbery * * * shall suffer death or shall be punished by imprisonment in the state prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person * * * subjected to such kidnaping suffers * * bodily harm."

The mere detention of the victim during the commission of armed robbery is not kidnaping for the purpose of robbery within the meaning of section 209 of the Penal Code. People v. Taylor, 135 Cal.App.2d 201, 202, 286 P.2d 952. When the victim, by threat of force, is transported or carried away to commit robbery, the offense of kidnaping for the purpose of robbery is committed. People v. Thompson, 133 Cal.App. 2d 4, 7–8, 284 P.2d 39, "It is the fact, not the distance, of forcible removal which constitutes kidnaping in this state." People v. Chessman, 38 Cal.2d 166, 192, 238 P.2d 1001, 1017. Kidnaping for the purpose of robbery is a separate and distinct offense from the robbery. People v. Beltran, 93 Cal.App.2d 704, 706, 209 P.2d 635. Here there was a clear case of kidnaping for the purpose of robbery. Defendant forced

Spencer at gunpoint to drive around for several blocks until a convenient place for robbing him was found, where he ordered him to stop and the robbery took place. There were two separate and distinct offenses committed—the transportation or kidnaping for the obvious purpose of robbery and the robbery at the place where Spencer was ordered to stop. The judgment sentencing defendant for the two offenses did not constitute double punishment for one offense. Cf. People v. Brown, 29 Cal.2d 555, 176 P.2d 929.

[6, 7] The contention that the evidence is insufficient on which to base the implied finding of bodily harm is predicated on the theory that defendant did not intentionally shoot Spencer. The intention of a person is manifested by the circumstances connected with the offense. Pen.Code, § 21. Intention is a question of fact. It was for the trier of fact to say whether defendant intentionally shot Spencer. Defendant told him he would give him something to remember him by and then shot him. The fact that he shot Spencer, together with this statement, was enough to show his intention to subject Spencer to bodily harm. People v. Brown, 29 Cal.2d 555, 559, 176 P.2d 929.

[8] An argument that there was no intention is based on the testimony of Spencer given on the hearing of the motion for a new trial. When asked if he believed defendant "might have intended to do some injury to you and then may have at a later time abandoned that intention, let us say," he answered, "That's pretty hard to tell." What Spencer's state of mind was some time after defendant had been found guilty is of no consequence on review. The court's finding of "guilty" was predicated on Spencer's testimony that defendant shot him. Defendant did not deny the fact. Whether Spencer later thought the shooting was not intentional is immaterial. People v. Holt, 93 Cal.App.2d 473, 477, 209 P.2d 94.

The judgment and the order denying a new trial are affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

142 Cal.App.2d 468

Edward L. MARTIN and Herbert H. Hastings, as co-partners doing business under the firm name and style of Bayshore Construction Company, Plaintiffs and Respondents,

v.

Harry KARSH and Sylvia Karsh, Hy Karsh and Muriel Karsh, The Prudential Insurance Company of America, a corporation, and Alameda County-East Bay Title Insurance Company, a corporation, Defendants,

Harry Karsh and Sylvia Karsh, Hy Karsh and Muriel Karsh, Defendants and Appellants.

Harry KARSH and Hy Karsh, Plaintiffs and Appellants,

v.

BAYSHORE CONSTRUCTION COMPANY and Hartford Accident and Indemnity Company, a corporation, Defendants and Respondents.

Civ. 16759.

District Court of Appeal, First District, Division 2, California.

June 22, 1956.

Consolidated actions (1) by contractors to foreclose mechanic's lien for balance allegedly due under construction contract and (2) by contractees for alleged breach of contract for construction of concrete warehouse. The Superior Court, Alameda County, Marvin Sherwin, J., rendered judgments for the contractors, and the contractees appealed. The District Court of Appeal held that evidence sustained findings that contractors had substantially performed their contract and were entitled to agreed price for principal work done and certain extra work, less sum of $625 for costs and expenses of repairing concrete work which would ordinarily have been done by a contractor after completion of such a job.

Affirmed.

1. Contracts ⇐295(1), 302, 323(3)

In case of building contracts, and especially where owner has taken possession

of building and is enjoying fruits of contractor's work, no literal compliance with contract in all details and no absence of all defects and imperfections is required to entitle contractor to recovery on contract; and he can have such recovery after substantial performance in good faith if deviations and imperfections do not substantially affect usefulness of building for purposes for which it was intended, subject to allowance for damages if owner suffered any by reason of failure to perform strictly; and whether, in any case, defects and omissions are substantial or unimportant is generally a question of fact.

2. Contracts ⇐322(4)

Mechanics' Liens ⇐281(1)

In consolidated actions (1) by contractors to foreclose mechanic's lien for balance allegedly due under construction contract and (2) by contractees for alleged breach of contract for construction of concrete warehouse, evidence sustained findings that contractors had substantially performed their contract and were entitled to agreed price for principal work and certain extra work, less sum of $625 for costs and expenses of repairing concrete work which would ordinarily have been done by a contractor after completion of such a job.

Theodore Golden, J. Bruce Fratis, Robert N. Stefan, Oakland, for appellants.

Fitzgerald, Abbott & Beardsley, Oakland, for respondents.

PER CURIAM.

[1, 2] This is an appeal in consolidated actions relating to the sufficiency of the performance of the contractors, Martin and Hastings, doing business as "Bayshore Construction Company" hereinafter referred to as "Bayshore," in constructing a concrete warehouse under a fixed fee contract for Harry Karsh, Hy Karsh and their wives, the owners of the property in Oakland on which the warehouse was built, hereinafter referred to as "Karsh." Bayshore instituted action 254691 to foreclose a mechanic's lien against Karsh for the balance allegedly due under the construction contract; Karsh instituted against Bayshore action 25472 for damages (in the amount of $30,000) because of alleged breach of said construction contract on the ground that Bayshore had not completed the warehouse in a workmanlike manner and in conformity with the plans and specifications. The court found in substance that Bayshore had duly performed its contract and was entitled to the agreed price for the principal work and certain extra work less the sum of $625 allowed by the court for cost and expense of repairing concrete work which the court found would ordinarily be done by the contractor after the completion of a job like this one. Accordingly the foreclosure of a lien for the balance so found due was ordered and Karsh were adjudged to take nothing by their action and to pay the costs of both actions. They appeal from the judgment in the consolidated actions, contending that the evidence does not support the findings. We have concluded that said contention is without merit, that the conflicting evidence contains substantial support for the findings and judgment and that appellants' contrary argument is based on an incorrect stressing of their own evidence, rejected by the trial court, instead of the evidence favorable to respondents on which the trial court relied.

It is conceded by respondents that there were some deviations from a strict performance of the letter of the contract, plans and specifications, which deviations, however, they contend were made in good faith and justified by the circumstances, and some slight imperfections not more than normal for such buildings. It is accordingly their position that they substantially performed their contract, that the value of the building was in no way impaired and that appellants did not suffer any damage. The court's judgment and findings sustain those contentions except for the allowance of the stated deduction of $625 for repair of imperfections (cracks) of the concrete work, normally borne by the contractor.

The law is settled in this state, that in the case of building contracts, especially where the owner has taken possession of

the building and is enjoying the fruits of the contractor's work, no literal compliance with the contract in all details and no absence of all defects and imperfections is required to entitle the contractor to recovery on the contract, but that he can have such recovery after substantial performance in good faith, if the deviations and imperfections do not substantially affect the usefulness of the building for the purposes for which it was intended, subject to an allowance for damages if the owner has suffered any by reason of the failure to perform strictly. Whether, in any case, defects and omissions are substantial or unimportant is generally a question of fact. Thomas Haverty Co. v. Jones, 185 Cal. 285, 197 P. 105; Smith v. Mathews Construction Co., 179 Cal. 797, 801–802, 179 P. 205; Connell v. Higgins, 170 Cal. 541, 556–557, 150 P. 769.

In this case the evidence shows that appellants were fully enjoying the intended advantages of the construction and that its usefulness for the intended purpose was not substantially impaired. The building had been leased pending construction on the plans and specifications filed for a term of 10 years at a rent of $1,700 a month, it had been occupied by the lessee in July, 1953, and since then till the trial in October, 1954, the lessee had paid the rent provided for without complaining or requiring remedying of any of the defects and deviations stated by Karsh in this action and no repair or replacement of any of the work done by Bayshore had been made or requested. For their contention that the value of the building was impaired by the alleged deviations and defects appellants rely on the testimony of their expert appraisers, (brokers), that the property without said deviations and defects would have been worth $170,000 whereas as constructed the value would be between $120,000 and $140,000. However, said evidence caused a conflict only with the evidence of Bayshore's expert witnesses that none of the matters complained of was poor workmanship or a structural defect or affected the value of the building, which latter evidence was corroborated by the fact that in November, 1953, Karsh procured from The Prudential Insurance Company a loan on the warehouse of $125,000 based on an appraisal of $187,000.

As the above in itself is a sufficient justification of the judgment little need be said about the specific complaints. Karsh mainly complains of two deviations:

1. The footing for the center columns were poured separately, whereas the plans provided for a monolithic pour, in one piece with the adjacent floor slab. The reason given for the deviation by Bayshore is that Karsh eliminated from the original plans the wire mesh reinforcement which was originally intended to integrate the column footings and the adjacent floor slabs and instead increased the thickness of the floor slab and that said revision caused the separate pouring to be advisable. Even appellants' foundation expert conceded that to reach by the monolithic pouring a good effect in distributing the load over the floor reinforcing material would probably be required. From the side of Bayshore there was much expert evidence that the separate pouring under the circumstances was better or at least not less good than the monolithic pouring which would have led to different, but worse or at least not less cracking of the concrete. Among those who so testified was Robinson, the structural engineer of the work to whose satisfaction the work according to the specifications had to be completed.

2. The purlins of the roof were not hung level with the arches between which they were fastened as provided by the plans but so that the top of the purlins were 2 inches higher than the arches which prevented the nailing of the sheathing to the arches themselves over and above the nailing to the purlins. It is conceded by appellants that the plans requiring level hanging and nailing also to the arches failed to provide for the fact that the laminated arches were tied together by stitch bolts, the heads of which extended above the top of the arches and that such created a problem in nailing the sheathing to the arches which had to be solved in some way. Appellants, however, contend that other solutions than providing room for the bolts

by raising the whole ceiling two inches would have been preferable, to wit cutting out the sheathing where it came over the bolt head or countersinking the head bolts into the laminated arches. Again the evidence was conflicting, the experts of respondents among whom the engineer Robinson, testifying that the method used was just as good as the methods preferred by appellants, that it was in accordance with good engineering practice and not a structural defect.

Appellants rely on that part of the provision of section 34 of the specifications which reads: "No deviations shall be made from the plans or the specifications." This provision should be construed together with provisions which require the work to be done in a substantial and workmanlike manner to the satisfaction of the engineer of which we cite the following ones. Part of section 31 reads: "* * * The Contractor and Owner admits and agrees that the plans and specifications exhibit the intent and purpose of the Owner in regard to the work, and that they are not necessarily complete in every detail and are to be considered as showing the purpose and intent only; * * *"

Section 22 reads: "The Contractor shall comply with the obvious intent and meaning of these plans and specifications, which shall be construed to include all material, measures and modes of work necessary to complete the work herein specified in a workmanlike manner, in strict accordance with these plans and specifications, and to the satisfaction of the Engineer. Should any question arise as to the intent and interpretation of these plans and specifications he shall refer the same in writing to the Engineer, whose decision thereon shall be final." It then appears that the provision against deviation is not intended to make the plans and specifications inviolable under all circumstances but is part only of a system intended to obtain a good and workmanlike job in accordance with the general intent of the owner and under the control of the engineer. So construed it is not intended or effective to deviate from the legal rule of substantial performance. There can be no doubt that under the above evidence the court's implied holding that the two deviations complained of did not prevent recovery by the contractor under said rule and did not entitle appellants to damages over and above the deduction granted for cracks to be repaired by the contractor is binding on this court.

The same applies to the miscellaneous imperfections of the concrete work complained of, photographs of which in evidence were shown to the Engineer, Robinson, who testified of each that it was not a structural defect, not less than good workmanship and that the whole work was performed to his satisfaction, although he testified that some cracks in the concrete were such that the owner could expect the contractor to repair them, for which repairs the court granted the deduction of $625. There is no evidence showing that said amount is not sufficient for said purpose.

Judgment affirmed.



142 Cal.App.2d 438

Patrick A. CONRAD, Plaintiff and Appellant,

v.

Louis D. VERDUSCO; Fausto Gallego; Holly Meat Packing Co., a corporation; Charles Bonnicci; Louis J. Figone and Charles J. Figone, Defendants and Respondents.

Civ. 5152.

District Court of Appeal, Fourth District, California.

June 19, 1956.

Action to recover damages for breach of contract to sell Mexican-cured beef to plaintiff, for conspiracy to defraud plaintiff of expected profits from such contract and contract for resale of such beef and for wrongfully inducing repudiation of contract to sell beef to plaintiff, wherein one of the defendants filed a cross-complaint. The Superior Court of San Diego County, Joe

L. Shell, J., rendered judgment that plaintiff recover nothing, and plaintiff appealed. The District Court of Appeal, Barnard, P. J., held, inter alia that findings that at no time had any defendant entered into any conspiracy to defraud plaintiff of expected profits or any course of conduct to induce repudiation of contract to sell beef to plaintiff were supported by substantial evidence.

Judgment affirmed.

1. Appeal and Error ⇐866(1)

Where some of plaintiff's evidence and most of the evidence in depositions read into the record by plaintiff was favorable to defendants, many exhibits upon which both parties relied were introduced in evidence, no order of nonsuit was requested or made, and trial court, after weighing the evidence, decided the issues as questions of fact and not of law, rules governing appeal from a nonsuit were not applicable on appeal from judgment that plaintiff recover nothing, and existence of substantial evidence in favor of plaintiff would not of itself require a reversal of judgment.

2. Evidence ⇐591

Depositions of defendant and others, offered in evidence by plaintiff under statutory provision for examination of adverse party, his employees, etc., as if on cross-examination, constituted evidence in the case, though plaintiff was not bound by the evidence in such depositions. West's Ann. Code Civ.Proc. § 2055.

3. Sales ⇐417

In action for breach of contract to sell Mexican-cured beef to plaintiff finding that such contract had been abandoned by plaintiff was supported by the evidence.

4. Release ⇐28(1)

Plaintiff could not recover on cause of action for breach of contract to sell Mexican-cured beef to plaintiff where one of two defendants had not been served and plaintiff, in writing, had released codefendant from the effect of any possible judgment against him.

5. Sales ⇐370

Plaintiff, being unable to preform under contract of sale of Mexican-cured beef to defendant packing company, could not recover against such company or its officers, unless charges that such defendants and codefendants, who had contracted to sell the beef to plaintiff, had conspired to defraud plaintiff of expected profits from such contracts and that packing company and its officers had wrongfully induced repudiation of contract to sell beef to plaintiff, were established.

6. Conspiracy ⇐19
Torts ⇐27

Mere fact that packing company which had contracted to purchase Mexican-cured beef from plaintiff later purchased some meat from a Mexican corporation in which one of the parties to contract to sell such meat to plaintiff held some stock was not sufficient to establish alleged conspiracy by packing company, its officers, and plaintiff's vendors to defraud plaintiff of expected profits from contracts for purchase and resale of meat or that packing company and its officers had wrongfully induced repudiation of contract to sell meat to plaintiff.

7. Conspiracy ⇐19
Torts ⇐27

In action to recover damages for alleged conspiracy to defraud plaintiff of expected profits from contracts for purchase and resale of Mexican-cured beef and for wrongfully inducing his vendors to repudiate contract to sell such beef to plaintiff, findings that at no time had any defendant entered into any such conspiracy to defraud plaintiff or any course of conduct to induce his vendors to repudiate contract to sell meat to plaintiff were supported by substantial evidence.

8. Evidence ⇐253(1)

Where plaintiff failed to establish alleged conspiracy, his motion that declarations made by some of several defendants, out of the presence of codefendants, be admitted as binding upon all defendants was properly denied.

Scampini, Mortara & Ertola, Angelo J. Scampini, So. San Francisco, for appellant.

Joseph L. Alioto, Walter F. Calcagno, San Francisco, for respondents.

BARNARD, Presiding Justice.

This is an action for damages arising out of contracts for the sale of meat. On April 17, 1951, the plaintiff entered into a contract with the defendants Gallego and Verdusco, under which they agreed to sell to him 1,500,000 pounds of Mexican-cured beef at 30¢ a pound "for all weights shipped and as certified by the United States Customs". The contract provided that the sellers would have available for shipment not less than 60,000 pounds per week beginning May 1, 1951, and that "all shipments shall be made f. o. b. San Ysidro, California, or border"; that the plaintiff would furnish the barrels in which the beef was to be shipped, would furnish a skilled person to instruct sellers' employees in the proper method of curing the beef, and would furnish curing materials amounting to not more than 1½¢ per pound of cured beef; that the beef should comply with all government regulations pertaining to the importation of beef from Mexico; that the plaintiff would deposit in a bank a letter of credit in an amount sufficient to pay for all shipments as made, with the sellers authorized to draw thereon "when the shipment of cured beef shall pass final inspection" by the United States authorities; and that the performance by either party should be suspended "if either Mexico or the United States prevent the export or import of beef—until such restrictions be released," whereupon the agreement should be reinstated. By a supplementary agreement executed on April 18, 1951, it was agreed that the provision for a minimum delivery per week be deleted and suspended; that the plaintiff would use his best efforts to make available to the sellers a sum not exceeding $20,000 to be used for the sole purpose of purchasing cattle to conform with the agreement; and that "Upon advance or availability of the mentioned sum the clause covering the minimum amount to be delivered per week will be reinstated in the originial agreement."

On April 20, 1951, the plaintiff entered into a contract with the defendant Holly Meat Packing Co., herein referred to as "Holly", in which he represented that he "is causing" 1,500,000 pounds of beef to be slaughtered and cured in Mexico, and agreed to sell this meat to Holly at 45¢ per pound, agreeing to deliver all such beef available for shipment up to 80,000 pounds per week, starting April 30, 1951. The contract provided that title was to pass to the buyer when payment was made and possession of the meat was delivered at the border; and that Holly should deposit a letter of credit with a bank at San Ysidro, upon which the seller could draw at the rate of 45¢ per pound for every shipment of such beef upon presenting to the bank certain documents.

Shortly after the execution of these contracts the plaintiff hired one Leininger to supervise the curing of the meat. Leininger moved to Tijuana where Gallego's plant was situated, and remained there until about August 15, 1951. The plaintiff also shipped to Gallego at Tijuana 195 barrels, and sufficient curing materials to start operations. He also hired a bookkeeper and a manager, and retained a brokerage firm to keep him advised of all requirements of United States authorities. Holly deposited at the bank at San Ysidro a letter of credit in the sum of $45,000, as provided in its contract with the plaintiff.

On May 7, 1951, the plaintiff was advised by his brokerage firm that no Mexican-cured beef could be imported into the United States unless it came from a Mexican federally inspected plant. It was then discovered that Gallego's plant did not comply, and that Gallego could not receive the necessary license until he built a new slaughterhouse. Gallego started to build a slaughterhouse. The plaintiff advanced about $3,700 to Verdusco and Gallego for that purpose, and also arranged for the purchase of certain machinery for the slaughterhouse costing $4,700. All of the money he put into the deal came from a group of his backers in Los Angeles. On July 7, 1951, Mexico banned the export of meat to the United States, because of an outbreak of hoof and mouth disease, and this ban was not lifted until about December 28, 1951.

Early in August, 1951, the plaintiff and Gallego had a quarrel in which Gallego accused the plaintiff of charging him $2,000 more for the slaughterhouse equipment than it had cost, as a result of which the

plaintiff cancelled another contract in which he had agreed to lease this equipment to Gallego. On or about August 15, 1951, the plaintiff had another quarrel with Gallego in which the plaintiff claimed he was not obligated to furnish $20,000 for the purchase of cattle, but was only obliged to use his best effort to that end. At that time something occurred, and the evidence is conflicting as to whether the plaintiff abandoned and cancelled the original contract of April 17, 1951, or whether Gallego repudiated that contract and refused to carry it out. It appears without dispute that shortly thereafter the plaintiff proposed a new and different agreement with Gallego; that Gallego also proposed a new agreement between them; that the plaintiff submitted this proposed new agreement to his backers, who had furnished him what money he had used, and they rejected it; and that Verdusco at all times desired to have the original contracts performed. During the fall several letters were exchanged between Gallego and counsel for the plaintiff, in which suggestions for a new arrangement were made, and in which each claimed that the other was at fault.

On November 21, 1951, Holly notified the plaintiff that it regarded its contract with him as null and void. It is admitted that Gallego received a permit to export meat to the United States sometime after November 21, 1951, and before April 8, 1952; that the embargo on the shipment of meat was lifted on December 28, 1951; that between April 10, 1952 and June 13, 1952, Holly purchased and received 426,988 pounds of meat at 47¢ a pound from "Empacadero de Tijuana," a corporation which had taken over Gallego's plant; and that Gallego was one of three stockholders in "Empacadero de Tijuana".

The plaintiff brought this action on July 21, 1952, naming as defendants Verdusco, Gallego, Holly and three of Holly's officers and directors. The first cause of action was directed to the defendants Gallego and Verdusco alone, and sought damages for the claimed breach of the contract of April 17, 1951, as supplemented on April 18, 1951. A second cause of action alleged a conspiracy between all of the defendants to defraud the plaintiff out of his expected profit from the contract of April 17, 1951, and the contract with Holly, and sought damages therefor. The third cause of action alleged a wrongful interference by Holly and its defendant officers in the contractual relation between the plaintiff and defendants Verdusco and Gallego, by which Verdusco and Gallego were induced to repudiate their contract with the plaintiff, and sought damages therefor. Answers were filed by all of the defendants except Gallego, and Verdusco also pleaded a special defense, with a cross-complaint, alleging that on August 15, 1951, the plaintiff had abandoned his contract with Verdusco and Gallego and refused to perform the same. Gallego, a resident of Mexico, was never served, did not appear in the action, and is not involved in this appeal.

At the trial, the plaintiff and two of his witnesses testified, the plaintiff read into the record the depositions of Verdusco, Charles J. Figone and Louis J. Figone, and 63 documentary exhibits were introduced of which 42 were received as plaintiff's exhibits and 21 as defendants' exhibits. The defendants introduced no other evidence, and the case was submitted. The court found, among other things, that the officers of Holly, who were sued as defendants, acted at all times as representatives of Holly and not in their individual capacity, which was known to the plaintiff; that prior to August 16, 1951, the plaintiff abandoned his contracts of April 17 and 18, 1951, with Verdusco and Gallego; that the plaintiff was not ready and able to comply with or perform the terms of those contracts; that the plaintiff had no source of Mexican beef to deliver to Holly, other than the beef which he was to purchase from Verdusco and Gallego; that the plaintiff was not at any time ready and able to comply with or perform the terms of his contract with Holly; that Holly was at all times ready, willing and able to comply with and perform the terms of that contract; that the plaintiff had released Verdusco from any claims arising out of the contracts of April 17 and 18, 1951; that at no time did Verdusco and Gallego breach or abandon the contracts of April 17 and 18,

1951; that at no time did the defendants or any of them enter into a conspiracy to cheat and defraud the plaintiff of any purported profits, as alleged in the complaint; that at no time did Holly and its defendant officers breach any contract with the plaintiff; that at no time did these defendants enter into any course of conduct to induce Verdusco and Gallego to repudiate their contract with the plaintiff; and that the plaintiff had not sustained the burden of proof resting upon him. Judgment was entered ordering that the plaintiff recover nothing from the answering defendants, and that Verdusco recover nothing on his cross-complaint. The plaintiff has appealed from this judgment.

The appellant contends that the rules governing a nonsuit apply, since the defendant submitted the case for decision without offering additional evidence, and that the judgment must be reversed if there is any substantial evidence in favor of the plaintiff; that the essential findings as above outlined are not supported by the evidence; and that the court committed prejudicial error in denying plaintiff's motion, at the conclusion of his case, that the evidence of all declarations and admissions made by any of the defendants, out of the presence of the others, be admitted as binding upon the other defendants.

[1, 2] There is no merit in the contention that the rules governing a nonsuit are here applicable. Some of the plaintiff's evidence was favorable to the defendants, as was most of the evidence in the depositions read into the evidence, and there were a great number of exhibits upon which both parties relied. While the appellant was not bound by the evidence in the depositions, since they were offered under Section 2055 of the Code of Civil Procedure, the depositions constituted evidence in the case. No order of nonsuit was requested or made and the court, after weighing all of the evidence, decided the issues as questions of fact and not of law.

[3] If the finding that the appellant abandoned his contracts with Verdusco and Gallego is sustained by the evidence that fact is conclusive as to all issues in the case. The appellant argues that there is no evidence to sustain this finding other than the statements of Verdusco contained in his deposition, and "some self-serving statements to that effect" contained in several letters written by Gallego to appellant's attorney. While there is a conflict in the evidence, Verdusco testified that the appellant on August 10, 1951, cancelled his contracts of April 17 and 18, 1951, by going to the plant on that day and telling Gallego and Verdusco that he could not comply with the contracts any longer, that he could not get any money, that he was finished and that he said "So far as I am concerned, I am all washed up." He further testified that the appellant at that time stated that he had gone to a lot of trouble and did not want to lose out entirely, and that he would take 1¢ a pound as commission. This is somewhat confirmed by other evidence. Leininger left the plant at that time, Gallego submitted to the appellant a new proposed agreement which was rejected by appellant's backers, and the appellant later proposed a new and different agreement under which he might receive the meat. While there is no evidence that these new agreements were entered into, the appellant on August 16, 1951, wrote a letter to the president of Holly in which he stated that it was obvious that when the embargo on the importation of meat was lifted cattle prices in Mexico would rise, that in order to protect everybody the appellant had "worked out a different arrangement" with Gallego whereby the appellant was to purchase the cattle immediately, that he had also arranged to lease Gallego's entire facilities at so much per pound, and that "in other words, I would have my own cattle and my own facilities to work with". There was also evidence that the appellant's backers had quit and he had no money to go on with the deal, and many other bits of evidence which, in connection with other matters, tend to support this finding. In view of all of the evidence in this regard, there is no merit to appellant's contention that it is unbelievable that he would abandon a contract which would necessarily result in a large profit to him, at a time when nothing remained for him to do. Nothing more

than a conflict in the evidence appears in this connection.

[4, 5] In any event, the appellant could not recover on Count I since Gallego was not served and the appellant, in writing, had released Verdusco from the effect of any possible judgment against him. Whether the contracts of April 17 and 18, 1951, were abandoned by the appellant or repudiated by Gallego, it conclusively appears that the appellant was and would be unable to deliver any such meat to Holly, and that he could not recover against Holly and its officers unless the charges contained in the second or third counts were established.

[6–8] While there was some evidence of statements made to Gallego and Verdusco by these agents of Holly, to the effect that the appellant was not needed in the transaction, that he was without funds, and that he could not perform the contracts, these statements were denied. At the taking of one of the depositions it was stipulated that nothing had been done by Holly to discourage the appellant's backers in connection with the deal, and at the trial the appellant testified that it developed that "the plant couldn't give any meat" and that this was not the fault of Holly. There was a mass of evidence that at all times up to late November, 1951, Holly fully cooperated with the appellant, endeavored in every way to help him straighten out his difficulties, and tried to make it possible for him to deliver the meat which it wanted and needed. The mere fact that Holly some four months later bought some meat from a different corporation, in which Gallego held some stock, is not sufficient to establish the allegations contained in Counts II and III of the complaint, especially in view of all of the other evidence. Long before that time it conclusively appeared that the appellant could not deliver the meat called for by his contract with Holly. If it be assumed that there was sufficient evidence to make prima facie proof of a conspiracy, or of a wrongful interference with the contractual relations between the appellant and Verdusco and Gallego, the court found against the appellant on those issues and those findings are abundantly supported by the evidence. Since no conspiracy was established, the court properly denied appellant's motion that certain declarations made by some of the defendants, out of the presence of the others, be admitted as binding upon all defendants.

The appellant's attack upon the other findings is based upon conflicts in the evidence, or upon possible inferences therefrom. All of the material findings are sufficiently supported by the evidence. Aside from existing conflicts the court indicated, with great reason, that it did not believe appellant's testimony in many respects. It rather clearly appears that any possible violation of those contracts was chargeable to Gallego and not to Holly or any of its agents. The record is voluminous, there are 146 pages in the opening brief, and we have intentionally refrained from setting forth many factual details and from commenting on some of the points incidentally raised.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



Ada D. RIPPEE and Paul Marvin Rippee, Plaintiffs and Respondents,

v.

Edward H. LAKIN, doing business as Ed Lakin Finance Co., Lane W. Crossley, Yvonne Constance Crossley, G. C. Bliss, Frances Geraldine Bliss, William B. Pettis, Mrs. William B. Pettis, Carl W. Holland, and Edgar Davis, Defendants,

Edward H. Lakin, Appellant. *

Civ. 21416.

District Court of Appeal, Second District, Division 1, California.

June 26, 1956.

Hearing Granted Aug. 21, 1956.

Action against owner of trailer and against others for death of plaintiff's dece-

* Appeal Dismissed by Stipulation of the Parties Jan. 10, 1957.

dent, who had rented trailer and who was killed in gas explosion therein. The Superior Court, Los Angeles County, Lewis Drucker, J., after verdict for defendants, granted a new trial as to owner, and owner appealed. The District Court of Appeal, Fourt, J., held that evidence was insufficient to take to jury question whether trailer had been knowingly rented with any latent defect.

Order reversed.

1. Bailment ⇐33

In action for death of plaintiff's decedent who was killed in gas explosion in trailer which decedent had rented, evidence was insufficient to take to jury question whether trailer had been knowingly rented with any latent defect.

2. Bailment ⇐9

Lessor of trailer was not liable for death of lessee who was killed in gas explosion in trailer in absence of showing that trailer was rented with a defect which was known to and concealed by lessor and which was not discoverable by a reasonable inspection of the tenant.

3. Landlord and Tenant ⇐168(1)

It is the duty of a renter to exercise reasonable care and diligence in inspecting premises which he proposes to rent.

4. Landlord and Tenant ⇐168(1)

A lessee cannot recover for injuries to which his negligence proximately contributed, even if landlord covenanted to repair defects or voluntarily concealed hidden defects.

5. Bailment ⇐9

Lessor of a trailer had no greater duty to lessee than the duty owed by lessor of realty to his tenant.

6. Bailment ⇐31(1)

Where rented trailer was under exclusive control of lessee at time of explosion, and explosion was caused by open valve on gas heater in trailer, doctrine of res ipsa loquitur did not apply to establish lessor's negligence.

Ball, Hunt & Hart, Long Beach, by Clark Heggeness, Long Beach, for appellant.

N. E. Youngblood, Marvin Gross, Beverly Hills, for respondents.

FOURT, Justice.

This is an appeal by defendant Edward H. Lakin from an order granting a new trial.

Ada D. Rippee and Paul Marvin Rippee brought an action for damages for the wrongful death of Paul Martin Rippee, husband and father respectively of the plaintiffs, who died as a result of an explosion apparently centered around a butane heater in a rented trailer. Named as defendants were Edward H. Lakin, doing business as Ed Lakin Finance Company, Lane W. Crossley, Yvonne Constance Crossley, G. C. Bliss, Frances Geraldine Bliss, William B. Pettis, Mrs. William B. Pettis, Carl W. Holland, and Edgar Davis. A jury trial was had and a verdict rendered in favor of all defendants, after which plaintiffs moved for a judgment notwithstanding the verdict, and in the event such motion was denied, that plaintiffs be granted a new trial. The motion for a judgment notwithstanding the verdict was denied. The motion for a new trial was granted as to the defendants G. C. Bliss and Edward H. Lakin on the ground of insufficiency of the evidence.

Lakin has appealed upon the ground that the court abused its discretion in that there was no substantial evidence which would support a judgment for the plaintiffs, and further that the plaintiffs' evidence established the contributory negligence of the deceased as a matter of law.

A fair résumé of the facts of the case is as follows: On April 9, 1953, decedent Paul Martin Rippee, an oil well driller from Santa Barbara, left for Los Angeles county to work for the Santa Fe Drilling Company, and that was the last time Ada Rippee saw her husband before the explosion. At about 5:00 o'clock p. m. on the same date, Mr. Rippee requested motel space at the Pettis Motel and Trailer Court which was owned by Lane W. Crossley and Yvonne Constance Crossley and managed by Frances G. Bliss, with the occasional assistance of her husband, G. C. Bliss, who also supervised Edgar D. Davis, an employee of Pettis

Motel and Trailer Court. The decedent was informed by Mrs. Bliss that there were no cabins available and thereupon Mr. Bliss offered to rent to him the trailer in question. The trailer was looked at by the decedent and accepted and rented by him at the rate of $10 per week plus $1.40 for a tank of butane.

Mr. Bliss instructed and helped Davis in connecting the butane tank which supplied fuel for a heater and a cook stove in the trailer. Bliss told Davis to check the lines leading from the tank, and to check the stoves. Davis tested the stove but not the heater, since he was unaware that it was a "conversion job" and believed it was what it appeared to be, namely, a coal oil heater. Davis tested the main line that went to the stove and the burners with a match.

Shortly thereafter, decedent moved into the trailer. No information or instructions regarding the operation of the stove or heater were given him. At about 5:00 o'clock a. m., April 10, 1953, there was an explosion. Timothy Cavanaugh, a tenant of the establishment, saw the decedent with his clothes on fire and helped put the flames out, and thereafter Cavanaugh went to the trailer and turned the valve on the outside butane tank to an "off" position. Cavanaugh testified that the deceased was "incoherent and not understandable" at that time. Davis testified that he summoned Mr. and Mrs. Bliss, returned to the trailer and heard decedent say, "there was a gas leak".

James H. Collings, Jr., a deputy sheriff, arrived on the scene to find decedent in a severe state of shock. The officer wrapped him in blankets and placed him in his car. According to the officer, the decedent at that time was in a "high state of shock" and too badly injured to answer any questions. The officer further testified that upon examining the heater on the inside of the trailer, he found "that the butane line led directly into this kerosene stove with no burner on it", and that the tube was either bent or broken.

When Mrs. Bliss arrived at the scene she saw decedent in the car wrapped in blankets. The officer testified that she told him that "the victim * * * had stated to her that he had thought he had smelled gas escaping from the heater, and upon attempting to light same, the explosion occurred." Mrs. Bliss, in her deposition which was read into the record, stated that she had no conversation with decedent and heard none between the decedent and anyone else.

George Hodges, fire captain, Los Angeles county, arrived at the scene about 5:44 a. m. and found smoldering spots, but no fire. He found a heavy coating of ice or frost on the butane tank outside the trailer indicating that the butane had passed out of the tank rapidly within the last one and one-half hours. The valve on the tank had already been closed by someone. Inside the trailer he discovered the valve on the heater in an "open position"; the valve on the cook stove was in a "closed position". He checked the appliances and the visible fuel lines from the tank to the appliances and they all appeared to be in good order. He further explained in his testimony that the heater was lit in the conventional manner. He was qualified as an expert and when asked his opinion as to the cause of the explosion, said, "Now, what I think happened: The valve was in an open position on the heater. The gas passed from the tank to the line out the burner, which was not on. It poured gas into the trailer. And when a match was struck, presumably by the victim, a fire occurred and an explosion".

The trailer was formerly owned by Ella Jean Adams who testified that she sold it to Lakin or Holland or both in July, 1952. Lakin apparently financed Holland's purchase of the trailer and purchased her sales contract. She testified, in substance, that the trailer was equipped with a cook stove and a heater both using butane gas from a tank located outside of the trailer. The heater was near the door and was vented. There were valves on the appliances to regulate the flow of gas into the appliances. There was a small door at the base of the heater which had to be opened to turn the valve on the heater. She described and demonstrated how the heater was lit. She stated that she had used both appliances for four years without any difficulty.

There was a conflict in the evidence as to whether Lakin was the true owner or simply the legal owner.

There was a prior butane gas explosion in the trailer, the origin of which was unknown. Lakin knew of the previous explosion and had sent the trailer to a company to have the explosion damage repaired. On April 8, 1953, the day before the trailer was rented to the decedent, Lakin instructed the repair company to release the trailer to Mr. Bliss. Bliss stated that he was directed by Lakin to place the trailer on the Pettis Motel and Trailer Court premises temporarily and to rent it or sell it. Lakin denied that he gave Bliss any authority to rent the trailer. Bliss was not told of the prior explosion and had no knowledge of it, nor of any possible defect in the appliances. Bliss did not inform the decedent that the apparent coal oil heater had been converted to a butane heater. There were no changes made on the heater, the stove or the lines from the time Bliss picked the trailer up until it was rented to the decedent. After the explosion Lakin directed Bliss and Davis to repair the trailer.

[1–4] Appellant contends, and we believe properly so that there was no evidence presented to the effect that the trailer was knowingly rented with any latent defect. The plaintiffs alleged that the deceased rented the trailer and that its possession was surrendered to him. The relationship of the parties was therefore that of lessor and lessee. The plaintiffs, to recover, must show that the trailer was rented with a defect which was known and concealed by the lessor and not discoverable by a reasonable inspection of the tenant. It was appropriately said in the case of Nelson v. Myers, 94 Cal.App. 66, at pages 73–76, 270 P. 719, at page 722, in an action for wrongful death brought about by the death of a tenant as a result of asphyxiation caused by a defective automatic gas heater:

> "* * * the liability of the respondent has not been shown, and that the motion for nonsuit should have been granted.
>
> * * * * * *
>
> "* * * He was employed regularly as an oil well driller, and must be presumed to have been familiar with the danger of noxious fumes incident to the improper combustion of gas. Neither the gas heater nor the alleged disconnected vent pipe may be deemed to be latent or hidden dangers under the facts of this case. The condition of both was open and visible to any occupant of the bathroom. * * *
>
> * * * * * *
>
> "* * * It is the settled law of this state that, in the absence of fraud or deceit on the part of the landlord in concealing latent defects of which he has knowledge, and in the absence of a direct covenant to make repairs, the lessor is not liable to the tenant or others for injuries resulting from defects in the rented premises. * * *
>
> * * * * * *
>
> "A landlord is not an insurer of his demised premises against damages or injuries. He becomes liable for injuries or damages only when his conduct amounts to fraud or deceit, such as a failure to disclose the existence of hidden defects of which he has knowledge, and which may not be discovered by the use of reasonable diligence on the part of the lessee. The doctrine of *caveat emptor* ordinarily applies to the leasing of premises. It is the duty of the renter to exercise reasonable care and diligence in inspecting the premises which he proposes to rent. Even when the landlord has covenanted to repair defects, or is guilty of constructive fraud in concealing hidden defects of which he has knowledge, the lessee may not recover damages when his own negligence proximately contributed to the injuries sustained."

In the case of Neuber v. Royal Realty Co., 86 Cal.App.2d 596, at pages 616 and 630, 195 P.2d 501, at page 514, the court said:

> "* * * when a lessee rents premises that are safe as leased, but are rendered unsafe by his use of them, neither the lessee nor his employees can recover from the lessor for injuries

resulting from that condition. In this view the trial court is supported by a long, uniform and unbroken line of decisions in this state. * * *

* * * * * *

"It is not only necessary to prove a defendant's negligence, but it is a basic element in every right of recovery that a defendant's negligence must contribute to the injury—must be the proximate cause of the injury. Unless in addition to proving defendant's negligence, such negligence is in some way fastened to the injury, then a case is not made out. And before a defendant can be held to answer in damages for the injuries suffered by a plaintiff it is incumbent upon the latter to assume the burden of proof and show by a preponderance of the evidence that the negligence of the defendant was the proximate cause of such injuries. Where the facts go no further than to establish a possibility that defendant's negligence was the proximate cause of the injury, a plaintiff can not recover. * * *"

And in Daulton v. Williams, 81 Cal.App. 2d 70, at pages 73 and 75, 183 P.2d 325, at page 327, it was stated:

"Not having concealed any defective condition from his tenants or positively misrepresented the condition of his tenement, a landlord is not liable to his tenant for injuries due to a defective condition or faulty construction. * * * Also, before a landlord can be liable for the existence of such defect it must be proved that he actually knew of it. * * * The landlord is bound to disclose such concealed defects as are known to him at the date of the letting and then only if they are such as would not be discoverable by a reasonable inspection.

* * * * * *

"A landlord is not an insurer of his premises against injuries to his tenant unless he fails to disclose the existence of hidden defects of which he had actual knowledge. Moreover, the tenant must himself use reasonable care and diligence to inspect the property in which he is to reside. His failure to exercise such care defeats his claims for injuries based upon the alleged negligence of the landlord. Nelson v. Myers, 94 Cal.App. 66, 75, 270 P. 719. The landlord is not liable because of the presence of the dangerous condition, but solely by reason of his concealment thereof. * * *

"There is no duty on the landlord to inspect his tenement with the object of locating latent defects or of repairing them. * * *"

The evidence in this case produced by the plaintiffs themselves demonstrates that the lines were in good order; that the valve to the heater was opened by the decedent and that sometime later he lit the match thereby bringing about the explosion.

[5] The plaintiffs have suggested that the trailer was personal property and that therefore the appellant owed a duty to the decedent different from the duty owed by a landlord to a tenant. In Forrester v. Hoover Hotel & Inv. Co., 87 Cal.App.2d 226, 231–232, 196 P.2d 825, 828, the court said: "We are persuaded that to hold the landlord liable upon warranty for any injury resulting from a latent defect in the equipment or furnishings leased with a furnished apartment would be to make the landlord virtually an insurer of the safety of the tenant. We are satisfied that the correct rule, supported in this state by a long line of decisions, is that a landlord is not liable to the tenant for injuries due to a defective condition or faulty construction of the demised premises, in the absence of fraud, concealment or covenant in the lease".

In the case of Wilson v. Ray, 100 Cal. App.2d 299, 223 P.2d 313, a guest of a tenant in a furnished apartment was injured when an old gas stove exploded. An action was brought for damages against the landlord and the claim was made that the ordinary principles of liability did not apply because the defective equipment was personal property. Previous to the explosion the landlord had used the stove and had trouble with it, and she knew that the holes in the

burner should be enlarged. The court said at pages 303–304 of 100 Cal.App.2d, at page 315 of 223 P.2d:

"Fourth: *Were defendants liable to plaintiff for the defective condition of the stove because it was defective when the apartment was leased to Mr. and Mrs. Muti?*

"This question must likewise be answered in the negative. It is the general rule that a landlord is not liable to a tenant or his invitees for defective condition or faulty construction in property leased, in the absence of fraud, concealment or a covenant in the lease. (Forrester v. Hoover Hotel & Inv. Co., 87 Cal.App.2d 226, 232, 196 P.2d 825; Shotwell v. Bloom, 60 Cal. App.2d 303, 309, 140 P.2d 728.) It is likewise settled that if a plaintiff is seeking to recover against a lessor on the theory that he has a cause of action falling within the exception to the general rule, such plaintiff must plead and prove the exception to the general rule under which he claims a right against the lessor. (See the cases cited in 21 Cal.Jur. (1925) p. 60, Pleading, sec. 36. Cf. Reinhard v. Lawrence Warehouse Co., 41 Cal.App.2d 741, 745, 107 P.2d 501.) In the present case there is no pleading or proof that defendants covenanted in their lease that the stove in question was not defective, that they perpetrated any fraud upon the lessee or concealed any material facts from the lessee."

[6] Although at the trial of the case the plaintiffs requested no instructions on *res ipsa loquitur,* and none were given, they now contend that they could establish the defect or negligence by means of that doctrine. We are of the opinion that the doctrine of *res ipsa loquitur* does not apply in the case at hand. The trailer was under the exclusive control of the decedent; the plaintiffs' own testimony showed that a cause of the explosion was the open valve on the heater; the explosion was not an event that ordinarily occurs only by reason of the negligence of the parties sought to be charged and the defendants had no greater knowledge of the events leading up to the explosion.

In Wilson v. Ray, supra, the court held that the doctrine did not apply, and among other things, said at page 304 of 100 Cal. App.2d, at page 316 of 223 P.2d:

"Sixth: *Is the doctrine of res ipsa loquitur applicable to the facts of the instant case?*

"This final question must too be answered in the negative. It is the general rule that the doctrine of res ipsa loquitur is inapplicable in the absence of a showing that the instrumentality causing the injury was within the exclusive control of the defendant. [Citing cases.] In the present case plaintiff failed to offer any evidence proving or tending to prove that the instrumentality which caused the accident was within the exclusive control of defendants or either of them. On the contrary the evidence disclosed that the gas range was within the control of the lessees of the apartment and not of defendants. Therefore the doctrine of res ipsa loquitur was inapplicable in the present case."

In the case of Shaha v. Frey, 129 Cal. App.2d 509, 514, 277 P.2d 428, 431, where there was an explosion while the defendant was filling a butane tank, the court said as to *res ipsa loquitur* the following:

"* * * the doctrine will not ordinarily apply if it is equally probable that the negligence was that of someone other than the defendant; that it must appear that the defendant had sufficient control or connection with the accident that it can be said that he was more probably than not the person responsible for plaintiff's injury and that the plaintiff may properly rely upon res ipsa loquitur even though he has participated in the events leading to the accident if the evidence excludes his conduct as the responsible cause."

In the instant case the plaintiffs' proof showed that the decedent had the control of the trailer and that he opened the valve on the heater. The explanation for the explosion was no more accessible to the

appellant, who had never, so far as the record indicates, seen the trailer, than to anyone else.

For the reasons heretofore set forth we are of the opinion that the order granting the new trial as to the appellant must be reversed. It is unnecessary, therefore, to consider other points raised by counsel.

The order granting a new trial as to Edward H. Lakin is reversed.

WHITE, P. J., and DORAN, J., concur.



142 Cal.App.2d 613

Ben HERMAN, Plaintiff and Appellant,

v.

Harry BLACKMAN and Lillian Blackman, Defendants and Respondents.

Civ. 21421.

District Court of Appeal, Second District, Division 2, California.

June 27, 1956.

Action to recover sum allegedly due on stock purchase agreement. Defendants filed a cross-complaint to recover sum already paid to plaintiff by corporations. The Superior Court of Los Angeles County, Philbrick McCoy, J., rendered judgment that plaintiff take nothing on the complaint and that defendants have judgment on the cross-complaint, and plaintiff appealed. The District Court of Appeal, Fox, J., held that even though books of corporations showed an indebtedness to defendant, cause of action to recover sum allegedly erroneously paid to plaintiff was in corporation, since such sum had been paid from checking accounts or general funds of corporations and not from any special accounts or special funds that had been set apart as belonging to defendant.

Judgment on complaint affirmed and judgment on cross-complaint reversed.

1. Money Received ⇐8

In absence of authorization by individual to whom corporation was indebted, he could not be charged with sums represented by checks issued by corporation and checks allegedly issued by corporation in payment of such individual's obligations were "wrongfully received" by payee thereof, notwithstanding that person signing such check was authorized to sign for corporations.

2. Money Received ⇐18(3)

Evidence would not sustain contention that individual to whom corporation was indebted had ratified corporation's payment of amount of such indebtedness to third person.

3. Money Received ⇐13

Even though books of corporations showed an indebtedness to individual, cause of action to recover sum erroneously paid to third person was in corporation, where such sum was paid from checking account or general fund and not from any special account or special fund that had been set apart as belonging to such individual.

Marvin Segal and Chester L. Smith, Beverly Hills, for appellant.

Seymour Gold, Mitchell & Gold, Beverly Hills, for respondents.

FOX, Justice.

In his complaint plaintiff alleges that on or about October 22, 1953, he entered into an oral agreement to sell certain stock that he owned in the NBH Corporation and in Lord's Appliance Co., Inc., to defendant Harry Blackman, Al Haytin and Sam Nassi for $15,000. The contemplated source of these funds was as follows: Defendant Blackman $5,000; Haytin $800; Nassi $800; and the remaining $8,400 was to come from funds that these two corporations owed Blackman, Haytin and Nassi. Each of these parties had a one-third interest in the funds owed them by the corporations.[1]

1. $1,900 was due from the NBH Corporation to the three men, and $6,500 was due them from Lord's Appliance Co., Inc.

None of the parties made any payments to plaintiff on account of this alleged purchase. On November 4, 1953, plaintiff received a check drawn on the account of Lord's Appliance Co., Inc., in the sum of $6,500 and another check in the amount of $1,900 drawn on the account of the NBH Corporation. These checks were signed by Al Haytin and Zarmond Goodman, who were apparently authorized to sign checks on behalf of each corporation. Plaintiff immediately cashed both checks. Two days later Norman Herman, son of plaintiff, took to defendant Blackman a written document setting forth plaintiff's understanding of the alleged agreement which was claimed to have been reached at a dinner meeting on October 22, 1953. Blackman refused to sign the document.

It was at this time that defendant Blackman learned that the above mentioned checks had been issued and delivered to plaintiff. Blackman immediately got in touch with Haytin and Goodman, who signed these checks, and protested their action.

On January 13, 1954, plaintiff filed suit against Blackman and his wife to recover the $5,000 which he alleged Blackman owed on his oral agreement to purchase the stock. Blackman filed an answer in which he denied making any agreement to purchase said stock. He also filed a cross-complaint in which he alleged that the payment to plaintiff of the $8,400 from the funds of the two corporations was "wrongful and without authority" and that he was entitled to one-third thereof, and prayed for judgment against the cross-defendant Herman for $2,800.

The court found there was no agreement between plaintiff and Blackman for the purchase and sale of said stock and accordingly rendered judgment "that the plaintiff take nothing by his complaint," and that Blackman have judgment against Herman on the cross-complaint for $2,800.

Plaintiff does not challenge the sufficiency of the evidence to sustain the findings nor does he otherwise attack the correctness of the court's findings and judgment on the complaint. It is therefore established by the court's decision on the complaint that there was no agreement on the part of defendant Blackman to purchase plaintiff's stock. The only basis upon which plaintiff Herman could have any right to this $2,800 is on the theory that there was an agreement between the parties for the purchase and sale of the stock. Since the court found there was no such agreement the plaintiff is not entitled to this money.

[1] It must be remembered that this was a purported transaction between Herman and Blackman. Any obligation that might have been created would have been Blackman's personal obligation and not that of either of the corporations; neither of them, of course, was buying the stock. The checks that were issued by the corporations were not in payment of any obligation that either of them had incurred in the course of their regular business. They were issued without authorization and apparently in the mistaken belief that a binding contract had been entered into between Herman and Blackman. Blackman's interest in these checks could only be charged against him in the event he authorized their issuance. He testified he made no such authorization. That is sufficient to sustain the finding that the plaintiff "wrongfully received" said $2,800.

Plaintiff argues that because Haytin and Goodman were authorized by the respective corporations to sign checks, therefore the payments to plaintiff were proper. This, of course, would be true if the checks were in payment of obligations which the respective corporations owed to plaintiff but, as previously pointed out, these checks were not issued as a result of any business transaction between plaintiff and either of them. The fact that these men were authorized to sign checks for the respective corporations did not authorize them to pay out funds that were owed Blackman to an unauthorized person such as plaintiff.

[2] Plaintiff argues that Blackman ratified the payment of the $8,400. He asserts that Blackman's "entire conduct" is perfectly consistent with his acceptance and ratification of the payment of the $8,400. The record does not support this contention. Blackman refused to sign the docu-

ment which plaintiff's son brought to him on November 6th, which purported to incorporate the plaintiff's understanding of what had transpired at the dinner-meeting of October 22d. This clearly justifies the inference that he did not understand that any such purported agreement of the sale of stock had been made. It was then that he learned that the two checks above mentioned had been issued. He immediately protested their issuance to both Haytin and Goodman, who signed them. His "entire conduct" is therefore entirely inconsistent rather than consistent with ratification.

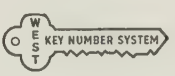
Plaintiff contends that the payments in this proposed deal were "divisible," and that therefore he is entitled to keep the $8,400 even though he is not entitled to collect the other $5,000 from Blackman. The record is clear that this was one transaction by which plaintiff undertook to sell his entire stock in these two corporations to Blackman and his associates for $15,000. His complaint is based upon that theory. The proposed transaction was an entire deal as between Herman, the seller, and Blackman and his associates as purchasers. The suggested arrangement by which Blackman and his associates would pay different amounts was simply a matter of convenience among them and a practical arrangement by which they expected to raise the total purchase price. There was no suggestion that plaintiff was selling only a portion of his stock for a part of the total price.

[3] While it is clear that Herman is not entitled to retain the $2,800 here involved, it does not follow that cross-complainant Blackman is entitled to recover it. The money that was paid to Herman by these two corporations was from their checking accounts or general funds and not from any special account or special fund that had been set apart as belonging to Blackman and his associates. It is true that the books of the corporations showed an indebtedness to Blackman, but that was simply a debtor-creditor relation. The corporations did not have specific funds which belonged to Blackman. The title to the money paid to Herman was, prior to payment, in the corporations. The payments, as we have shown, were unauthorized by Blackman. These corporations simply erroneously paid the $2,800 to Herman. The cause of action to recover the money was in the corporations. Blackman has no assignment of the corporations' claims. He does not own the causes of action on which judgment was rendered. It was therefore improper to render judgment in his favor on the cross-complaint.

The ruling herein does not preclude the corporations from taking the necessary steps in this or another action to recover the $2,800 here in question.

That portion of the judgment based on the complaint is affirmed; that portion of the judgment based on the cross-complaint is reversed. Plaintiff is to recover his costs on appeal.

MOORE, P. J., and ASHBURN, J., concur.



142 Cal.App.2d 494

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation, Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION and Helen Bamford, Respondents.

Civ. 16965.

District Court of Appeal, First District, Division 1, California.

June 25, 1956.

Petition to review a decision of the Industrial Accident Commission awarding benefits to the widow of a member of the petitioner's fire department involving the application of the disputable presumption created by the statute that in case of a member of such department, heart trouble developing during a period while the member is in service of the department, shall be presumed to arise out of and in course of

employment. The District Court of Appeal, Fred B. Wood, J., held that the statute was applicable where the employee, an arson inspector in the fire department suffered a heart attack the day immediately following the end of his vacation and that the statute was not unconstitutional for the reasons asserted against it.

Affirmed.

1. Workmen's Compensation ⇐1365

The statute creating a disputable presumption that member of fire department developing heart trouble during a period while a member is in service of the department shall be presumed to arise out of and in course of employment was applicable to an arson inspector who suffered a heart attack and died immediately following the end of his vacation notwithstanding employee's major assignment was office work where he was not chained to a desk, was subject to assignment to more strenuous tasks and in view that vacation relief work required member to go to a fire during conflagration. West's Ann.Labor Code, § 3212.

2. Workmen's Compensation ⇐1365

The statute creating a disputable presumption in case of a member of a fire department developing heart trouble during a period while member is in service of the department that injury arose out of and in course of employment, did not require a member's assignment in the department to be exclusively or even in a major part of a nature that exposes him to fire, smoke, fumes and other hazards which attend the actual work of fire-fighting or of investigating a fire while it is in progress. West's Ann.Labor Code, § 3212.

3. Statutes ⇐220

Since members of the warden service have the benefit of a disputable presumption that heart trouble resulting during a period while a member is in service of the department shall be presumed to arise out of and in course of employment only if their principal duties consist of active law enforcement service excepting those whose principal duties are clerical and somewhat similar limitations to State Forestry Division members authorized inference that failure to impose any such limitations upon members of local fire department manifested the legislative intent that no such limitations were intended in respect to them. West's Ann.Labor Code, § 3212.

4. Constitutional Law ⇐43(1)

Question of constitutionality of statute creating disputable presumption that heart trouble developing in a member of a fire department during a period while such member is in service presumably arises out of and in course of employment was not waived by failure to present it in the proceeding below, where referee did not originally predicate his findings upon statutory presumption and Commission did not make use of it until it denied the employer's petition for reconsideration. West's Ann. Labor Code, § 3212.

5. Workmen's Compensation ⇐1910

Omission of the question of constitutionality of the statute respecting the disputable presumption that heart trouble developing in member of the fire department during period while member is in service presumably arises out of and in course of employment from the petition for review did not bar the Court of Appeal from considering the contention when later presented during the pendency of the review proceedings. West's Ann.Labor Code, § 3212.

6. Constitutional Law ⇐208(7)
Workmen's Compensation ⇐40

The statute creating a disputable presumption that heart trouble developing in member of a fire department during a period while member is in service of the department presumably arises out of and in course of employment is not invalid as based on an unreasonable classification on the ground that inclusion of firemen whose chief duties are office work along with firemen engaged in natural fire fighting is unreasonable. West's Ann.Labor Code, § 3212.

7. Workmen's Compensation ⇐40

Statute creating a disputable presumption in case of member of a fire department that heart trouble developing during period while member is in service of department presumably arises out of and in course of employment was enacted in exercise of the plenary power vested in the Legislature unlimited by any provision of the constitu-

tion to create a complete system of workmen's compensation and in view that in the area applicable to public employees the Legislature has greater latitude in furtherance of social public policy of the state than it might have as between private employers and employees. West's Ann.Labor Code, § 3212; West's Ann.Const. art. 20, § 21.

8. Constitutional Law ⇐46(1)

One attacking a statute for unconstitutionality is limited in its attack to the factual situation now before the court.

9. Statutes ⇐47

The statute creating a disputable presumption in case of "member of fire department" that heart trouble developing while member is in service of the department presumably arises out of and in course of employment is not invalid on ground that the quoted phrase is too indefinite and ambiguous to interpret and apply. West's Ann.Labor Code, § 3212.

10. Workmen's Compensation ⇐1411

Hearsay testimony may support a decision of the Industrial Commission. West's Ann.Labor Code, §§ 5708, 5709.

Dion R. Holm, City Atty. of City and County of San Francisco, Patrick R. Kelly, Deputy City Atty., San Francisco, for petitioner.

Everett A. Corten, Daniel C. Murphy, San Francisco, for respondents.

FRED B. WOOD, Justice.

The main question upon this review of a decision of the Industrial Accident Commission which awarded benefits to the widow of a member of petitioner's fire department, involves the applicability of the disputable presumption that in the case of a member of such a department "heart trouble which develops or manifests itself during a period while such member is in the service of" such department "shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by other evidence, but unless so controverted, the commission is bound to find in accordance with it." § 3212, Labor Code.

The decedent was employed as a fireman commencing October 1, 1947. He served as a hoseman until April 22, 1952, when he was assigned to the arson squad. His superior officer testified that his duties in the latter capacity consisted of a day shift from 8 a. m. to 5 p. m., assigned to a desk, and included the typing and filing of daily records of fires, duties which continued until the commencement of his vacation on December 9, 1953, "with the exception of 15 to 18 weeks during the year when he would be called upon to relieve men with field duties who were on vacation. The field duties involved around-the-clock outside investigation of fires. It is only on rare occasions that an outside arson investigator goes into a fire during the blaze or the conflagration. I couldn't say whether or not Mr. Bamford [the deceased employee] investigated any fires during the 15 or 18 weeks while he was on vacation relief which might have caused him any exposure to smoke or fumes."

The employee suffered a heart attack and died on December 30, 1953, the day immediately following the end of his vacation.

The referee summarized the widow's testimony, in part, as follows: "She testified in this connection that his duties [as arson inspector] were to answer all two-alarm fires and inspect during the progress of the fire to determine, if possible, what the cause might have been, that this necessitated his going in the buildings and that this work caused him to complain of burning in his throat. He complained of being 'full of smoke'; complained of severe pain, particularly on severe coughing which followed performance of such duties. Testified that he had paroxysms of coughing; testified that for possibly two years prior to his passing on, 12–30–53[,] [h]e had frequently complained of severe pains substernally and would frequently tap his upper sternal area with his fingers, that he would stay up late at nights sitting in the chair, he having told her that this was more comfortable."

There was only one medical witness, a doctor who was of the opinion that the heart ailment which caused death arose out

of and in the course of the employment, based upon the coroner's report, certain hospital records, and information given by the widow, which the doctor indicated was substantially the same as the widow's testimony upon the stand.

The referee found that "the employee's activities exposed him to excessive smoke which he inhaled which produced paroxysmal coughing attacks with resultant strain to the applicant's [employee's] heart and circulatory system resulting in the employee's death on December 30, 1953, from the cause above stated," coronary arteriosclerosis with intramural hemorrhage and thrombosis of right coronary artery. This finding was challenged by the employer upon petition for reconsideration upon the asserted grounds that from April 22, 1952, decedent had no fire fighting duties, was not exposed to smoke for more than 20 months prior to his death and had not been working for three weeks, having been on vacation; and that the medical expert's opinion was based on the widow's testimony concerning exposure to smoke, that testimony being "colored by self-interest."

In recommending denial of that petition the referee gave the following as his reasons for crediting the testimony of the widow: "Which is entitled to receive the greater weight—the recitations to the widow by the employee during his lifetime of the physical reactions on him of the conditions of his employment, which repetition forms the basis for the testimony of Dr. Elise Rose, or whether a greater weight is to be given to the statement affidavit of the employee's superior officer. This Refferee recognized this dilemma prior to the issuance of the decision and reconciled it in favor of compensability. The record discloses that the deceased had served in many capacities with the City & County of San Francisco. These had been as firemen and arson inspector, and the widow's testimony as to the inhalation of smoke in the performance of these duties as given to her by him during his lifetime, this Referee felt to be entitled to greater weight than the report of the employee's superior officer. There can be no question but that * * * [the employee's superior officer] devoted himself to his work, but he undoubtedly had too many men under him to be accurately acquainted with the various facets of their activities."

In a memorandum filed with its order denying reconsideration, the commission stated (1) the presumption declared by section 3212 was applicable and that no medical evidence to rebut the presumption had been adduced, (2) that the commission gave greater weight to the testimony of the widow than to that of the superior officer; and that accordingly, with or without the statutory presumption the case must be resolved in favor of the applicant.

[1] We deem the statutory presumption clearly applicable. No one doubts that the employee was a "member of the fire department" at the time of the heart attack. We think, also, he was "in the service of such department" at that time. The fact that the employee had just completed his vacation and had not yet reported back on the job does not convince us that the seizure occurred during a break in "service"; no more than if it had happened after hours or upon a day off. It would not be reasonable to ascribe to the Legislature an intent to limit the expression "during a period while such member is in the service of such department" to the times when a person is actually at work in such service, especially in view of the fact that until 1945 the statute said "in actual service in such department" when the Legislature amended it to read "in the service of such department". Stats.1945, ch. 742, p. 1428.

Nor do we deem the fact that this employee's major assignment was office work removed him from the purview of the statute. He was not chained to his desk. He was subject to assignment to more strenuous tasks, evidenced by the very fact of his vacation relief work, 15 to 18 weeks a year, investigating the causes of fires, work which the trier of the facts found (upon evidence it weighed and deemed worthy of belief) exposed him to the smoke and fumes of fires. Indeed, the petitioner's evidence did not really controvert that evidence, for the employee's superior officer recognized that upon occasion (albeit rarely, he said) the vacation relief work required the employee to go into a fire during the conflagration, and disavowed any

knowledge whether or not the employee while on vacation relief visited any fires which might have exposed him to smoke or fumes.

[2, 3] Certainly the statute does not require a member's assignment in the department to be exclusively, or even in major part, of a nature that exposes him to fire, smoke, fumes and other hazards which attend the actual work of fire-fighting or of investigating a fire while it is in progress. In this view we are aided by the fact that the statute makes such a distinction in respect to some other types of service. Thus, members of the warden service bureau of the State Division of Fish and Game (now Wildlife Protection Branch of the Department of Fish and Game) have the benefit of the presumption only if their "principal duties consist of active law enforcement service, excepting those whose principal duties are clerical or otherwise do not clearly fall within the scope of active law enforcement service such as stenographer, telephone operators, and other office workers * * *" Somewhat similar is the limitation to State Forestry Division members: they must be "active fire fighting members" of the division and their duties must "require fire fighting." We may reasonably infer from the failure to impose any such limitation upon members of local fire departments that no such limitations were intended in respect to them; at least, no limitations that would adversely affect a member of a city and county fire department who had the employment history and the duties that the decedent had.[1] Accordingly, the statutory presumption not having been controverted, the commission correctly concluded that it was bound to find in accordance with the presumption.

[4, 5] During oral argument, in this review proceeding, petitioner for the first time questioned the constitutionality of section 3212 of the Labor Code. The respondent commission contends that petitioner had waived this point, not having presented it in the proceeding below. We are not inclined to agree that there was thereby a waiver. The referee did not originally predicate his findings upon the statutory presumption. The commission did not make use of it until it denied the employer's petition for reconsideration. Therefore, the employer was not presented with the problem of presenting or waiving this point in the proceeding below. Nor do we hold that the omission of this point from the petition for review bars this court from considering it when later presented during the pendency of the review proceeding. See Healy v. Industrial Acc. Comm., 41 Cal.2d 118, 120, 258 P.2d 1.

[6] Petitioner argues that "the inclusion of firemen whose chief duties are office work, clerical and stenographic along with firemen who engage in actual fire fighting is an unreasonable classification." We do not so view it as applied to the facts of this case, a fireman who is assigned 15 to 18 weeks a year to 24-hour duty investigating fires, potentially exposed to smoke and fumes when conducting such investigations. The decedent may have been so exposed less frequently than during the 4½ years he served as a hoseman, but the exposures during the latter period may have been equally potent in inducing or aggravating a heart ailment. However, the relative frequencies and degrees of exposure do not impress us as significant differentiating factors in this type of legislation. In either case there is a rational evidentiary relationship.

[7] We must bear in mind the fact that this statute was enacted by the Legislature in the exercise of "plenary power" vested in it, "unlimited by any provision of this Constitution, to create, and enforce a complete system of workmen's compensation" and that "A complete system of workmen's compensation includes * * * full provision for vesting power, authority and jurisdiction in an administrative body * * to determine any dispute or matter arising

1. This is not to say that a person working in a fire department at a clerical job, qualified only to do office work and subject to assignment to do office work only (not fire-fighting or fire-investigating or other work of a hazardous character) might not also be "in the service" of the department within the meaning of section 3212. But that is not our case.

under such legislation"; also, that the Legislature is "vested with plenary powers, to provide for the settlement of any [such] disputes * * * by an Industrial Accident Commission * * * and may fix and control the method and manner of trial of any such disputes" and "the rules of evidence * * *." Cal.Const. art. XX, § 21. Furthermore, the disputable presumption here involved applies to public agencies and public employees. In that area, conceivably, the Legislature has greater latitude, in furtherance of "the social public policy of this State" declared by section 21 of Article XX than it might have as between private employers and employees.

[8, 9] Petitioner makes the added argument that section 3212 is unconstitutional if it applies to members of a fire department who have solely office duties and are never exposed to the hazards of a fire and that the expression "member of the fire department" is too indefinite and ambiguous to interpret and apply. In furtherance of this argument petitioner presents several hypothetical situations in which it claims there would be no rational basis for the presumption. The answer is that those situations are not here involved and the petitioner is limited in its attack to the factual situation now before this court. Max Factor & Co. v. Kunsman, 5 Cal.2d 446, 468, 55 P.2d 177; Wholesale Tobacco Dealers, etc. v. National Candy & Tobacco Co., 11 Cal.2d 634, 661, 82 P.2d 3, 118 A.L.R. 486; Ferrente v. Fish & Game Commission, 29 Cal.2d 365, 373, 175 P.2d 222; People v. Bowlin, 19 Cal.App.2d 397, 399–400, 65 P.2d 840; In re Estate of Monks, 48 Cal.App.2d 603, 604, 614, 120 P.2d 167. For example, the record before us does not indicate whether respondent's fire department, or any other local fire department, has or ever had employees not subject to assignment to hazardous duties, nor does this record present other data pertinent for consideration in ascertaining whether the Legislature intended to include such employees when it used the expressions "members of * * * fire departments" and "in the service of such * * * department". It will be time enough to consider such a question if and when such an employee, or his dependent, invokes the disputable presumption declared in section 3212. We entertain no doubt concerning the constitutionality of section 3212 in its application to the facts of this case.

[10] In view of this conclusion it is unnecessary to consider whether, irrespective of the statutory presumption, the evidence supports the findings and award. In passing, we note that hearsay testimony may support a decision of the commission. Labor Code, §§ 5708 and 5709; State Comp. Ins. Fund v. Industrial Acc. Comm., 195 Cal. 174, 231 P. 996; London G. & A. Co., Ltd., v. Industrial Acc. Comm., 203 Cal. 12, 263 P. 196; Independence Indemnity Co. v. Industrial Acc. Comm., 2 Cal.2d 397, 410, 41 P.2d 320; Sada v. Industrial Accident Comm., 11 Cal.2d 263, 78 P.2d 1127; French v. Rishell, 40 Cal.2d 477, 254 P.2d 26; 27 Cal.Jur. 478–481, §§ 148 and 149.

The award is affirmed.

PETERS, P. J., and BRAY, J., concur.



142 Cal.App.2d 484

Application of William P. ROBINSON, For A Writ of Habeas Corpus.

Cr. 3235.

District Court of Appeal, First District, Division 2, California.

June 22, 1956.

Habeas corpus proceeding by state prisoner. The District Court of Appeal, Dooling, J., held that, where only punishment provided for forcible rape is imprisonment in state prison for not more than 50 years, but defendant, who was found guilty of such crime, was sentenced to one year in county jail, and court suspended execution of sentence and granted defendant probation for term of three years, upon revoca-

tion of defendant's probation, court had power to impose on defendant the only legally proper sentence, and, therefore, sentencing him to state prison for term prescribed by law was proper.

Writ discharged, and petitioner remanded.

1. Criminal Law ⇐1001

Where only punishment provided for forcible rape is imprisonment in state prison for not more than 50 years, but defendant, who was found guilty of such crime, was sentenced to one year in county jail, and court suspended execution of sentence and granted defendant probation for term of three years, upon revocation of defendant's probation, court had power to impose on defendant the only legally proper sentence, and, therefore, sentencing him to state prison for term prescribed by law was proper. West's Ann.Pen.Code, §§ 261, subd. 3, 264, 1203.2.

2. Criminal Law ⇐996(1)

Where sentence is beyond court's power to impose, such sentence is void, and court has power at a later time to impose the legally provided sentence.

3. Criminal Law ⇐1178

Question, which was neither briefed nor argued by counsel, would be regarded by the district court of appeal as not before it.

Harold J. Truett, San Rafael, for petitioner.

Edmund G. Brown, Atty. Gen., of California, Clarence A. Linn, Asst. Atty. Gen., Arlo E. Smith, Deputy Atty. Gen., for respondents.

DOOLING, Justice.

Petitioner was found guilty of the crime of forcible rape, Penal Code § 261(3), and applied for probation. On April 24, 1953, the court imposed a sentence of one year in the county jail, suspended the execution of the sentence and granted petitioner probation for a term of three years. On May 14, 1954, after proceedings regularly taken, the court revoked petitioner's probation and sentenced him to the state prison for the term prescribed by law. Petitioner is now confined in the state prison at San Quentin pursuant to this judgment.

Where a judgment authorized by law has been pronounced and its execution suspended before granting probation Penal Code section 1203.2 provides that upon revocation of probation "the judgment shall be in full force and effect" and it has been held that the court under such circumstances has no power to impose a different judgment on revoking probation. In re Loros, 48 Cal.App.2d 680, 120 P.2d 69.

[1] In this case, however, the judgment first imposed by the court, imprisonment in the county jail for one year, was one which the statute, Penal Code § 264, gave the court no power to impose, since the only punishment provided therein for forcible rape is imprisonment in the state prison for not more than fifty years. The people therefore argue, and we believe correctly, that the court had the power to impose the only legally proper sentence on petitioner upon the revocation of his probation.

Petitioner argues that the original sentence, though erroneous, was not void and that the time for appeal therefrom having expired such judgment was final when the court imposed the second judgment and was beyond the power of the court to correct. Petitioner cites In re Reed, 143 Cal. 634, 77 P. 660, in which case the sentence had been for seven years where the minimum sentence provided by law was ten. The court held in that case that the judgment though erroneous was not void, saying 143 Cal. at page 635, 77 P. at page 661: "The judgment does not impose any kind of punishment different from that prescribed by the Code * * *. If the judgment had been for ten years, it would have been a judgment for seven years and three years more, and, so far as the mere naked question of jurisdiction is involved, the power to sentence for the longer term includes the power to sentence for the shorter."

Giving the Reed case its full effect it is not controlling here. As the attorney general points out, in the Reed case the sentence was to the state prison and, since the

court had power to sentence the defendant to the state prison, the court was correct in saying: "The judgment does not impose any kind of punishment different from that prescribed by the Code". In our case the court by its first judgment purported to sentence the petitioner to the county jail, a power which it did not possess, and therefore did attempt to impose a kind of punishment different from that prescribed by the code. The court had no more power to sentence petitioner to be confined in the county jail for this offense than it would have had to sentence him to confinement in a state hospital.

[2] Authority is ample that when the sentence is beyond the power of the court to impose it is void and the court has the power at a later time to impose the legally provided sentence. In re Lee, 177 Cal. 690, 171 P. 958; In re Fritz, 179 Cal. 415, 177 P. 157; In re McCready, 179 Cal. 514, 177 P. 459; Matter of Smith, 152 Cal. 566, 93 P. 191; People v. Booth, 37 Cal.App. 650, 174 P. 685; People v. Scott, 39 Cal.App. 128, 178 P. 298; People v. Gibson, 45 Cal. App. 770, 188 P. 603; In re Adams, 61 Cal. App. 239, 214 P. 467; cf. In re McCoy, 32 Cal.2d 73, 194 P.2d 531; In re Ferguson, 123 Cal.App.2d 799, 804 et seq., 268 P.2d 71. Cases cited by petitioner involving attempts to impose a second sentence, where the sentence first imposed was within the court's power, are clearly not in point. E. g. Roberts v. United States, 320 U.S. 264, 64 S.Ct. 113, 88 L.Ed. 41; People v. McAllister, 15 Cal.2d 519, 102 P.2d 1072; In re Loros, supra.

[3] The petition also contains allegations that on a later charge the petitioner was by a different judge ordered committed to a mental institution for observation as a sexual psychopath, which order has not been carried out because of his confinement in San Quentin. The question thus presented was neither briefed nor argued by counsel for petitioner and we are entitled to regard it as not urged before us.

The writ is discharged and the petitioner remanded.

NOURSE, P. J., and DEVINE, Justice pro tem., concur.

Fannie M. LAMOREUX et al., Plaintiffs, Cross-Defendants, Appellants, and Cross-Respondents,

v.

SAN DIEGO AND ARIZONA EASTERN RAILWAY COMPANY, a corporation, et al., Defendants, Cross-Complainants, Respondents and Cross-Appellants,

Union Sugar Company, a corporation, Cross-Defendant and Respondent.*

Civ. 5120.

District Court of Appeal, Fourth District, California.

June 21, 1956.

Rehearing Denied July 17, 1956.

Hearing Granted Aug. 17, 1956.

Wrongful death action by widow of person killed by train at crossing. Railroad cross-complained against employer of deceased. The jury returned verdicts for plaintiff and against employer. Upon motion for new trial by railroad and employer, the Superior Court of Imperial County, Elmer W. Heald, J., granted motion, and plaintiff appealed. The District Court of Appeal, Griffin, J., held, in part, that where wrongful death action, which was originally brought against deceased's employer, and railroad, as joint tort-feasors, was dismissed, with prejudice, as against employer, upon execution of approved settlement of workmen's compensation claim, and settlement agreement expressly stated facts which negatived finding that accident was industrial in nature, release of employer as joint tort-feasor would operate to release railroad.

Order affirmed.

1. Appeal and Error ⇐854(6)

Where insufficiency of evidence was not one of grounds incorporated in order granting new trial, District Court of Appeal would not consider such ground in determining whether order was properly granted. West's Ann.Code Civ.Proc. § 657.

2. New Trial ⇐113

Failure to state in notice of motion for new trial whether motion would be made upon affidavits, or minutes of court, or both, did not deprive trial court of juris-

* Opinion vacated 311 P.2d 1.

diction to grant motion. West's Ann.Code Civ.Proc. §§ 659, 963.

3. Appeal and Error ⇐222
New Trial ⇐139

Where plaintiff did not object seasonably in trial court to failure of defendants' notice of motion for new trial to specify whether motion would be made upon affidavits, or minutes of court, or both, trial court was authorized, under circumstances, to grant new trial, and plaintiff could not raise such objection for first time on appeal from order. West's Ann.Code Civ. Proc. §§ 659, 963.

4. Compromise and Settlement ⇐15(2)
Release ⇐29(1)

Where original action was brought under wrongful death statute and employer of deceased was charged as joint tort-feasor, plaintiff in such action would not be permitted to accept remuneration from employer as compromise and settlement without thereby releasing all joint tort-feasors. West's Ann.Code Civ.Proc. §§ 377, 597.

5. Dismissal and Nonsuit ⇐42
Pleading ⇐252(1)

Where original action was brought under wrongful death statute and employer of deceased was charged as joint tort-feasor, dismissal of action as to employer, with prejudice, and failure to include employer in amended complaint with employer's joint tort-feasor, without adequate explanation, would not necessarily withdraw allegation of original complaint from further consideration. West's Ann.Code Civ.Proc. §§ 377, 597.

6. Workmen's Compensation ⇐1177

The Industrial Accident Commission may exercise jurisdiction only in cases where an employee is injured in an industrial accident. West's Ann.Labor Code, §§ 3601, 3602.

7. Release ⇐29(1)

Where wrongful death action, which was originally brought against deceased's employer and railroad, as joint tort-feasors, was dismissed with prejudice as against employer, upon execution of approved settlement of workmen's compensation claim, and settlement agreement expressly stated facts which negatived finding that accident was industrial in nature, release of employer as joint tort-feasor would operate to release railroad. West's Ann.Code Civ.Proc. §§ 377, 597; West's Ann.Labor Code, § 3602.

8. Negligence ⇐83.10

The doctrine of last clear chance does not apply to ordinary case in which act creating peril occurs practically simultaneously with happening of accident, in which neither party can fairly be said to have had a last clear chance thereafter to avoid consequences.

9. Railroads ⇐338.3

Where motorist had stopped when he encountered sand or gravel difficulty at accommodation railroad crossing, and trainmen had no reason to suspect that, after stopping, motorist would again start and continue across in path of approaching train, and when trainmen noticed motorist's decision to do so they were quite close upon him and stopped train as suddenly as it could be brought to a halt, doctrine of last clear chance was inapplicable, in absence of proof that deceased was in perilous position when trainmen first noticed him, and that they had last clear chance to avoid collision.

10. New Trial ⇐111

Where jury returned verdict for plaintiff and against railroad, in wrongful death action, and for railroad and against deceased's employer for amount of verdict against railroad, employer was aggrieved party, within Code of Civil Procedure provision, and was entitled to join with railroad in making application for new trial. West's Ann.Code Civ.Proc. § 657.

11. Death ⇐99(4)

Wrongful death award of $20,000 to remarried widow of 53 year old worker who had contributed only part of his earnings to widow's support, where widow had already received $3,500 in settlement of workmen's compensation claim against employer of deceased husband, would have justified trial court in granting new trial on ground of excessive damages.

12. Appeal and Error ⇐123

Where, upon appeal from order granting new trial, by stipulation no judgment

had been entered on verdict, defendant's cross-appeal and attempted appeal from verdict and judgment would be dismissed. West's Ann.Code Civ.Proc. § 963.

David M. McGahey, Palm Springs, for appellant Lamoreux.

Horton & Knox, El Centro, for respondents and cross-appellants San Diego & Arizona Eastern Ry. Co., H. D. Holmes, C. M. Brown and L. Graham.

Dickenson, Sattinger & McKee, El Centro, for respondent Union Sugar Co.

GRIFFIN, Justice.

Plaintiff, cross-defendant and appellant Fannie M. Lamoreux (hereinafter referred to as plaintiff) was the wife of the deceased William Vance Lamoreux, who was killed in a collision between his car and a train owned and operated by defendant, cross-complainant, respondent and cross-appellant San Diego and Arizona Eastern Railway Company (hereinafter referred to as Railway Company). In an original action for damages for wrongful death, filed March 19, 1949, plaintiff and other heirs alleged that defendant Railway Company, its agents, and defendant Union Sugar Company (hereinafter referred to as Union), on March 27, 1948, negligently operated the train; that both defendant corporations jointly engaged in the construction of a sugar beet dump at the south edge of the railway tracks, and also in raising the grade of the tracks; that they negligently performed such work and negligently maintained a road crossing over said tracks; that William Lamoreux was lawfully driving his car across said crossing and it became entangled in the soft dirt placed there by defendants; and that he started forward across the main track and the train ran into and killed him. It then alleges that plaintiff was in some doubt as to whether she was entitled to redress against all defendants named but left that question to be determined in the action. $25,000 general damages for loss of comfort, security and support, and $1,275 special damages were sought. The complaint was not served on defendant Railway Company.

It appears that about one year later a release was executed between plaintiff and her deceased husband's employer, defendant Union, and the Pacific Employers Insurance Company (the insurance carrier of Union), whereby, in consideration of $3,500, defendant Union and its insurance carrier were released from all liability. The release, signed on February 20, 1950, was approved by plaintiff's counsel and is lengthy. It recites in general that a reasonable doubt exists as to the right of plaintiff to any death benefits; that on the date of death of the decedent his work had terminated at 11 a. m.; that he was on his way home, driving his own automobile, when the fatal accident occurred at 11:15 a. m. Therein it was agreed by all parties that decedent was performing no service incidental to his employment and was receiving no compensation from Union; that he was not being furnished with transportation by Union, and the accident did not occur on the premises or any approach thereto owned by or under the control of Union; that the $3,500 was paid to plaintiff by Union and the insurance carrier in full satisfaction and release of "all claims against Union" arising under the Workmen's Compensation Insurance and Safety Laws of California; that upon the approval of the compromise agreement by the Industrial Accident Commission, plaintiff released said employer and insurance carrier "from all claims and causes of action", whether known or ascertained, as a result of said injury, including any and all liability of said employer and said insurance carrier to the dependents; that upon approval, plaintiff agreed to execute and file a dismissal with prejudice of the instant action as to defendant Union. On April 25, 1950, the dismissal was signed, and filed on January 25, 1954, at the time of the trial. On March 30, 1951, plaintiff filed an amended complaint, naming only the railway company and its agents, and omitting Union as a party defendant, without explanation, and it omitted any allegation of negligence against Union. The prayer for general damages was increased to $50,000.

On July 9, 1951, the Railway Company answered the amended complaint, denied generally the allegations, and admitted that

on March 27, 1948, a sugar beet dump was being constructed by Union near the south side of their three pairs of tracks on the right of way under an agreement with it. It denied that the Railway crossing on which the deceased was traveling was a public thoroughfare. It alleged that any dirt dumped on the crossing was placed there by persons or corporations other than the Railway Company. Contributory negligence of the deceased is alleged and it is further alleged that he was, at the time of his death, an employee of Union and acting within the scope and course of his employment.

By proper order of the court first obtained, the Railway Company filed a supplemental answer and cross-complaint and brought in Union as a cross-defendant, setting up a written lease between Union and Railway Company whereby Railway Company leased to Union space near its southerly pair of tracks to construct a sugar beet dump and pertinent structures. It also provided that in connection therewith Union and its agents were permitted to use the private railway crossing here indicated. It then contains a provision that lessee, Union, agrees to indemnify and save Railway Company harmless against any and all loss, injury, etc., resulting directly or indirectly from the maintenance, presence, use or operation of said beet loading conveyor. It is then alleged that deceased died as a direct result of the maintenance and operation of the beet-loading conveyor, and in using said private road crossing in the course of his employment by Union. In addition it is alleged that Railway Company gave Union a written license to use said crossing, including a provision that all persons using said crossing shall be deemed to be the agents of said licensee, and said licensee agreed to indemnify and save harmless the licensor against any loss, damage, etc., for any cause whatsoever resulting directly or indirectly from the maintenance, presence, or use of said crossing.

Judgment is sought against Union for costs of defending the action and for any judgment which might be obtained by plaintiff against it. It then alleges that unknown to defendant Railway Company, plaintiff and cross-defendant Fannie M. Lamoreux filed a compensation claim with the Industrial Accident Commission against Union and its compensation insurance carrier and that, without the knowledge and consent of Railway Company, Union compromised and settled the claim for $3,500 with plaintiff and filed a dismissal of the action as to Union, the alleged joint tort-feasor, as indicated by the original complaint, and claimed that the release of Union barred further action against Railway Company.

Plaintiff filed a motion to quash service of the cross-complaint upon her which was, by the court, denied and no appeal was taken from this order. On August 23, 1952, Union filed an answer to the cross-complaint and denied generally its allegations and specifically denied that deceased was, at the time of his death, acting within the scope of his employment, denied any negligence on its part, and alleged the cause of decedent's death to be the negligence of the Railway Company. A jury trial was demanded. During the trial, on January 25, 1954, Union amended its answer to the cross-complaint and alleged that the release operated as a general release of all tort-feasors, including the Railway Company and the individual defendants as well as Union. Upon these pleadings and issues the jury returned a verdict in favor of plaintiff and against defendant Railway Company and another verdict in favor of defendant Railway Company against Union on its cross-complaint, each for the sum of $20,000.

[1] A motion for new trial was made by both the Railway Company and Union on all statutory grounds and was granted. Insufficiency of the evidence was not one of the grounds incorporated in the order and therefore will not be considered. Sec. 657, Code Civ.Proc. The only remaining grounds mentioned in that section which might justify the order are "Excessive damages" and "Error in law" occurring at the trial. Plaintiff appeals from the order granting a new trial as to defendant Railway Company. Railway Company appeals from the order granting Union a new trial, and cross-appeals from the verdict and judgment in favor of plaintiff.

[2, 3] The first argument of plaintiff is that the motions for new trial filed by the Railway Company and Union, although fully setting forth the named statutory grounds, did not show whether such motions would be made on affidavits or the minutes of the court or both, as required by section 659 of the Code of Civil Procedure, and accordingly the notice was invalid and the court had no jurisdiction to grant a new trial. She cites such authority as Smith v. Ibos, 22 Cal.App.2d 551, 71 P.2d 847; Melvin v. Carl, 206 Cal. 772, 276 P. 574; and Kohlstedt v. Hauseur, 24 Cal.App.2d 60, 74 P.2d 314. This general rule was considered in Melvin v. Carl, supra, and it was there indicated that the failure to state these facts in the notice did not deprive the trial court of jurisdiction to act. See also Bauer v. Helene Curtis Industries, Inc., 117 Cal. App.2d 66, 254 P.2d 931; and Hamasaki v. Flotho, 39 Cal.2d 602, 248 P.2d 910. In Secreto v. Carlander, 35 Cal.App.2d 361, 95 P.2d 476 [hearing in the Supreme Court denied], where the same contention was made, it was directly held that although plaintiff's notice of intention to move for a new trial did not contain a statement that the motion would be made upon affidavits or the minutes of the court or both, any irregularities therein were waived and could not be urged upon appeal, where the motion for new trial was argued and submitted without any objection being made as to defects in the notice of intention to move for a new trial. We will therefore consider the showing in this respect. When the jury returned its verdict, according to the minutes, all counsel being present, including counsel for plaintiff, counsel for Union and the Railway Company moved the court for judgment notwithstanding the verdict, or in the alternative for a new trial. "Counsel agree no affidavits need be filed". Thereafter, written notices of such motions were filed, as indicated, and were heard on February 19, 1954. Apparently no objection as to form was made, and the court orally granted the motions for new trial. On February 22, plaintiff filed a notice of motion to reconsider the court's announced intention to grant a new trial and stated therein that it would be based upon the pleadings, records and files in the action, the testimony and evidence produced at the trial, and the minutes of the court. It was there, for the first time, that plaintiff stated, among other grounds, that the "decision was not in accordance with law", but the reasons are not therein indicated. It appears that in the meantime the court had signed a written order granting the motions for a new trial and plaintiff's motion was denied. It further appears in the reporter's transcript that the hearing on the motions for new trial and judgment notwithstanding the verdict were heard at the same time, by stipulation. The court reminded counsel of the fact that they might not be able to file "their papers" in reference to the new trial within the required time, and counsel for Union then announced: "I dont anticipate that there will be any affidavits". He conferred with his co-counsel and stated they would not file such affidavits and that they would stipulate it might be heard soon. It was then stipulated by all counsel that it could be heard on the next Friday and it was further stipulated that the entry of the judgment on the verdict could be held up until the ruling on the motion for judgment notwithstanding the verdict. Apparently no claim was then made as to any defects in the form of the notice and plaintiff did not insist on a strict compliance. Under the circumstances the trial court was authorized to act in granting a new trial and such claim may not now be raised for the first time on appeal. No appeal was taken from the order denying the motion for judgment notwithstanding the verdict. Sec. 963, Code Civ.Proc.

While the record does not show the particular reason why the trial court granted the motion for new trial other than the stated grounds indicated, it appears that the main claim was that the court may have erred in not holding, as a matter of law, as a special defense under section 597 of the Code of Civil Procedure, that according to the wording of the release of Union, as indicated, it did operate as a release of a joint tort-feasor. Hadden v. Moran, 104 Cal.App.2d 777, 232 P.2d 594; Leff v. Knewbow, 47 Cal.App.2d 360, 117 P.2d 922; Tompkins v. Clay Street R. Co., 66 Cal.

163, 4 P. 1165; Markwell v. Swift & Co., 126 Cal.App.2d 245, 272 P.2d 47; Bee v. Cooper, 217 Cal. 96, 17 P.2d 740; Hawber v. Raley, 92 Cal.App. 701, 268 P. 943.

[4–6] Considering this question, the record shows that the original action was brought under section 377 of the Code of Civil Procedure against all defendants named in which Union was charged as a joint tort-feasor. Under such circumstances plaintiff would not be permitted to accept remuneration from Union as a compromise and settlement without releasing all joint tort-feasors. Markwell v. Swift & Co., 126 Cal.App.2d 245, 253, 272 P.2d 47. Nothing was indicated therein that the accident was industrial in nature. By the dismissal of the action as to such defendant with prejudice and the failure to include it in an amended complaint with its joint tort-feasor, without adequate explanation, does not necessarily withdraw the allegation of the original complaint from further consideration. Lee v. Hensley, 103 Cal.App.2d 697, 230 P.2d 159; Hicks v. Corbett, 130 Cal.App.2d 87, 278 P.2d 77; Rhode v. Bartholomew, 94 Cal. App.2d 272, 210 P.2d 768; Gaglione v. Coolidge, 134 Cal.App.2d 518, 286 P.2d 568. Had the compromise and settlement between plaintiff and Union been exclusively confined to liability under the Workmen's Compensation Act, a different question might here be presented. Smith v. Coleman, 46 Cal.App.2d 507, 116 P.2d 133; Eckman v. Arnold Taxi Co., 64 Cal.App.2d 229, 148 P.2d 677. In Popejoy v. Hannon, 37 Cal.2d 159, 231 P.2d 484, the court held that in all cases where the conditions of compensation do not concur, the liability of the employer is governed by the law of negligence, and that it is only where the conditions specified by the act exist that recovery of compensation is the exclusive remedy. The Industrial Accident Commission may exercise jurisdiction only in cases where an employee is injured in an industrial accident. Duprey v. Shane, 39 Cal.2d 781, 790, 249 P.2d 8. See also Secs. 3601 and 3602, Labor Code; Jackson v. Pacific Gas & Electric Co., 95 Cal.App.2d 204, 212 P.2d 591; Freire v. Matson Navigation Co., 19 Cal.2d 8, 118 P.2d 809; Schumacker v. Industrial Accident Commission, 46 Cal. App.2d 95, 115 P.2d 571; Law v. Dartt, 109 Cal.App.2d 508, 240 P.2d 1013; Baugh v. Rogers, 24 Cal.2d 200, 148 P.2d 633, 152 A.L.R. 1043.

[7] In the settlement it is not agreed that the injury arose out of the employment, and in fact the circumstances related indicate that it did not. There is no finding of the Industrial Accident Commission that it did. The trial judge, on the motion for new trial, might well have believed, from a recitation of the facts in the settlement and from the evidence, that it did not. Accordingly, the order granting the motions for new trial is sustainable. Jackson v. Pacific Gas & Electric Co., supra; Liberty Mutual Insurance Co. v. Superior Court, 62 Cal. App.2d 601, 145 P.2d 344; Robbins v. Yellow Cab Co., 85 Cal.App.2d 811, 813, 193 P.2d 956; 27 Cal.Jur. Sec. 84, p. 380. Section 3602 of the Labor Code provides that in all cases where the conditions of compensation do not concur, the liability of the employer is the same as if this division had not been enacted.

[8, 9] In addition, it appears that the court gave, at plaintiff's request, an instruction on the doctrine of last clear chance. It is well settled that this doctrine does not apply to the ordinary case in which the act creating the peril occurs practically simultaneously with the happening of the accident, in which neither party can fairly be said to have had a last clear chance thereafter to avoid the consequences. Rodabaugh v. Tekus, 39 Cal.2d 290, 295, 246 P.2d 663. See also Doran v. City and County of San Francisco, 44 Cal.2d 477, 283 P.2d 1; and Wilson v. Knudson Creamery Co., 137 Cal.App.2d 552, 290 P.2d 677. Here, the uncontradicted evidence shows that deceased was approaching the south spur track of the Railway Company's line when he encountered some sand or gravel difficulty and then went forward onto the center main line track with his automobile and was struck just as he was crossing the north center rail. There was nothing to obstruct his view of the oncoming train. The testimony of the trainman indicates that this was an accommodation crossing and not a public crossing; that they had no reason to suspect that after stopping, deceased

would again start and continue on across in the path of the approaching train; that as soon as they noticed his decision to do so, they were quite close upon him and stopped the train as suddenly as it could be brought to a halt. There is no evidence indicating that deceased was in a perilous position when they first noticed him, and that they had a last clear chance to avoid the collision. The trial court might well have been justified in believing that error was committed in the giving of that instruction, under the evidence produced. The testimony in reference to decedent's contributory negligence which might bar a recovery does not appear to be one of law, but it is a close question. Heintz v. Southern Pacific Co., 63 Cal.App.2d 699, 147 P.2d 621.

[10] Contrary to plaintiff's claim, Union was an aggrieved party within the meaning of section 657 of the Code of Civil Procedure and entitled to join with the Railway Company in making an application for a new trial.

[11] Considering the ground of excessive damages, although it does not appear as a matter of law from the evidence, that they were excessive, the trial court may have concluded otherwise. $3,500 was received by plaintiff from Union and its insurance carrier on some theory of the case. Decedent was 53 years of age and had been married to plaintiff for a number of years at the time of the accident. She was then 56 years old. Decedent had been employed by Union for several years, although not steadily, and when he worked he averaged about $250 per month and spent only part of his earnings for plaintiff's support, because she worked. She remarried about one year and five months after her husband's death to a carpenter who worked with decedent.

[12] We conclude, from the evidence and upon the grounds here considered, that the trial court was justified in granting the motions for a new trial. By stipulation no judgment has been entered on the verdict. Accordingly, Union's cross-appeal, and attempted appeal from the "verdict and judgment" is dismissed. Sec. 963 Code Civ. Proc.; Sawyer v. Sunset Mutual Life Ins. Co., 8 Cal.2d 492, 66 P.2d 641; Carpenter v. Hamilton, 18 Cal.App.2d 69, 62 P.2d 1397.

Order granting motions for new trial affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



142 Cal.App.2d 419

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Vertric EDWARDS, Defendant and Appellant.

Cr. 3220.

District Court of Appeal, First District, Division 2, California.

June 19, 1956.

Defendant was convicted in the Superior Court, City and County of San Francisco, C. Harold Caulfield, J., of possession of heroin, and he appealed. The District Court of Appeal, Kaufman, J., held that circumstance of defendant's flight, upon discovering presence of officers, conducting narcotics investigation, in hotel room to which defendant sought entry, was sufficient to induce reasonable belief that defendant was engaged in narcotics traffic, and officer who caught defendant in course of such attempted flight was entitled to pick up bindle of heroin which defendant then dropped, even though officer had no search warrant, and held that the bindle was legally admissible evidence.

Affirmed.

Arrest ⇦71

Criminal Law ⇦395

Circumstance of defendant's flight, upon discovering presence of officers conducting narcotics investigation in hotel room to which defendant sought entry, was suffi-

cient to induce reasonable belief that defendant was engaged in narcotics traffic; and officer who caught defendant, in course of such attempted flight, was entitled to pick up bindle of heroin which defendant then dropped, even though officer had no search warrant; and such bindle was legally admissible evidence in ensuing prosecution for possession of heroin. West's Ann.Health & Safety Code, § 11500.

Vertric Edwards, in pro. per. San Quentin.

Edmund G. Brown, Atty. Gen., of the State of California, Clarence A. Linn, Asst. Atty. Gen., Arlo E. Smith, Deputy Atty. Gen., Thomas C. Lynch, Dist. Atty. of the City and County of San Francisco, San Francisco, for respondent.

KAUFMAN, Justice.

This is an appeal from a judgment of conviction on a charge of violating § 11500 of the Health and Safety Code, possession of heroin. Defendant waived jury trial.

On the evening of October 12, 1955 at approximately 9:00 p. m., Officers Shannon and Brazil of the San Francisco Police Department were conducting a narcotics investigation in Room 112 of the Congress Hotel on Fillmore Street. In the room at the time were two other persons, Edward Heide and Georgia Brown. The officers heard someone knocking at the door. Officer Shannon opened it and he and Officer Brazil saw appellant Edwards in front of the door, and another person, Frank Robinson immediately behind him. When Brazil stepped into the doorway Robinson ran down the hall, and Edwards took a half turn and started to run, but Brazil seized his wrists.

As the officer caught appellant, he saw him drop a bindle from his left hand. It fell to the floor near his feet and the officer subsequently picked it up. Tests proved that it was heroin. Brazil testified that he did not have a search warrant at any time.

Appellant told Brazil that he had brought the bindle into the hotel with him and that he had had it for some time. Appellant admitted a prior narcotics conviction. He did not testify in his own behalf.

Appellant contends that the search of his person was improper since it preceded his arrest, and cannot be justified by what it turned up, citing People v. Brown, 45 Cal. 2d 640, 290 P.2d 528. His counsel moved to strike all of the evidence on the ground that it had been illegally obtained, but the motion was denied. In the Brown case on which appellant relies the officers observed defendant at about 7:30 p. m. walking across the street with one hand clenched in a fist. They approached her from behind, one officer grabbing one of her wrists, the other officer the other. They identified themselves and asked to see what was in her hand. She refused. They did not inform her that she was under arrest, but took from her hand a rubber container which was subsequently proved to contain heroin. The People there contended that if the arrest was lawful, the search was reasonable, but the court held that there was nothing apparent to the officers' senses before the arrest to indicate that defendant was committing or attempting to commit a public offense. The case differs from the present one in that the defendant therein was walking on a public street, whereas here appellant at night sought entry to a hotel room where a narcotics investigation was in progress. In the Brown case the officers seized defendant from behind before she knew of their presence, whereas here upon sight of the officers in the hotel room, appellant instantly attempted flight. In the Brown case there was nothing apparent to the officers' senses to indicate that a felony was being committed. In the present case we have the facts that appellant was attempting to visit a hotel room at night where the occupants were undergoing a narcotics investigation and the hasty flight of appellant and his companion at sight of the officers. It is clear that these circumstances were sufficient to induce a reasonable belief that appellant and his companion were engaged in the narcotics traffic. Furthermore, here the appellant voluntarily dropped the bindle of heroin to the floor. Hence there is no question of

any illegal search involved. After appellant's attempted flight the officer was entitled to pick up the bindle from the floor as part of his police investigation.

It is said in the recent case of People v. Rodriguez, 140 Cal.App.2d 865, 296 P.2d 38, 41, that "the courts are in substantial agreement as to what constitutes reasonable cause or probable cause such as will justify one in arresting or prosecuting another upon a criminal charge", quoting with approval the rule stated in People v. Kilvington, 104 Cal. 86, 92, 37 P. 799, "'"There must be such a state of facts * * * as would lead a man of ordinary care and prudence to believe, or entertain an honest and strong suspicion, that the person is guilty."'" In the Rodriguez case the officers observed defendant in a district known to be frequented by narcotics peddlers and users. They were attracted by his nervous mannerisms, and when they talked to him he appeared to be under the influence of alcohol or narcotics. Later they noticed a paper resembling a bindle protruding from a cuff of his pants. The arrest was held to be based upon reasonable cause, and the search incidental thereto, legal. While in the case now before the court, the officer did not see the bindle until he had forcibly detained appellant from his flight, it is clear that the circumstances here were sufficient to give rise to a reasonable belief that appellant was carrying narcotics on his person.

The case of People v. Simon, 45 Cal.2d 645, 290 P.2d 531, is distinguishable, in that there the officer stopped two young men who were walking in a warehouse district at about 10:40 p. m. One of the men carried a bottle, and the officer stopped both men and searched them, believing that the one carrying the bottle of liquor was a minor. He proved to be a minor but defendant who was over 21 years of age had no bottle. The officer, however, thought that defendant looked younger than his companion. In the course of the search he found a marijuana cigarette in defendant's pocket. The court held that the search could not be justified on the ground that the officer "didn't feel" that such a person had any lawful business in that area at night.

In People v. Boyles, 45 Cal.2d 652, 290 P.2d 535, relied upon by appellant, the officers were watching in a hotel room, and when defendant knocked at the door, they seized her hands and took two bindles from one hand. Defendant's motion to set aside the information was granted on the ground that the evidence had been illegally obtained, but this order was reversed on appeal since defendant had prevented the officer from testifying to facts which might have established reasonable cause for believing a felony was being committed by defendant.

Appellant in his brief contends that the officer illegally seized appellant and forced him to drop the bindle by twisting his wrists, that he had his hands in his pockets and brought them out as fast as possible when the officer jumped him, but there is no such testimony in the record. Appellant did not testify, hence the only testimony is the officer's to the effect that he seized appellant by the wrists as he turned to flee, and that appellant then dropped the bindle on the floor.

In the case of Badillo v. Superior Court, 46 Cal.2d 269, 294 P.2d 23, where it was held that the evidence was illegally obtained, defendant ran out of the house and threw away a package of heroin which was retrieved by a narcotics agent. It was held that defendant's flight was the direct result of the officer's illegal entry which was made by breaking into the house without a search warrant. In the instant case no prima facie case of an illegal entry by the officers was made out by appellant, whereas in the Badillo case an illegal entry was shown, thus placing the burden on the officers to establish that they had reasonable cause to break and enter to make the arrest.

The Attorney General argues that there was in reality no search either actual or constructive, involved in this case, and that when contraband is observed by an officer in a public place and seized, it is legally obtained evidence, citing People v. Exum,

382 Ill. 204, 47 N.E.2d 56; People v. Smith, 315 Ill.App. 671, 43 N.E.2d 420; State v. Hawkins, 362 Mo. 152, 240 S.W.2d 688; McDonald v. United States, 83 U.S.App. D.C. 96, 166 F.2d 957. These cases all hold that "search" connotes an uncovering of that which is hidden, a prying into hidden places for that which is concealed. Some of the above cases involved the observation by police of stolen or contraband articles in plain view of the officers. However, in People v. Smith, supra, an open knife which was laying on the floor after the police scuffled with defendant whom they were attempting to arrest was held to be properly introduced in evidence, as being merely incidental to the arrest and it was held that no search had been involved.

There can be no question but that under the circumstances herein there was reasonable cause for a police investigation of appellant and his companion. In the recent case of People v. Martin, 46 Cal.App.2d 387, 295 P.2d 33, it was said that there was reasonable cause for a police investigation when two men were seen in a parked automobile on a lover's lane at night. When they fled at sight of the patrol car, the officers could reasonably conclude that they were guilty of some crime, which made an investigation not only reasonable but necessary. It was said that "under these circumstances the officers were justified in taking precautionary measures to assure their own safety on overtaking the suspects, and it was therefore reasonable for them to order the suspects to put their hands in front of them and to get out of the automobile to be searched for weapons before being questioned." The bag of narcotics was disclosed when the suspects removed their hands, and the officer was justified in taking the bag, for he had reasonable cause to conclude that its possession had prompted their flight.

In the present case, it may also be said that the officer upon overtaking appellant, could take the reasonable precaution of protecting himself by laying hold of appellant's wrists, so as to forestall attack. If appellant because of the application of this necessary and reasonable force decided to hastily dispose of the bindle of narcotics or if he accidently exposed it in his confusion, the officer had the right to take it and it may be considered as legally obtained evidence.

No prejudicial error appearing in the record before us the judgment must be affirmed.

Judgment affirmed.

NOURSE, P. J., and DOOLING, J., concur.



142 Cal.App.2d 307

Joseph SIMONE, Plaintiff and Respondent,

v.

Sam McKEE, Individually and doing business as Sam McKee & Company, et al., Defendants and Appellants.

Civ. 16731.

District Court of Appeal, First District, Division 1, California.

June 18, 1956.

Fraud action by vendor against broker. The Superior Court, City and County of San Francisco, Ralph McGee, J., rendered judgment for plaintiff. Defendant appealed therefrom and purported to appeal from order granting plaintiff leave to file amended complaint to conform to proof and from failure of court to rule upon or grant defendant's motion for new trial. The District Court of Appeal, Peters, P. J., held that the evidence warranted award of $3,800 compensatory damages and $1,000 exemplary damages.

Judgment affirmed; purported appeals dismissed.

1. Fraud ⇐41

Amended complaint charging that material representation was made, that it was false, that defendant knew it was untrue, that defendant intended to induce plaintiff to act thereon and that plaintiff

believed the representation was true and acted on it to plaintiff's damage was sufficient to charge fraud.

2. Fraud ⇐58(2, 4)

In vendor's action against broker for fraud, evidence warranted findings that broker, by failing to disclose a second offer to purchase, affirmatively represented that no other offer existed, that broker knew of falsity and materiality of representation and that vendor knew of representation and relied thereon.

3. Brokers ⇐19

Broker retained by owner to sell realty owed owner affirmative duty to disclose second offer to purchase, and failure to disclose was equivalent to affirmative representation that no other offer existed.

4. Fraud ⇐29

Representations made to one person with intention that they will be repeated to another and acted upon by him and which are repeated and acted upon to his injury give the person so acting the same right to relief as if the representations had been made to him directly.

5. Appeal and Error ⇐103, 870(5)

An order permitting filing of amended complaint to conform to proof is a nonappealable order, but it is reviewable on appeal from judgment.

6. Pleading ⇐236(5)

Courts have discretion to allow pleadings to be amended to conform to proof unless pleader attempts to set forth entirely different set of facts; a wholly different cause of action cannot thus be pleaded. West's Ann.Code Civ.Proc., §§ 469–471, 473.

7. Pleading ⇐238(4)

Where leave is granted to amend pleadings to conform to proof and new issues are pleaded the adverse party should be given an opportunity to meet the new issues, but if it is clear that adverse party has presented his full case to the court the case need not be reopened. West's Ann.Code Civ.Proc., §§ 469–471, 473.

8. Pleading ⇐236(7)

Where original complaint set forth charges of fraud against defendant and charged that defendant and another conspired to defraud plaintiff and amendment to conform to proof omitted allegations of conspiracy and simply charged defendant with fraud in language almost identical with that used in original complaint and every element of fraud against defendant was proved, the amendment simply changed plaintiff's theory and did not change fundamental cause of action against appellant and allowance of amendment was within trial court's discretion. West's Ann.Code Civ.Proc., §§ 469–471, 473.

9. Appeal and Error ⇐237(1)

Allowance of amendment to omit allegations of conspiracy of defendant and codefendant to defraud and to retain only allegations charging defendant with fraud did not prejudice defendant on any theory that defendant was precluded from cross-examining plaintiff because of failure to reopen case after the amendment, where early in the trial it was announced that plaintiff would not be called as a witness and defendant made no request or demand that plaintiff be present and at time of amendment defendant did not request that case be reopened to allow defendant to examine plaintiff.

10. Appeal and Error ⇐110

The denial of new trial in civil cases is nonappealable. West's Ann.Code Civ. Proc., § 660.

11. Fraud ⇐62

In vendor's action against broker for fraud in that broker received offer of $17,000 for property and failed to disclose such offer to vendor and disclosed only another offer of $13,000 which vendor was induced to accept, evidence warranted award of $3,800 compensatory damages computed on the $4,000 differential less the 5 per cent commission which vendor would have had to pay on such $4,000. West's Ann.Civ.Code, §§ 1709, 3333, 3343.

12. Fraud ⇐59(3)

Where there is fraud by a fiduciary, section 1709, relating to measure of damages for fraudulent deceit, and section 3333, relating to measure of damages for breach of obligation other than contract, are applicable rather than section 3343

stating the "out of pocket rule" of damages for fraud in purchase, sale or exchange of property. West's Ann.Civ.Code, §§ 1709, 3333, 3343.

13. Fraud ⇐59(3)

"Actual value" in statute providing that one defrauded in purchase, sale or exchange of property is entitled to recover difference between actual value of that with which defrauded person parted and actual value of that which he received is not the listing price. West's Ann.Civ.Code, § 3343.

See publication Words and Phrases, for other judicial constructions and definitions of "Actual Value".

14. Fraud ⇐61

In vendor's action against broker for fraud in sale of property for $13,000 when there was an offer of $17,000 not disclosed by broker, evidence disclosed such aggravated case of fraud as to warrant award of exemplary damages of $1,000 against broker. West's Ann.Civ.Code, § 3294.

15. Damages ⇐93

While exemplary damages cannot be allowed where a defendant dies before trial, the right becomes vested with entry of judgment and subsequent death of defendant has no effect on award. West's Ann.Civ.Code, § 3294.

Hyman & Hyman, San Francisco, for appellants.

Carroll F. Jacoby, Jack Flinn, San Francisco, for respondent.

PETERS, Presiding Justice.

Defendant, Sam McKee, a real estate broker, appeals from an adverse judgment awarding plaintiff Joseph Simone $3,800 compensatory damages and $1,000 exemplary damages for fraud practiced by McKee in a real estate transaction. He also purports to appeal from an order granting plaintiff leave to file an amended complaint to conform to proof, and "from the failure of the Court to rule upon or grant the said defendant's motion for a new trial."

The original complaint charged a conspiracy to defraud on the part of McKee and one Genevieve Chisholm, alleging that McKee, while representing plaintiff in the sale of his San Francisco property, informed plaintiff that Chisholm had offered to purchase the property for $13,000; that such amount was the best price obtainable and that there were no other offers in excess of that amount; that such representations were false in that defendant knew that one Adelaide Clatanoff had offered to buy the property for $17,000; that the false representations were maliciously made to induce the sale of the property to Chisholm; that defendants concealed the Clatanoff offer in a conspiracy to have the property sold to Chisholm and then resold to Clatanoff in order to gain a secret profit; that in reliance on these representations plaintiff sold the property to Chisholm for $13,000, and Chisholm resold it to Clatanoff for $17,000. At the conclusion of the trial, over McKee's objections, the trial court granted plaintiff leave to file an amended complaint to conform to proof. The amended complaint dropped Chisholm as a conspirator, and set forth a cause of action against McKee alone for fraud, alleging the fraud in substantially the same language as appears in the original complaint.

[1, 2] The evidence overwhelmingly supports the allegations of both complaints to the effect that McKee, while acting as a broker for plaintiff in a real estate transaction, was guilty of fraud. The evidence shows that plaintiff lived in Saratoga while the property, three flats, was located in San Francisco. McKee, a licensed real estate broker, as agent of plaintiff, collected the rents, secured insurance, and arranged for repairs to the flats. In April of 1953 plaintiff notified his San Francisco attorney, one Jacoby by name, to list the flats for sale with McKee. About May 7, 1953, Jacoby arranged for plaintiff to sign a listing agreement and authorization to sell the flats for $16,500, and delivered such authorization to McKee. Early in June, McKee telephoned Jacoby and told him that he had a cash offer of $12,500 for the property. Jacoby told McKee that the price was too low. Several days later McKee in-

formed Jacoby that the purchaser had raised the offer to $13,000 cash, and recommended that that price be accepted. Jacoby told McKee to complete the transaction at that price. McKee then sent to Jacoby's office a deposit receipt and agreement signed by Genevieve Chisholm whereby she agreed to purchase the property for $13,000, and acknowledging a $100 deposit from her. Jacoby sent the agreement to plaintiff, who signed it on June 12th or 13th, and returned it to Jacoby on June 14th. The deed from plaintiff to a title company was executed by plaintiff on June 13th and recorded June 18th. The title company executed a deed to Chisholm on June 17th, and it, too, was recorded on the 18th.

McKee at no time informed Jacoby or plaintiff that any other offer had been made to purchase the property.

Significantly, just before the final closing of the deal, McKee told Jacoby that the purchaser wanted to affix revenue stamps on the deed indicating a purchase price of $17,000, stating that Chisholm was buying the property for speculation, and that among speculators this was common practice. Jacoby refused to enter into such chicanery.

During this period, McKee had received a bona fide offer to buy the property for $17,000. Adelaide Clatanoff testified that she first visited McKee's office on May 26th and asked about the property, and one of McKee's salesmen, a Mr. Henry, showed it to her on that day and the next; that on May 28, 1953, she signed an agreement to buy the property for $17,000, and gave Henry a $100 deposit; that her offer to buy was subject to the condition that she obtain a $9,000 loan at 5 per cent; that about June 1st Henry told her that the owner's signature had not been obtained to the agreement because the owner was in the Navy and out of town; that about June 6th she talked with McKee and Henry about the proposed loan; that McKee told her a 5 per cent loan could not be secured and that a $2,000 deposit should be made; that she refused to increase her deposit until the sale had been approved by the owner; that subsequently she talked with McKee several times about the bank loan, and he finally reported that the best he could get was $8,500 at 5½ to 6 per cent; that she told him this would be acceptable if she could not do better but that she, personally, would try to negotiate the loan; that on June 16th Henry again demanded a $2,000 deposit which she again refused until the owner approved the sale; that on June 18th McKee told her he had such approval and showed it to her on the 19th; that this contract of sale was signed by Chisholm, McKee representing that Chisholm was the owner's sister; that on the 19th she deposited a $2,000 check and left it with McKee who delivered to her a new receipt and agreement of sale, tearing up the old ones; that she asked McKee not to cash the check because the money was in her savings account in which there was $14,000 on deposit, and he agreed not to cash the check until after July 1st so her right to interest would not be affected; that on July 1, 1953, Chisholm deeded the property to her and she paid the $17,000. She had secured an $8,500 loan at 5 per cent.

McKee denied most of this testimony, contending that he first met Clatanoff on June 19th and first heard of her offer on June 14th, but did not think the offer was a serious one because of the conditions attached to it in reference to the loan. He denied knowing that Clatanoff had made a deposit on the property or that she had signed a formal sales agreement on May 28, 1953. He admitted that the Chisholm offer was the only one transmitted by him to Jacoby, and admitted telling Jacoby that the $16,500 listing price was too high. It was his story that up to July 1st he did not believe Clatanoff would close the deal.

Chisholm operated a small restaurant near McKee's office, and had, on three prior occasions, bought property from him. Chisholm testified that she borrowed the money to buy the property, and that none of it was advanced by McKee; that all McKee got out of the deal was two commissions, one of $650 and one of $850; that she bought the property as a speculation, and that when she bought it she did not know there was another buyer bidding for the property.

The salesman Henry generally corroborated his employer.

The trial court, on this evidence, found against the conspiracy allegations, exonerated Chisholm of liability, found that the allegations of the amended complaint charging McKee with fraud were true, and awarded plaintiff as against McKee $3,800 compensatory damages and $1,000 exemplary damages. McKee, thereafter, moved for a new trial, but the motion was never passed upon. After the appeal was perfected McKee died and his executor has been substituted.

The amended complaint charges fraud. It charges that a material representation was made; that it was false; that McKee knew it was untrue; that McKee intended to induce plaintiff to act thereon; that plaintiff believed the representation was true and acted on it to his damage. These allegations are sufficient to charge fraud. Hobart v. Hobart Estate Co., 26 Cal.2d 412, 159 P.2d 958; Nathanson v. Murphy, 132 Cal.App.2d 363, 282 P.2d 174. The trial court found these allegations to be true, and those findings, relating to a direct misrepresentation, are amply supported.

[3] It must also be remembered that McKee was plaintiff's broker. As such, he owed plaintiff an affirmative duty of disclosure. Fisher v. Losey, 78 Cal.App.2d 121, 177 P.2d 334. It was a breach of this duty not to disclose the Clatanoff offer. Failure to disclose, under such circumstances, is equivalent to the affirmative representation that no other offer existed. Rattray v. Scudder, 28 Cal.2d 214, 169 P.2d 371, 164 A.L.R. 1356. These representations were obviously material, and false. The evidence, already recounted, shows that McKee knew that they were untrue. The argument that McKee's conduct at most amounted to negligence and bad judgment in failing to recognize Clatanoff as a legitimate buyer is based upon McKee's and Henry's version of the facts which were disbelieved by the trial court. McKee's main basis for claiming that he in good faith did not believe the Clatanoff offer was legitimate was that the loan demanded —$9,000 at 5 per cent—was an impossible condition. Yet Clatanoff did get an $8,500 loan at 5 per cent, and as early as June 5th there was a commitment for an $8,500 loan at 5½ or 6 per cent which Clatanoff testified she told Henry would be acceptable if she could not make a better deal. The other evidence already set forth clearly supports the challenged findings.

[4] The other necessary findings are also supported. Appellant vigorously attacks the finding that respondent believed the representations to be true and relied upon them, urging that respondent was not called as a witness and therefore there is no evidence that respondent knew of the representations or relied thereon. It is claimed that the representations were made to Jacoby and that there is no evidence that he communicated with respondent, and that the evidence shows reliance on Jacoby and not on appellant. These contentions simply ignore the facts and the applicable law. Respondent did not live in San Francisco but in Saratoga. While he employed Jacoby as his attorney to look after his San Francisco business interests, he also employed appellant to collect rentals and to make repairs to this property. Respondent, when he decided to sell the property, directed Jacoby to arrange for the sale through appellant. After McKee had told Jacoby that he recommended the acceptance of the $13,000 offer, Jacoby conveyed the offer to respondent and told him if acceptable to sign the agreement, which he did. It is a proper inference from these facts that respondent selected appellant to act as his agent in the sale of the property and directed Jacoby to handle the details. It is clear that both respondent and Jacoby relied on appellant to find a purchaser and to recommend a price. Obviously, had either known there was another purchaser offering $17,000 for the property they would not have accepted a $13,000 offer. This is not a case where the evidence shows that respondent relied on the advice of Jacoby, because the evidence shows that Jacoby was acting simply as the intermediary between appellant and respondent. The law is well settled that "representations made to one person with intention that they will be repeated to another and acted upon by him and which are repeated and acted

upon to his injury gives the person so acting the same right to relief as if the representations had been made to him directly." Strutzel v. Williams, 109 Cal.App.2d 512, 515, 240 P.2d 988, 990; see also Crystal Pier Amusement Co. v. Cannan, 219 Cal. 184, 25 P.2d 839, 91 A.L.R. 1357. That is this case.

[5–7] Appellant purports to appeal from the order permitting the filing of the amended complaint to conform to proof. This is a nonappealable order, but it is reviewable on the appeal from the judgment.

The power of the court to grant motions for leave to amend to conform to the proof is found in section 473 of the Code of Civil Procedure. See also sections 469, 470, 471. Courts have discretion to allow such amendments unless the pleader attempts to set forth an entirely different set of facts by way of amendment. A wholly different cause of action cannot thus be pleaded. Klopstock v. Superior Court, 17 Cal.2d 13, 108 P.2d 906, 135 A.L.R. 318. Of course, if new issues are pleaded, the adverse party should be given an opportunity to meet them, Reidy v. Collins, 134 Cal.App. 713, 26 P.2d 712; Richter v. Adams, 19 Cal.App. 2d 572, 66 P.2d 226, but if it is clear that the adverse party has presented his full case to the court, the case need not be reopened. Rabbit v. Atkinson, 44 Cal.App.2d 752, 113 P.2d 14; Valencia v. Shell Oil Co., 23 Cal.2d 840, 147 P.2d 558; M. J. Ryan Co. v. Brown, 138 Cal.App. 176, 31 P.2d 1076.

[8] In the instant case the original complaint, which was entitled "Complaint for Damages—Fraud" set forth charges of fraud against appellant in some detail. It joined Chisholm and charged her and appellant with conspiring to defraud respondent. The amendment to conform to proof omitted the allegations of conspiracy and simply charged appellant with fraud in language almost identical with that used in the original complaint. Because the trial court found no conspiracy, the appellant charges there was a failure to prove the only cause of action pleaded—conspiracy. The argument lacks merit. Here, it is true that in one particular—the conspiracy—there was a failure of proof. But every element of fraud against appellant was proved. Thus, the amendment, dropping the conspiracy charge and alleging a fraud action against appellant, simply changed respondent's theory—it did not change the fundamental cause of action against appellant. This the trial court had the power to do. Brown v. Klein, 89 Cal.App. 153, 264 P. 496; Wennerholm v. Stanford Univ. Sch. of Med., 20 Cal.2d 713, 128 P.2d 522, 141 A.L.R. 1358.

[9] The contention that appellant was prejudiced when the court allowed the amendment without reopening the case because appellant was thus precluded from cross-examining the respondent, who was not called as a witness, is not supported by the record. Early in the trial counsel stated that the respondent would not be called as a witness. The appellant made no request or demand that respondent be present. When the amendment to conform to proof was offered and the order made, appellant's counsel did not then request that the case be reopened to allow him to examine respondent or to re-examine Henry and appellant. Moreover, the evidence demonstrates that respondent knew little about the transaction, relying on information conveyed to him by Jacoby, who did testify. The record shows that the case was tried on the issue of fraud and that such issue was completely embraced within the issue of conspiracy to commit fraud. No new issue was presented by the amendment. The conspiracy issue was simply deleted. No prejudice to appellant occurred by the amendment.

[10] The appellant noticed a motion for a new trial. The court failed to pass on the motion. Appellant purports to appeal from the "failure" of the court to rule upon and grant the motion. Under section 660 of the Code of Civil Procedure the motion for a new trial is automatically denied if not acted upon in 60 days. The denial of a new trial in civil cases is nonappealable. Hamasaki v. Flotho, 39 Cal.2d 602, 248 P.2d 910.

[11, 12] Appellant claims that the award of damages is excessive. The court awarded $3,800 compensatory damages. This was

computed as follows: Obviously, there was a $4,000 differential between the price received by respondent and the price paid by Clatanoff. But had the full $17,000 been received by respondent instead of the $13,000, he would have had to pay a 5 per cent commission on the additional $4,000 or $200. Thus, he was actually damaged to the extent of $3,800. Appellant contends, however, that since respondent listed the property at $16,500, he was only damaged to the extent of $3,500 less 5 per cent, and not $4,000. He contends that the "out of pocket rule" codified in section 3343 of the Civil Code is here applicable. All of the cases cited in support of this rule are cases between a vendor and vendee. None of them involve fraud by a fiduciary. As to such cases the much broader provisions of sections 3333 and 1709 of the Civil Code are applicable. Gagne v. Bertran, 43 Cal.2d 481, 275 P.2d 15; Nathanson v. Murphy, 132 Cal.App.2d 363, 282 P.2d 174.

[13] Moreover, section 3343 provides that the defrauded person is entitled to recover "the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received." "Actual value" is not the listing price. There is evidence that appellant appraised the property at $18,500. The very fact that Clatanoff offered and paid $17,000 for the property is some indication that that was the price a reasonable person in a free market was willing to pay. Thus, there was evidence of "actual value" of $17,000 or more.

[14] The exemplary damages of $1,000 were clearly allowable under section 3294 of the Civil Code. The facts found show an aggravated case of fraud.

[15] The fact that appellant died after judgment was entered does not affect the right to exemplary damages. While exemplary damages cannot be allowed where a defendant dies before trial, Evans v. Gibson, 220 Cal. 476, 31 P.2d 389, the right becomes vested with the entry of judgment and the subsequent death of the defendant has no effect on the award. Leavitt v. Gibson, 3 Cal.2d 90, 43 P.2d 1091; see 24 Cal. L.Rev. 479; 14 Cal.Jur.2d p. 820, sec. 189.

The purported appeals from the order granting leave to file an amendment to conform to proof and from the failure of the court to rule upon or grant appellant's motion for a new trial, are dismissed; the judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

142 Cal.App.2d 382

SHIELDS CO., Inc., a corporation, Plaintiff and Respondent,

v.

COLLINS ELECTRICAL CO., Inc., a corporation, Defendant and Appellant.

Civ. 16838.

District Court of Appeal, First District, Division 2, California.

June 19, 1956.

Hearing Denied Aug. 16, 1956.

Heating subcontractor's action against electrical subcontractor for materials furnished under protest after dispute arose as to which of the two subcontractors was required to furnish same. The Superior Court, Marin County, Jordan L. Martinelli, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Kaufman, J., held that evidence would not sustain defendant's contention, that plaintiff had been a volunteer who had furnished equipment without request to defendant who did nothing other than install it, and established to contrary that there had been an implied contract to pay for items if defendant's subcontract imposed upon it duty to supply them.

Affirmed.

Dooling, J., dissented.

1. Appeal and Error ⇐882(17)

Finding could not be attacked on basis that it was outside issues formed by pleadings, where both parties had offered evi-

dence relative to issue which finding resolved.

2. Sales ⇐357(1)

In heating subcontractor's action against electrical subcontractor for materials furnished under protest after dispute arose as to which of the two subcontractors was required to furnish same, evidence was sufficient to support finding that it had been duty of defendant to supply items in dispute.

3. Contracts ⇐208

A contract creating indebtedness was performable at creditor's place of business.

4. Sales ⇐357(1)

In heating subcontractor's action against electrical subcontractor for materials furnished under protest after dispute arose as to which of the two subcontractors was required to furnish same, memorandum, signed by both parties' agents and showing that items had been delivered by plaintiff to defendant "pending further clarification of specifications", was some evidence that defendant had received items and impliedly agreed to pay for them if it was its duty to do so.

5. Sales ⇐365

In heating subcontractor's action against electrical subcontractor for materials furnished under protest after dispute arose as to which of the two subcontractors was required to furnish same, it was not necessary that trial court find specific date when obligation was incurred; it being sufficient that court found that it accrued within two years prior to commencement of action.

6. Account, Action on ⇐22

In heating subcontractor's action against electrical subcontractor for materials furnished under protest after dispute arose as to which of the two subcontractors was required to furnish same, there was no evidence to support finding that defendant had become indebted to plaintiff upon book account for goods, wares and merchandise.

7. Sales ⇐357(1)

In heating subcontractor's action against electrical subcontractor for materials furnished under protest after dispute arose as to which of the two subcontractors was required to furnish same, judgment for plaintiff could be supported if there was substantial evidence to support finding that defendant had become indebted to plaintiff for goods, wares and merchandise sold and delivered to defendant at its special instance and request and for which defendant had agreed to pay, even though there was no evidence to support finding that defendant had become indebted to plaintiff upon book account for goods, wares and merchandise, where sum found to be due and owing was same under each count.

8. Sales ⇐357(1)

In heating subcontractor's action against electrical subcontractor for materials furnished under protest after dispute arose as to which of the two subcontractors was required to furnish same, evidence would not sustain defendant's contention that plaintiff had been a volunteer who had furnished equipment without request to defendant who did nothing other than install it, and established to contrary that there had been an implied contract to pay for items if defendant's subcontract imposed upon it duty to supply them.

9. Sales ⇐342

That heating subcontractor had estimated cost of such items in arriving at total of its lump sum bid and had accordingly been paid therefor was immaterial to its right to recover from electrical subcontractor for materials furnished by heating subcontractor under protest after dispute arose as to which of the two subcontractors was required to furnish same, where it was electrical subcontractor's duty to supply disputed items under terms of its subcontract.

10. Sales ⇐357(1)

In heating subcontractor's action against electrical subcontractor for materials furnished under protest after dispute arose as to which of the two subcontractors was required to furnish same, evidence sustained finding as to cost to plaintiff of materials furnished.

Mazzera, Snyder & DeMartini, Loraine B. Early, Stockton, for appellant.

Lawrence A. Cowen, San Rafael, Leo V. Killion, San Rafael, of counsel, for respondent.

KAUFMAN, Justice.

This is an appeal from a judgment in the sum of $4,225.79 rendered by the Superior Court in and for the County of Marin in favor of respondent Shields Co., Inc., and against Collins Electrical Co., Inc., a corporation. Both companies were subcontractors under a prime contract which had been awarded to the Del E. Webb Construction Co. to construct an aircraft shop building at Travis Air Force Base near Fairfield-Suisun, California.

On August 18, 1952, respondent was awarded a sub-contract in the amount of $197,834.02 to do certain mechanical work as set forth in detail in the contract which also included by reference certain enumerated sections of the Specifications. Respondent was engaged in the general plumbing, heating and sheet metal contracting business in San Rafael, California.

Appellant, a general electrical contractor with its principal place of business in Stockton, California, on August 22, 1952, was awarded a sub-contract to do the general electrical work on a form similar to that used for respondent, in which the work was described as "all electrical work, interior, and electrical distribution system, aerial complete, installed according to plans, specifications, and addenda * * *." "This work includes without limitation all General and Special conditions of the Specifications, and section 31, 32 and 41 * * * motors, motor controls, switchboards * * *." The contract price was $68,850.54.

In the sub-contract of respondent there was the phrase "electrical work as required under mechanical work" set forth in a series of items to be furnished by respondent, such as "steel racks, blow-off tank, bilge set, boiler room trenches and iron work, heating units, gauges", etc.

A controversy arose during the course of construction between the superintendents of the two sub-contractors as to which company was to supply certain items of electrical equipment—namely, starters, a generator set, reostat, and a control panel. Schwall, superintendent for Collins, refused to supply them, and the work was being held up. Schwall took up the matter with the superintendent of Del Webb, the prime contractor, who told Wilcox, respondent's superintendent, that it was Shield's duty to supply the items, that if Wilcox did not do something about it its payment would be withheld. Respondent then furnished the items which were installed by appellant. When Wilcox delivered this equipment he insisted that Schwall give him a purchase order for it, which he refused to do. Wilcox then prepared a receipt which Schwall signed, dated September 24, 1953, and reading as follows: "We have received various starters also control panels and accessories for spray booths and air compressor on Aircraft Shops at Travis A.F.B. pending further classification of the specs." Some additional material was delivered on October 20, 1953, receipt of which was acknowledged by Collins.

On September 24, 1953, Wilcox wrote to Del Turney, an officer of Shields Co., stating that he and the superintendent for Collins had "decided it was beyond us to decide and that rather than hold up the job I would move the panel up there and he would sign a tag showing that he had received it and the clarifying of the specs would be taken up by the heads of the companies", and that about twenty minutes later, Mr. Kuntz of Del Webb called, saying that Collins' superintendent was in his office, and asked if Wilcox would come over, as the three of them should get together on a deal. Wilcox asked who would interpret the specifications, and Kuntz replied that he would. Wilcox said he did not think that was right. Kuntz asked if he refused to give Collins the switchboard. Wilcox answered, "No, that their Supt. said he would sign for it." Kuntz then said he would stop Shield's payment, as it was his opinion that it was that company's work. Wilcox told him that he was asking for clarification and had offered to supply it on receipt, pending clarification.

On December 24, 1953, respondent sent appellant four invoices for these items in a total sum of $6,087.01, claimed due from appellant. The invoices showed that 15% overhead and 10% profit had been added to

each of the four sets of items to make up the above total. Each of these charges was dated August 27, 1953. A bill of particulars covering these items was by stipulation filed during trial for the convenience of the court in following the testimony.

The complaint for moneys in the instant case consisted of two counts, the first alleging that within the two years last past, appellant became indebted to respondent in the sum of $6,087.01 for goods, wares and merchandise sold and delivered to appellant at its special instance and request for which appellant agreed to pay. The second count alleged a book account for goods, wares and merchandise sold and delivered to appellant in the amount of $6,087.01, which has been owed since August 27, 1953.

The trial court found that the charging allegations in the first count were true except that the amount owed was $4,754.94. It also found that the allegations of paragraph II of the second cause of action were true except that the amount was $4,754.94 instead of $6,087.01. It made no finding in regard to the date of the book account, other than that it arose within the two years last past. The court further found that the items which were in dispute were shown upon the electrical plans and that under the specifications they were to be furnished by appellant; that respondent was forced to deliver them to appellant, and that the sum actually paid by respondent for them was the sum of $4,754.94, which was expended by respondent for the use and benefit of appellant. The allegations of the cross-complaint were found to be true, entitling appellant to a credit of $529.15.

[1, 2] Appellant contends that the findings of fact are not supported by the evidence. At the outset, however, appellant concedes that the finding that it was the duty of appellant to supply the items in dispute, cannot be attacked on the basis that it is outside the issues formed by the pleadings, since both parties offered testimony relative to the interpretation of the plans and specifications. Horton v. Horton, 115 Cal.App.2d 360, 367, 252 P.2d 397. Appellant also concedes that there is substantial evidence to support this finding.

[3] It is urged that there is no evidence of any transaction between the parties in the County of Marin, and the trial court found the allegation true that appellant became indebted to respondent in the County of Marin. There being evidence to support the finding that appellant became indebted to respondent for goods sold and delivered at its special instance and request, there is also evidence to support the finding that appellant became indebted to respondent in the County of Marin, for that is respondent's principal place of business. §§ 1488, 1489, Civ.Code; Roos v. Jansen, 30 Cal.App.2d Supp. 773, 78 P.2d 476; Bank of Yolo v. Sperry Flour Co., 141 Cal. 314, 74 P. 855, 65 L.R.A. 90.

[4, 5] It is asserted that there is no evidence that the goods were sold and delivered to appellant at its special instance and request. The memorandum signed by both parties' agents, showing that these items were delivered by respondent to appellant "pending further clarification of the specifications", following the dispute as to whose duty it was to supply them under the sub-contracts, is some evidence that appellant received the items impliedly agreeing to pay for them if it was its duty to do so. Certainly the conduct of the parties does not give rise to the inference that respondent intended a gift to appellant. As to the complaint that the trial court did not find the specific date when the obligation was incurred, it is sufficient that the court found that it accrued within the two years prior to the commencement of the action. Wagner v. El Centro Seed & Nursery Co., 17 Cal.App. 387, 119 P. 952.

[6] Appellant appears to be correct in its contention that there is no evidence to support the finding that appellant became indebted to respondent upon a book account for goods, wares and merchandise. There is no dispute as to what items were received by appellant from respondent, and it is conceded that a bill was received by appellant for these items. They were again listed in the bill of particulars which was filed by stipulation with the court. No books of account were introduced into evidence, nor did the only witness who testified as to the amounts charged appellant for

these items use any book of accounts in testifying, or state that there were any entries in any books of account concerning these items. He was questioned by respondent's counsel only in regard to the items which he had set forth in the bill of particulars. A book account is defined as "a detailed statement, kept in a book, in the nature of debit and credit, arising out of contract or some fiduciary relation." 1 Cal. Jur.2d 320, sec. 7. It is true, that in the absence of objection, a book account can be proved by secondary evidence presented by the plaintiff reading from his accounts, Gille v. Anderson, 34 Cal.App. 237, 167 P. 193, but even that was not done in this case. Furthermore, appellant could not have objected to appellant's method of introducing this evidence since it was admissible as to the first count of the complaint.

[7] However, the judgment may still be supported if there is substantial evidence to support the findings as to the first cause of action for the sum found to be due and owing to respondent was the same under each count, namely, $4,754.94. The second count may therefore be regarded as surplusage. See, Costello v. Campbell, 81 Cal. App.2d 452, 184 P.2d 315.

[8] Appellant contends that respondent was a volunteer who furnished the equipment without request to appellant who did nothing other than install it. The evidence reviewed above completely refutes this contention, for there was a showing of an implied contract to pay for the items if appellant's sub-contract imposed upon it the duty to supply them.

It is urged that the finding of coercion is unsupported since the threat to cut off respondent's payments if he did not supply the items was made by the prime contractor, and not by appellant who had no authority over such payment. It was said in Brahs v. Katcher, 106 Cal.App.2d 657, 659, 235 P.2d 619, 620, that it is well established that "to render a payment involuntary and hence recoverable, there must be an actual or threatened exercise of power possessed or supposed to be possessed by the party receiving payment. [Citations.] The threat must be clear and direct. It is not sufficient that a threat might possibly be inferred." But even if it be assumed that the evidence herein is not sufficient to show that the agent of the prime contractor and appellant's agent were acting in concert, the judgment can still be supported by the findings in regard to the first count of the complaint, as noted above.

[9] Appellant argues at length that respondent was once paid for the items here in question since in making up its bid it estimated the cost of these items in arriving at the total of its lump sum bid, and that appellant did not interpret its sub-contract as calling for these items, hence did not include them in its total. Respondent's superintendent did testify that since the specifications were ambiguous, he included some of the disputed items in his bid, that it is necessary in preparing such estimates to put aside a certain amount for irregularities that come up. Since appellant has admitted that the finding that it was appellant's duty to supply the disputed items under the terms of its sub-contract, is supported by substantial evidence, it is immaterial what estimates were made by either sub-contractor as they are bound by the terms of their contracts.

[10] Finally, appellant attacks the finding that the sum of $4,754.94 (the amount of the judgment) represents the sum that plaintiff actually paid for the items and that said sum was expended for the use and benefit of defendant. This finding discloses the basis of the amount arrived at in the preceding findings which are in the same amount. Appellant maintains that the record does not establish that this sum was the cost to respondent.

Respondent's witness Turney was examined as to the bill of particulars which had been filed in court by stipulation. He was the only witness to testify as to prices and costs of these items. Appellant's counsel examining him in regard to the bill of particulars asked if the price of one item, a control panel, listed at $2,230 was the amount he had paid for it. He replied that it was not, that he couldn't answer exactly without documents, that he would say it was about $1950. He stated that all of the items on the bill of particulars were in excess of the cost. On redirect examination, respondent's counsel asked, "These prices

that are shown upon your bill of particulars, they are not list prices, are they? He replied: I think there is a percentage for handling; I think it's the original billing, plus a percentage. Now, maybe fifteen and ten, I don't know. I think I have those." Then on re-cross examination, appellant's counsel asked: "In other words, you think you marked up these about twenty-five? A. No, I would say fifteen and ten, if anything, if we were selling them to somebody else, definitely they would be marked up fifteen and ten, fifteen overhead and ten percent for profit. Q. And that's your idea? A. *That would be the fair value of them; we were getting them for somebody else.*" Appellant states in its brief that the judgment was arrived at by deducting from the total amount claimed one item on the bill of particulars (which the parties stipulated should not have been included) and the sum of $1275.15 representing 15% overhead and 10% profit. From this sum of $4754.94 the amount claimed by appellant in its cross-complaint was subtracted. While the above testimony appears at first to be somewhat conflicting, it appears to be subject to the interpretation that the price stated for each item on the bill of particulars represented the original billing—the cost to respondent—plus 15% overhead and 10% profit. The trial court, according to appellant's statement, arrived at the amount of the judgment by subtracting these percentages, hence the finding that the cost of the items involved was $4,754.94 is supported by the record.

No prejudicial error appearing in the record before us, the judgment must be affirmed.

Judgment affirmed.

NOURSE, P. J., concurs.

DOOLING, Justice.

I dissent, since I am satisfied that there is no substantial evidence in the record of the reasonable value of the property involved. The burden was upon the plaintiff to establish the reasonable value of the items sued for. The majority opinion after paraphrasing the testimony on this subject and quoting some of it concludes: "While the above testimony appears at first to be somewhat conflicting, it appears to be subject to the interpretation that the price stated for each item on the bill of particulars represented the original billing—the cost to respondent—plus 15% overhead and 10% profit."

I cannot agree with this conclusion. The vice of the testimony is not that it is "conflicting." It is in fact perfectly consistent. Its vice is that it shows on its face that the witness Turney was not testifying to facts which he knew or remembered, but only to his surmise, guess and conjecture. To demonstrate this I quote all of the testimony given by the witness on the subject:

"Mr. Snyder: Q. There was one thing that I was wondering, for example, on this bill of particulars you have one control panel, $2,230.00. Is that what you paid for it, Mr. Turney? A. No, it is not.

"Q. What did you pay for it? A. Well, offhand I can't say, but I would say about $1,950.00, somewhere around there, I would say offhand; I couldn't be exact, I couldn't tell exactly without documents.

"Q. Would you say that all of these items on this bill of particulars there are in excess of what you paid for them? A. I wouldn't say that they all are.

"Q. Would you say most of them are? A. I believe that they are, most of them.

"Q. Now, I note generator set, that was a unit purchased along with the compressor? A. I am not positive of that; it was a part of the compressor, I suppose, I can't tell you that.

"Q. You didn't bring any of your bills? A. I didn't bring any, no, I didn't.

* * * * * *

"Mr. Cowen: Q. Mr. Turney, there is just one further question I would like to ask you. These prices that are shown upon your bill of particulars, they are not list prices, are they? A. I think there is a percentage there for handling; I think there is a percentage for handling. I

think it's the original billing, plus a percentage. Now, maybe fifteen and ten, I don't know. I think I have those.

* * * * * *

"Mr. Snyder: Q. In other words, you think you marked up these about twenty-five percent? A. No, I would say fifteen and ten, if anything, if we were selling them to somebody else, definitely they would be marked up fifteen and ten, fifteen overhead and ten percent for profit.

"Q. And that's your idea? A. That would be the fair value of them; we were getting them for somebody else."

The witness frankly admitted: "I *think* it's the original billing, plus a percentage. Now, *maybe* fifteen and ten. I *don't know.*"

Unless the pure guess, surmise and conjecture of a witness who frankly testifies that he does not know the facts is to be given the dignity of substantial evidence this testimony cannot support a finding of cost or value.



142 Cal.App.2d 324

Alfred BARNARD, Petitioner and Appellant,

v.

The MUNICIPAL COURT OF The CITY AND COUNTY OF SAN FRANCISCO, State of California, and The Honorable Judges Thereof, Respondents.

No. 16768.

District Court of Appeal, First District, Division 1, California.

June 18, 1956.

Petition for writs of prohibition and mandate against Municipal Court of City and County of San Francisco to prevent destruction of publications which had been seized and used as exhibits in prosecution of petitioner for selling indecent literature. The Superior Court of the City and County of San Francisco, Harry J. Neubarth, J., denied the petition and petitioner appealed. The District Court of Appeal, Bray, J., held that petitioner had adequate remedy at law by claim and delivery action.

Affirmed.

1. Mandamus ⇐7
Prohibition ⇐4

The issuance of prohibition and mandamus lies within court's sound discretion, even where questions of constitutionality are raised.

2. Mandamus ⇐3(2)
Prohibition ⇐3(1)

Prohibition and mandamus will be denied if applicant has a plain, speedy and adequate remedy at law.

3. Mandamus ⇐168(2)
Prohibition ⇐27

The burden is on one seeking mandamus and prohibition to show that he does not have plain, speedy and adequate remedy at law.

4. Criminal Law ⇐1221

One acquitted of selling indecent literature could maintain claim and delivery to recover possession of publications seized by arresting officers, which had been used as exhibits at his trial. West's Ann.Pen.Code, §§ 311, subd. 3, 312, 313.

5. Mandamus ⇐3(4)
Prohibition ⇐3(1)

Claim and delivery action to recover publications seized by arresting officers and used at trial in prosecution for selling indecent literature was a plain, speedy adequate remedy, precluding resort to mandamus and prohibition to compel restitution of such literature to defendant after acquittal.

6. Criminal Law ⇐1221

Claim and delivery action to recover publications which had been seized and used as exhibits in prosecution for selling indecent literature should be brought, not against municipal court, but against judge or clerk thereof.

James C. Purcell, Michael Riordan, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen. of the State of Cal., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for respondents.

BRAY, Justice.

Petitioner was charged and acquitted of the violation of section 311, subdivision 3, Penal Code (selling and distributing obscene and indecent writings, papers and books). At the time of his arrest, the arresting officers seized certain publications in petitioner's possession which they delivered into the custody of the municipal court, and which were used as exhibits at defendant's trial. After his acquittal petitioner filed in the superior court a petition for writs of prohibition and mandate against the municipal court, alleging that the latter has threatened to make an order that said publications be destroyed. The petition alleges that the municipal court claims jurisdiction to proceed to destroy said publications under the authority of sections 312 and 313, Penal Code.[1] The petition then alleges that these sections are unconstitutional as depriving petitioner of his property without due process of law; that petitioner made such objection in the municipal court; and that the municipal court has no jurisdiction to make the threatened order.

The superior court denied the petition on the ground that petitioner "has a plain, speedy and adequate remedy in the ordinary course of law, to wit, an action for claim and delivery."[2] Petitioner appeals from the judgment of denial.

Adequate Remedy.

The basic question here is whether the superior court abused its discretion in denying issuance of either writ.

[1–3] The issuance of prohibition and mandamus lies within the sound discretion of the court, even where questions of constitutionality are raised. It will be denied if the applicant has a plain, speedy and adequate remedy at law. See 3 Witkin, California Procedure, 2472; Rescue Army v. Municipal Court, 28 Cal.2d 460, 171 P.2d 8; Providence Baptist Church of San Francisco v. Superior Court, 40 Cal.2d 55, 251 P.2d 10; Phelan v. Superior Court, 35 Cal.2d 363, 217 P.2d 951; Code Civ.Proc. § 1086. The burden is on the petitioner to show that he does not have such remedy. Phelan v. Superior Court, supra, 35 Cal.2d at page 366, 217 P.2d 951.

[4, 5] The remedy referred to by the trial court, namely, a claim and delivery action, is open to petitioner. See Modern Loan Co. v. Police Court, 12 Cal.App. 582, at page 594, 108 P. 56, at page 61, involving alleged stolen jewelry in the possession of the police court taken upon a search warrant, the title to which the police court was attempting to try, where the court said "the law has provided the means for settling such question by the ordinary action of claim and delivery." To the same effect, People v. Lawrence, 140 Cal.App.2d 133, 295 P.2d 4 (allegedly stolen money). Faulkner v. First National Bank, 130 Cal. 258, at page 264, 62 P. 463, at page 465, points out that the so-called claim and

1. Section 312 provides: "Every person who is authorized or enjoined to arrest any person for a violation of" the above mentioned section 311, subdivision 3, "is equally authorized and enjoined to seize any obscene or indecent writing" etc. Section 313 provides that any magistrate to whom any obscene or indecent writing, etc., is delivered pursuant to section 312 "must, upon the examination of the accused, or, if the examination is delayed or prevented, without awaiting such examination, determine the character of such material or article, and if he finds it to be obscene or indecent, he must deliver one copy to the district attorney * * * and must at once destroy all the other copies."

2. The court ordered a stay of any proceedings in the municipal court pending appeal.

For some reason petitioner calls attention to the fact that subsequent to his acquittal, he was again arrested on a similar charge. He was convicted on this second charge. Inasmuch as the publications involved in the second charge were entirely different from those with which we are concerned here, we fail to see that his second arrest has any bearing on the matters before us.

delivery action embraces the common law action of detinue, which contemplates that "the original taking was not unlawful, but the detention" is, and provides "an auxiliary remedy by which, when a party brings an action to recover personal property, he may 'claim' that the property be immediately delivered to him at the commencement of the action, and without waiting the trial." 130 Cal. at page 263, 62 P. at page 464. Thus, the remedy is plain, speedy and adequate. Petitioner contends that claim and delivery will not lie because he contends that the publications are in custodia legis. Prior to defendant's trial and while they were being held as evidence they were in such custody, but now that they are no longer required for that purpose they are not in such custody, presuming, of course, that they are not obscene or indecent. If they are, the court, or the officers thereof, would not be required to return them to petitioner, even though his contention that section 313 providing for their destruction is unconstitutional, is correct. Havemeyer v. Superior Court, 84 Cal. 327, 24 P. 121, 10 L.R.A. 627, and Withington v. Shay, 47 Cal.App.2d 68, 117 P.2d 415, 119 P.2d 1, are not in point. In the Havemeyer case it was held that property in the hands of a receiver appointed by the court is in the hands of the court and that it is in the court which "holds, administers, and disposes of the property * * * and, so long as the property remains undisposed of, action by the court is necessary." 84 Cal. at page 390, 24 P. at page 137. In our case, if, as petitioner contends, the statute providing for the destruction of the publications is unconstitutional, nothing remains for the court to do except to turn them over to petitioner if he proves his right to possession. The Withington case dealt with surplus funds left in the hands of the sheriff after an execution sale by him. It was held that those funds were in custodia legis, the court pointing out in effect it was the court's duty to distribute such funds "to the respective parties in interest as their interests may subsequently be made to appear * * *." 47 Cal.App.2d at page 73, 117 P.2d at page 417.

" 'The question whether there is a "plain, speedy, and adequate remedy in the ordinary course of law", within the meaning of the statute, is one of fact, depending upon the circumstances of each particular case, and the determination of it is a matter largely within the sound discretion of the court. * * *' " Glasser v. Municipal Court, 27 Cal.App.2d 455, 458, 81 P.2d 260, 262, quoting from 21 Cal.Jur. p. 584 et seq.

Petitioner has not met the burden of showing that his remedy by claim and delivery is not plain, speedy and adequate. It should be pointed out that before the remittitur can go down to the superior court, 30 days must elapse after final determination of this appeal, during which time petitioner is protected by the stay order of the superior court. Obviously that gives ample time for petitioner to bring a claim and delivery action.

Ross v. O'Brien, 1 Cal.App.2d 496, 36 P.2d 1108, effectively answers petitioner's contention that the publications are in the type of custodia legis which would bar a claim and delivery action. There the appellant filed a petition in the superior court for a writ of mandate to compel the respondent, a constable, to deliver the appellant certain property belonging to the appellant which the constable had seized on execution. The appellant had filed the necessary bond for release of the execution, and the justice's court out of which the execution had issued had ordered the constable to release the property to appellant. The constable refused to do so for the reason that his fees had not been paid. The superior court denied the petition. On appeal the reviewing court held that the denial was proper, because "the common action of claim and delivery would assure to appellant a clear, speedy, and adequate remedy." 1 Cal.App.2d at page 502, 36 P.2d at page 1110.

[6] Petitioner contends that a claim and delivery action could not be brought in the municipal court against the municipal court. This is probably true. However, the action would not be against the municipal court. It would be against the judge or the clerk of that court. The publications

being no longer in custodia legis would be in the hands of the individuals of the court, again, assuming that the publications are not obscene or indecent. Their character in this respect would have to be determined by the court on the trial of the claim and delivery action.

There is nothing in the authorities cited by petitioner contrary to our holding herein. Boland v. Cecil, 65 Cal.App.2d Supp. 832, 150 P.2d 819, dealt with an action brought against the Director of Agriculture and other state officers for a return of meat wrongfully taken and withheld by those officers. The trial court gave judgment for the return of the meat, damages for its retention and in the alternative in case the meat could not be returned, damages for the value thereof. The reviewing court held that so far as both elements of damages were concerned an action against state officers was in effect an action against the state itself, and the state's immmunity to such an action because of its sovereignty also applied to its officers, and hence that portion of the action would not lie. However, the court held that the action did lie for the return of the meat and affirmed that portion of the judgment.

Willis v. Warren, Court of Common Pleas, N. Y., 1859, 1 Hilt. 590, likewise is of no help to petitioner. There the plaintiff brought an action for claim and delivery against the property clerk of the Board of Police Commissioners for the return of certain alleged gambling apparatus and obscene pictures claimed to have been illegally seized. The court recognized the propriety of the form of action, for it examined the circumstances of the seizure and held that the seizure was legal. It then stated that the property was in custodia legis and would so remain until the trial of the charges against the plaintiff. In so doing it stated that as to the gambling devices "The owner of the property thus held is not without a remedy. He may apply to the court, in which the charge of gambling is pending, for the restoration of the property, or he may urge his trial, and thus acquire it, if the complaint be not established. It is clear, however, that he has no remedy by action against a person holding the property as the custodian of the law, while the charge remains undisposed of:—*he must await its determination.*" At page 594; emphasis added. As to the lewd pictures the court pointed out at pages 594–595: "The public exhibition of them is an offence against society, and punishable (Commonwealth v. Sharpless, 2 Serg. & R. 91), and the pictures, being regarded as a common nuisance, may and should be destroyed in the administration of the law, when the charge of publication or exhibition is established." [3]

Heiser v. Severy, 1945, 117 Mont. 105, 158 P.2d 501, 160 A.L.R. 319, was an action in claim and delivery against the members of the State Fish and Game Commission and its agents, in their official capacity, for the return of a gun claimed to have been unlawfully seized, or for its value. The defendants refused to answer when their demurrer to the complaint was overruled, and then appealed from a default judgment entered in the trial court against them, which awarded damages for detention and costs, and damages for the value of the gun, in the event it could not be returned. The reviewing court in the majority opinion held that the action in essence was one against the state and entitled the state "to invoke its sovereign immunity from suit even though individual officials are nominal defendants." At page 115 of 117 Mont., at page 505 of 158 P.2d, at page 326 of 160 A.L.R. The plaintiff had contended that as the defendants were sued in their official capacities, the judgment for damages and

3. There is language in Modern Loan Co. v. Police Court, supra, 12 Cal.App. 582, 594, 108 P. 56, to the same effect as the last sentence above quoted. However, we do not deem it necessary to pass upon the power of the municipal court to destroy the alleged obscene literature nor the constitutionality of sections 312 and 313, Penal Code, appearing to grant such power, for the reason that, assuming, but expressly not deciding, petitioner's contention that no such power exists and that said sections would be unconstitutional if construed to grant such powers, nevertheless, as herein pointed out, this proceeding will not lie, because petitioner has an adequate remedy at law.

costs would be a direct charge against the funds of the Fish and Game Commission. The majority opinion, while it reversed the whole judgment and instructed the court to dismiss the complaint, did not discuss the issue concerning return of the gun. Its entire discussion related to the fact that the state and its agents could not be subject to damages. Three of the judges of the Montana Supreme Court signed the majority opinion. One judge concurred in part of the result and dissented in part, writing an opinion. This action and opinion was joined in by a second judge. The effect of this opinion is that the plaintiff in his complaint did state a cause of action for the return of the gun but did not, for the reasons given in the majority opinion, state a cause of action for damages of any kind; that the portion of the complaint dealing with damages should have been stricken out and the portion dealing with the demand for the return of the gun stated a cause of action and should have been permitted to stand. Quoting from an article in 49 Am.Jur. 308, the concurring and dissenting opinion states, at page 120 of 117 Mont., at page 507 of 158 P.2d, at page 329 of 160 A.L.R.: "'* * * An action may be maintained against a state officer who unlawfully withholds property of another, or who unlawfully deprives a citizen of his property or prevents his free enjoyment of it. This rule applies where rights are conferred by statute and the officer violates or abuses his authority under the statute to the injury of rights conferred thereby.'" On a rehearing the majority of three filed an "additional opinion." In this opinion the court points out that the plaintiff was looking to the State Fish and Game Fund "for the money to pay the damages and costs awarded in the aforesaid judgment." At page 125 of 117 Mont., at page 509 of 158 P.2d, at page 331 of 160 A.L.R. It then states: "* * * the fact that such individuals are public officers most certainly does not make the sovereign state of Montana answerable for their private wrongs." At page 125 of 117 Mont., at page 509 of 158 P.2d, at page 331 of 160 A.L.R. Significantly the opinion follows with this, at page 126 of 117 Mont., at page 510 of 158 P.2d, at page 331 of 160 A.L.R.: "If Heiser's gun is wrongfully detained by any of the individuals named, Heiser has his right of action against such individuals for the recovery of his property. But the state of Montana is not liable in damages to Heiser nor may the funds belonging to the state and deposited in the State Fish and Game Fund be used to pay the damage occasioned by private wrongs committed by public officers of the state." The two judges who joined in the previous minority opinion dissented. A reading of the majority opinion shows that those joining in it were determining the plaintiff's right to damages rather than to a return of the gun and because both matters were inextricably involved they refused to separate them. The annotation of this case, 160 A.L.R. 332, and the cases there cited, uphold the proposition that actions for return of property improperly seized may be brought against state officers (and federal officers, as well) although no action for damages will lie. "While it is a difficult problem to determine when the suit is in reality a suit against the state, the distinction between suits against the state and suits against officers may be generally expressed as follows: Those cases in which the decrees require, by affirmative official action on the part of the defendants, the performance of an obligation which belongs to the state in its political capacity, are suits against the state; while those actions at law or in equity against defendants who, while claiming to act as officers of the state, violate and invade the personal and property rights of the plaintiffs under color of authority unconstitutional and void are not suits against the sovereign. In the latter cases, the defendant is sued, not as or because he is an officer of the government, but as an individual, and the court is not ousted of jurisdiction because the defendant asserts authority as an officer of the state.

"Generally speaking, actions against public officers to recover possession of property are within the class last mentioned above, and, while cases involving such actions have aided in the development of the principle that suits against individual defendants are

not suits against the sovereign even though the defendant, as a defense to the suit, claims to act or to have acted in his official capacity where such acts unconstitutionally violate or invade the personal or property rights of the plaintiff * * *"

Petitioner argues that a right of action against the officers of the municipal court for a return of his property is not an adequate remedy for the reason that he may not recover damages for its detention, or its value, if the property cannot be restored. That remedy is as adequate in that respect as the one sought here, because in this proceeding, if it would lie, damages could not be recovered either.

The judgment denying the petition for writ of mandate and for writ of prohibition is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



142 Cal.App.2d 460

A. G. BAILEY and John A. Young, Plaintiffs and Respondents,

v.

Thomas B. LEEPER et al., Defendants, Thomas B. Leeper and Abbie F. Leeper, Appellants.

Civ. 8893.

District Court of Appeal, Third District, California.

June 21, 1956.

Rehearing Denied July 16, 1956.

Hearing Denied Aug. 16, 1956.

Action by judgment creditors to set aside as fraudulent the transfer of shares of corporate stock by the defendant to his wife. Judgment for plaintiffs in the Superior Court, Sacramento County, J. O. Moncur, J., and the defendants appealed. The District Court of Appeal, Van Dyke, P. J., held that evidence supported a finding that transfer which rendered transferor insolvent was not for a fair consideration and that failure of the trial court to specifically find as to certain matters was not prejudicial.

Judgment affirmed.

1. Fraudulent Conveyances ⇐297, 300(1)

Evidence did not justify setting aside as fraudulent the transfer of corporate stock by the defendant to his wife on the ground that it was without fair consideration and that it rendered the transferor insolvent as to the judgment creditors.

2. Trial ⇐392(1)

Trial court has the duty to find on all material issues regardless of whether the appealing party has made any requests for the special findings.

3. Appeal and Error ⇐1071(6)
Trial ⇐397(1)

A failure to find upon material facts may be held to be reversible error.

4. Appeal and Error ⇐1170(10)

In creditors' action to set aside as fraudulent transfer of corporate stock on ground that it was without consideration and rendered transferor insolvent, failure of the trial court specifically to find whether transferor and transferee had entered into an antecedent oral agreement setting up conditions under which transfers were to be made and as to values of property transferred as of date of transfer would not be reversible error unless from an examination of the entire record Appellate Court could say that error resulted in a miscarriage of justice. West's Ann.Civ. Code, § 3439 et seq.; West's Ann.Const. art. 6, § 4½.

5. Fraudulent Conveyances ⇐77

Value of the property transferred as of the date of the transfer is the critical date against which the validity of the transfer attacked as fraudulent is to be tested. West's Ann.Civ.Code, § 3439 et seq.

6. Appeal and Error ⇐1170(10)

In suit to set aside as fraudulent a transfer of corporate stock by defendant to his wife, failure of trial court specifically to find whether parties had agreed as to conditions under which transfers were to be made to transferee and as to value of

property transferred as of the date of transfer was not reversible error, where there was so great a disparity between values received and obligations assumed that trial court would have made same decision that it did make that the consideration was not fair within the Fraudulent Conveyance Act. West's Ann.Civ.Code, § 3439 et seq.; West's Ann.Const. art. 6, § 4½.

7. Fraudulent Conveyances ⇐76(1)

The question of fairness of consideration for an alleged fraudulent conveyance must be approached from the standpoint of creditor. West's Ann.Civ.Code, § 3439 et seq.

E. R. Vaughn, Sacramento, for appellants.

Freitas, Allen, McCarthy & Bettini, San Rafael, for respondents.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment setting aside as fraudulent the transfer of shares of stock in Pacific Coast Aggregates, Inc., a corporation, made by appellant Thomas B. Leeper to his wife, Abbie.

During 1950 and 1951 respondents, who are attorneys at law, performed professional services for appellant Thomas B. Leeper. On September 17, 1952 they brought suit to recover the reasonable value of those services, less the sum of $200 theretofore paid. On September 17, 1954 they obtained a judgment in the sum of $8,015, plus costs. Intermediate the commencement of said action and the entry of said judgment respondents brought the present action to set aside the transfer of the shares on the ground that the transfer had been made without consideration and with intent on the part of both appellants to defraud respondents. Judgment was entered in respondents' favor and supportive thereof the court made the following findings of fact: That prior to the month of May, 1953 Thomas B. Leeper owned "approximately 1,700 shares" of stock of the Pacific Coast Aggregates, Inc., a corporation; the shares had a value as of the time of rendition of judgment of $11,800; that between September, 1952 and May, 1953 Thomas transferred said shares of stock to his wife Abbie, together with all the property of which he was then possessed; that this transfer was made without a fair consideration; and that it rendered Thomas insolvent. No further findings were either made or requested.

Appellants challenge the judgment against them on two fronts. First, they say that procedurally the trial court committed error in failing to make specific findings as to all properties, including the shares transferred, as to their value when transferred, and as to the obligations entered into by Abbie in consideration of the transfer to her. They say the court's findings on the fairness of the consideration is nothing more than a conclusion of law. Second, they aver that, treating the court's findings as to consideration to be a finding of ultimate fact, it is not supported by the evidence.

[1] We will first consider the evidence as to its sufficiency to support a holding that fair consideration had not been given by Abbie for the transfer to her by Thomas of all his assets. Although the trial court confined its findings and its judgment, as noted above, to the shares of stock in Pacific Coast Aggregates, these shares did not constitute the whole of the property transferred. Rather, the shares constitute the residuum of the property transferred still in the hands of Abbie. Both Thomas and Abbie testified that when the transfers were made, the two of them had already by an oral agreement made in June of 1952 agreed upon the conditions for the transfer. This agreement was made while Thomas was in the Yolo County jail under stay of execution from a felony conviction. The agreement was that Thomas would transfer all of his assets to Abbie, and that in consideration of the conveyance, she would bind herself to do the following things: (1) Discharge all of Thomas' debts, both secured and unsecured, a list of which Thomas had made up (this list did not contain any reference to the debt to respondents, and Thomas testified that he left that debt out of the list because he had received no demand for money from them although their services had been completed

and he did not consider he owed respondents anything); (2) Devote the properties or moneys that might be left in her hands to her support and to the support of Thomas. Thereafter, and in August of 1952, following the oral agreement for transfer, Thomas transferred to Abbie all of his assets. He conveyed to her two ranches, one in Sutter County and one in Sacramento County. He transferred to her his bank account in the Merchants' National Bank, 31 shares of stock in the Merchants' National Bank, a banking corporation, and 1,600 shares of stock in Pacific Coast Aggregates, Inc. At an earlier date he had transferred to her an automobile which had not been fully paid for. Abbie completed the payments, after which she sold the car.

The testimony as to values is unsatisfactory. However, as to the ranches, it appears that there was evidence from which the court could infer they were valued at $40,000. Under cross-examination, Thomas was asked this question: "Q. Isn't it true that the approximate value of these ranches in 1952 was $40,000; is that right? A. That is an estimate, could vary some." The only other evidence as to the value of the ranches is that furnished by the actual sale of the ranches which Abbie made shortly after she received them. She sold the two ranches for a total of $28,760. It satisfactorily appears that the value of the Merchants' National Bank shares was $4,650 in 1953. There is no suggestion that this value varied materially between the date of transfer and the date as to which the values were fixed. It was stipulated that the Pacific Coast Aggregates shares were worth $6.00 per share in 1953, but Thomas testified that when he assigned the stock to Abbie it was worth not over $5.00 a share. The bank account was found to have had a balance of $200 at the time of transfer, which sum Abbie received. To pass good title to the ranches Abbie had to pay out a total sum of $14,028.85, and from the proceeds she also paid various other sums totaling $7,962.50. She repaid to herself a loan she had made to Thomas in the sum of $1,000. She paid his debt to the Merchants' National Bank in the sum of $1,847.50. She paid off a loan he had made on his life insurance in the sum of $900. She paid back rent he owed on his office in the sum of $400. She paid $75 to the telephone company, and she paid Mr. Vaughn for attorney's services the sum of $1,800. She paid lodge dues in the sum of $100, and in addition she forwarded to Thomas such moneys as the authorities would permit him to receive. These sums aggregated $840. After his parole and for a period of five months she paid him $200 a month for his support. She expended several thousand dollars in improving her home in which she and Thomas reside. When Thomas was indicted for the felony of which he was convicted, there were indicted with him several other persons, including one Green whose bond prior to trial was set at $10,000. Both Abbie and Thomas testified that prior to her marriage to him Thomas had persuaded her to go upon Green's bond, promising her that he would save her safe and harmless from loss. Green failed to appear for his trial and the bond was forfeited. In due course judgment was obtained by the County of Yolo against Abbie in the sum of $10,000, and execution was filed against her home. From the proceeds of the properties transferred to her, Abbie paid this judgment of $10,000.

Excluding the value of the automobile transferred to her, the record supports the following values of property transferred:

Ranches	$40,000
Bank Account	200
Merchants' National Bank shares	4,650
Pacific Coast Aggregates shares	8,000
Total	$53,850

If, for the $40,000 value, based as it is upon the testimony of Thomas, we substitute the sale price actually received, the total is reduced to $42,610.

Turning now to the other side of the ledger, the court could disallow payments made by Abbie in performance of her obligations under the assignment agreement which were for the purpose of supporting Thomas and could also disallow such sums as Abbie spent upon her home, since that

was not included within the obligations she assumed. As to disallowance of the items paid for the support of Thomas, see Hansen v. Cramer, 39 Cal.2d 321, 245 P.2d 1059, 30 A.L.R.2d 1204; Baxter v. Baxter, 19 Cal.App. 238, 239, 125 P. 359; First National Bank v. Smith, 217 Cal. 394, 395–396, 18 P.2d 930; Sudbrock v. Kroener, 136 Cal. App. 624, 630, 29 P.2d 435. Crediting all other disbursements Abbie made, they total the sum of $30,151.35. The disparity in value between the consideration received by Abbie and the obligations incurred by her is thus shown to be so great that the finding of the court that the transfer which rendered Thomas insolvent was not for a fair consideration is amply supported.

[2–5] Turning now to the contention that the cause should be reversed for failure of the trial court to make necessary findings, the following situation is presented: There was no specific finding as to whether or not Thomas and Abbie had ever entered into the antecedent oral agreement setting up the conditions under which the transfers were to be made to her; there is no finding as to the values of the property transferred as of the date of transfer, which date is the critical date against which the validity of the transfers is to be tested. Rummel v. Zeigler, 225 Iowa 613, 281 N.W. 159. It seems obvious that no other date can be considered when a determination is being made as to whether or not the consideration received for the alleged invalid transfers was or was not a fair consideration. Fluctuating values after the date of transfer could neither be allowed to help or hinder the determination of fair consideration. Generally as to what constitutes a fair equivalent or a fair consideration under the Fraudulent Conveyance Act, Civ.Code § 3439 et seq., see Hansen v. Cramer, supra, 39 Cal.2d at page 324, 245 P.2d at page 1060. There was no finding as to what specific allowances for expenditures made by Abbie as against the values of the assets transferred to her were allowed by the court. It is always the duty of the trial court to find on all material issues and this regardless of whether or not the appealing party made any request for special findings. Haight v. Tryon, 112 Cal. 4, 44 P. 318. As said in Palpar, Inc., v. Thayer, 82 Cal.App.2d 578, 584, 186 P.2d 748, 751:

> "Under Code Civ.Proc. § 647, 'the final decision' is 'deemed to have been excepted to' and the insufficiency of the findings to support the judgment may be urged on appeal although appellant neither excepted to the findings nor sought their amendment."

A failure to find upon material facts may be held to be reversible error. Krauss v. Strop, 47 Cal.App.2d 452, 118 P.2d 332. However, if we assume the trial court fell into error when it did not make the specific findings, the lack of which we have noted, still the error is one in procedure and therefore not reversible under the Constitution, Art. VI, sec. 4½, unless from an examination of the entire record we can say that the error complained of has resulted in a miscarriage of justice.

[6, 7] Looking at the record now in the light most favorable to appellants, we will assume that the appellants made the agreement in June of 1952, which they say they did; we will assume that the ranches transferred were worth no more than the sale price; we will assume that the other values be taken as either stipulated to or as the least values testified to; we will allow all the expenditures made by Abbie in consideration of the transfer, excepting only the expenditures for future support and upon her home, which as a matter of law cannot be accepted; and the result still is that there is so great a disparity between the values received and the obligations assumed, that the trial court would have made and should have made the same decision that it did make, that is, that the consideration was not fair within the meaning of that term as used in the Fraudulent Conveyance Act. The net result is that by transfers which left him insolvent and unable to respond to the demands of his creditors, the respondents herein, Thomas changed his position from that of a solvent debtor to that of an insolvent debtor, and there remains in the hands of his transferee after the performance of all obligations imposed upon her by her agreement with Thomas, more than enough

property, value wise, to answer the claims of respondents. The question of fairness of consideration must be approached from the standpoint of the creditor; and, so approached, it becomes evident that whatever error there may have been in the failure of the court to make specific findings of fact, the error did not result in a miscarriage of justice, and the judgment rendered is proper and fair.

The judgment appealed from is affirmed.

PEEK, J., and McMURRAY, J. pro tem., concur.



142 Cal.App.2d 332

William J. SULLIVAN, also known as W. J. Sullivan, Plaintiff and Appellant,

v.

Salvatore BALESTRIERI and Josephine Balestrieri, husband and wife, et al., Defendants and Respondents.

Salvatore BALESTRIERI and Josephine Balestrieri, Plaintiffs and Respondents,

v.

M. S. SULLIVAN, Bridie Sullivan, William Sullivan, et al., Defendants and Appellants.

Civ. 16745.

District Court of Appeal, First District, Division 2, California.

June 18, 1956.

Rehearing Denied July 18, 1956.

Hearing Denied Aug. 16, 1956.

Action for mandatory injunction for continuing trespass in maintaining a fence which encroached upon plaintiffs' land, wherein one of defendants filed a cross-complaint alleging ownership of the property. From a judgment of the Superior Court, City and County of San Francisco, I. L. Harris, J., the defendants appealed. The District Court of Appeal, Kaufman, J., held, inter alia, that where fence was created as a division fence and defendants intended to construct the fence on true boundary line and never intended to claim title to any land not in deed description until within five years from date of action by adjoining landowners, defendants did not acquire a prescriptive easement for maintenance of the fence.

Judgment affirmed.

1. Injunction ⇐128

In action for mandatory injunction for a continuing trespass in maintaining a fence which allegedly encroached upon plaintiffs' land ousting plaintiffs from possession of such strip of land, evidence supported finding that fence was not located in surplus area in block which defendants were claiming adversely.

2. Trial ⇐399

Where conclusion of law stated that plaintiffs were owners in fee simple of realty described in paragraph I of first amended complaint, and description of plaintiffs' property was set forth in paragraph II of complaint, paragraph I containing only allegations concerned with First Doe and Second Doe named therein, and paragraph I of findings of fact set forth in full the legal description of plaintiffs' property as it was set forth in paragraph II of complaint, and it was again similarly set forth in judgment, discrepancy in conclusions of law was result of typographical error so that judgment was not erroneous as matter of law on theory that conclusions of law were erroneous and not supported by findings of fact.

3. Boundaries ⇐55

Generally when surplus is found in area called for in surveys of tract it must be prorated among the several lots in block, but a shortage of distance in a block will not be apportioned among all lot owners where facts and circumstances specifically locate the shortage.

4. Adverse Possession ⇐85(3)

Evidence supported finding that adjoining landowners who constructed fence on land claimed to be held adversely had intended to construct it on their own true boundary line and never intended to claim title to any land not included in their own

deed description until year when a survey made by them disclosed that fence enclosed a portion of neighbors' property, which was within five years from date of action by neighbors against adjoining landowners.

5. Adverse Possession ⇐86

Without a showing that taxes assessed were paid by those who claimed title to property by adverse possession, title by adverse possession was not established. West's Ann.Code Civ.Proc., § 325.

6. Adverse Possession ⇐112

Plaintiffs having shown legal title in themselves, burden was upon defendants to affirmatively establish their alleged adverse possession. West's Ann.Code Civ.Proc., §§ 318, 322, 323, 325.

7. Adverse Possession ⇐68

Defendants who constructed fence on adjoining land could not claim under color of title where evidence showed that first time strip of land was included in any deed by defendants was less than five years before commencement of action by adjoining landowners for mandatory injunction for continuing trespass for maintaining fence.

8. Easements ⇐5, 36(1)

The same elements required to establish title by adverse possession of realty are necessary to acquire an easement by adverse possession, except that payment of taxes in the latter case need be shown only when easement is separately assessed, and burden of showing that taxes were assessed on easement is upon party contesting prescriptive right.

9. Easements ⇐36(3)

A prima facie case is established where there is open and uninterrupted use of easement for a requisite period, without protest or interference.

10. Fences ⇐29

Where defendants intended to construct fence on true boundary line and never intended to claim title to land not in deed description until within five years from date of suit by adjoining landowners, defendant did not acquire a prescriptive easement for maintenance of fence.

11. Fences ⇐29

Where grantors who deeded property to their son remained thereon as tenants with authority of son to do all acts necessary in management of the property, grantors could be considered parties actively involved in maintenance of fence as regards their liability in trespass for encroaching on adjoining landowners' property.

12. Injunction ⇐113

An action for mandatory injunction for continuing trespass by maintaining a fence encroaching upon plaintiffs' land was not barred by laches where no injury was shown to have resulted to defendants because of delay in asserting plaintiffs' rights.

13. Pleading ⇐78

Laches must be pleaded if it does not appear on face of complaint.

14. Equity ⇐71(1)

The lapse of considerable period of years does not in itself constitute laches as a matter of law.

15. Fences ⇐29

Evidence establishing that adjoining landowners were prevented by fence erected by defendants from draining water away from side of house which accumulated and seeped through the basement causing visible damage, which, because of continuing refusal to move the fence, grew worse from year to year as adjoining landowners were unable to make necessary repairs, supported award of $500 damages to adjoining landowners.

Phil F. Garvey, Julia M. Easley, San Francisco, for appellants.

Jackson, Barbarotto & Lank, San Francisco, for respondents.

KAUFMAN, Justice.

This is an appeal from a judgment of the Superior Court in and for the City and County of San Francisco in favor of respondents granting a mandatory injunction enjoining appellants from maintaining a certain fence and ordering the removal thereof, and for general damages in the sum of $500.

Respondents, Salvatore and Josephine Balestrieri, husband and wife, filed their first amended complaint on November 19, 1952, for mandatory injunction for a continuing trespass, alleging that a fence built and maintained by defendants along the northeast boundary of appellants' land extends and encroaches upon respondents' land for a distance of from twelve to eighteen inches, ousting respondents from possession of said strip of land. It was further alleged that this fence was built without right and without consent of respondents, and that it is so close to respondents' house as to prevent passage between said house and the fence. Damages were alleged to have resulted to respondents' house because of the accumulation of water between appellant's fence and respondents' house, causing cracks and leaks which have become increasingly worse because of respondents' inability to get into the area to make repairs, and appellant's continued refusal to remove the fence. The allegation of said damage was in the sum of $3,100. The property of both parties herein is adjoining residential property in the City of San Francisco.

The complaint set forth the description of appellants' property as beginning at a point 160 feet northeasterly from the point of intersection of the southeasterly line of Huron Avenue with the northeasterly line of Farragut Avenue, and running northeasterly along the southeasterly line of Huron Avenue for a distance of 53 feet 4 inches. Respondents' property is described as beginning at a point 213 feet and 4 inches northeasterly from the aforesaid point of intersection of Farragut and Huron Avenues, and running northeasterly along the southeasterly line of Huron Avenue for a distance of 26 feet 8 inches. It was alleged that these descriptions were taken from West End Map No. 2, filed on May 1, 1863, in the office of the Recorder of the City and County of San Francisco.

Appellant William Sullivan, son of appellants, M. S. and Bridie Sullivan, filed an answer denying the material allegations of the complaint, and setting up the affirmative defenses of various statutes of limitations. §§ 318–322, 324 and 338(2), Code of Civ. Proc. This appellant also filed a cross-complaint alleging ownership of the property on Huron Street, beginning at a point 160 feet northeasterly of Farragut Avenue and extending northeasterly along the southeasterly line of Huron Avenue for a distance of 55 feet 1¼ inches.

Appellants M. S. and Bridie Sullivan, denied generally the material allegations of the amended complaint, admitted that they had been owners of the real property described in the complaint prior to February 8, 1946. They further alleged that ever since April 3, 1918, they had enclosed with a fence, and were the owners and in peaceable possession, of the property beginning at a point 160 feet northeasterly of the intersection of Huron and Farragut Avenues, and running northeasterly along the northeasterly line of Huron Avenue for a distance of 55 feet 1¼ inches. They also pleaded the bar of the same statutes of limitations that were pleaded by William Sullivan.

It was established at the trial that appellants, M. S. and Bridie Sullivan, were the owners and in possession of the real property on Huron Avenue as described in respondents' complaint from March 29, 1918 until February 8, 1946 when they conveyed it to their son William. There was abundant evidence to prove that the elder Sullivans claimed the property according to the legal description in their deeds, which showed that the parcel of property consisting of two lots, extended for 53 feet 4 inches along Huron Avenue from a point 160 feet northeasterly of Farragut as set forth in the complaint and not for 55 feet 1¼ inches as alleged by appellants.

The testimony of appellants' own witness, J. E. Waite, a civil engineer, makes it clear that the fence is entirely on respondents' property. Appellants' exhibit 4, a survey map made by Waite, clearly shows that the Sullivan property begins at 160 feet from the intersection of Huron and Farragut, and that it extends along Huron for just 53 feet 4 inches. The fence thereon is shown entirely on the respondents' property. This witness testified that there is a surplus of 1 foot 7 inches in this block, the survey showing the total frontage

of the lots in this block on Huron Avenue as 481 feet 7 inches, whereas the official maps all state the block length as 480 feet. Waite said that he did not attempt to locate where this surplus was located. However, the map prepared by him divides the block into three sections, the first measuring 160 feet from Farragut Avenue to the beginning of the Sullivan property; the second, the 53 foot 4 inch frontage of the Sullivan property; the third, from the beginning of the Balestrieri property to the other end of the block at Whipple Avenue is shown as 266 feet 8 inches plus one foot seven inches. This map would therefore indicate that the surplus is located somewhere between the respondents' property and Whipple Avenue.

[1] A licensed surveyor, Albert Warber, a witness called by respondents, testified that he had surveyed lot 42, respondents' lot, before the house was built thereon, and that he located the surplus of 19¼ inches in the block as lying between respondents' lot 42 and the adjoining lot 43. The legal description of lot 43 describes it as beginning 210 feet southwest of Whipple Street with a 30 foot frontage. According to the official maps this would leave 26 feet 8 inches remaining between lot 43 and lot 41, and this is the record length of respondents' lot 42 as measured from Farragut Avenue. However, the survey made from Whipple Street following the legal description of lot 43 brings it to within 19¼ inches of the boundary of respondents' lot, thus definitely locating the surplus in that area. The trial court found that the excess of 19 inches in Block 7100 was not located in the area adversely claimed by William Sullivan and in no way affected the strip of land enclosed by the fence. This finding is supported by the above evidence, so it will be unnecessary to devote further attention to the portion of appellants' brief devoted to proving that the fence is located in the surplus area in the block which they were claiming adversely.

On February 8, 1946, Michael and Bridie Sullivan deeded their entire parcel of land on Huron Avenue to their son, William Sullivan, a single man. The grantors continued to live on the property with their son and paid $20 per month rental to him. Michael Sullivan testified on cross-examination that when he built the fence he thought it was on the border of his property, that he intended to construct it on land conveyed to him by his deed, that he did not intend to erect it on anyone else's land. It was not until he had the survey made by Waite on July 6, 1948, that he learned that the fence was not on his own property. When he was informed sometime after June 1947, by the foreman of the Frank-Vignati Corporation, which constructed the home later purchased by the respondents, that the fence was on the corporations' property, he said he would remove it. Later he said that he would not.

Appellant William Sullivan testified that he did not know that the fence was not within the boundaries of the land conveyed to him by his father by the deed of February 8, 1946; that on his behalf his father had the survey made by Waite; that when he received the deed he did not intend to claim title to someone else's property, but only the property described by the deed. He paid taxes on lots 40 and 41, but paid no taxes on lot 42. On September 10, 1948, William Sullivan conveyed the Huron Avenue property to Patricia Cunningham without consideration. On the same date Patricia Cunningham reconveyed the same property to William Sullivan. She recorded her deed on September 10, 1948, but William Sullivan did not record his deed until January 7, 1953. The description in these deeds described the property as embracing the strip of property on which the fence was located, adding approximately 19 inches to the frontage of the property described in the deed from Michael to William Sullivan. From 1948 to 1951 the taxes on lot 41 were assessed to Patricia Cunningham and the tax bills were sent to her.

The taxes on respondents' lot 42 had become delinquent for the fiscal year 1948–1949, but the property was subsequently redeemed and all taxes from that year until the time suit was brought had been paid by respondent Salvatore Balestrieri.

Alfred Abrahamsen, the supervising clerk in the assessor's office, testified that

lot 40 was assessed at a frontage of 33 feet 4 inches; lot 41, at a frontage of 20 feet; and lot 42, at a frontage of 26 feet 8 inches. This shows a total frontage of the Sullivan property on 53 feet 4 inches, which is the same as the total shown in the original deeds, and the same as shown on the survey of appellants' witness Waite.

Floyd Frank, president of the Frank Vignati Building Corporation, which built respondents' house, testified on their behalf that the entire area in respondents' Exhibit C, showing water stains inside the respondents' basement is covered on the outside by appellants' fence, and that the side of the home cannot be repaired unless the fence is removed. Mr. Frank stated that he found water stains inside the basement of the house adjacent to the fence, where the water had been leaking through. He said the leakage could be prevented by calking on the outside, but this could not be done while the fence was in its present position. Respondent Salvatore Balestrieri stated that rain water comes into his basement from the side of the house next to the fence, that the condition has become worse each winter since he has lived there, that he told the Sullivans of the necessity for repairs and asked Michael Sullivan for removal of the fence but that he just walked away and ignored him. The water which accumulates between the fence and the house cannot be drained because there is no room to get between the house and the fence.

[2] Appellants contend that the judgment is erroneous as a matter of law because the conclusions of law are erroneous and not supported by the findings of fact. Conclusion of Law numbered 1(a) states that respondents are owners in fee simple of the real property described in paragraph I of the first amended complaint. Said complaint sets forth the description of respondents' property in paragraph II of said complaint, paragraph I containing only allegations concerned with First Doe and Second Doe named therein. Paragraph I of the Findings of Fact sets forth in full the legal description of respondents' property as it is set forth in paragraph II of the complaint, and it is again similarly set forth in the judgment. The discrepancy in the conclusions of law is obviously the result of a typographical error. The Findings of Fact herein obviously support the judgment in regard to the description of the property.

[3] It is argued that since the trial court found that there was a surplus of 19 inches in this block on Huron Avenue, the judgment herein should not have been rendered, for the general rule is that when such a surplus is found, it must be prorated among the several lots in the block. 11 C.J.S., Boundaries, § 124, p. 737; Brumley v. Hall, 110 Cal.App.2d 638, 243 P.2d 27. In Hoffman v. Van Duzee, 19 Cal.App.2d 517, 522, 65 P.2d 1330, it was said that the other lot owners not then before the court, would have to be brought in before any final determination could be made concerning the excess footage in the lot, and the merits of their claims would have to be passed upon.

The article on the apportionment of an excess or deficiency in Corpus Juris Secundum, 11 C.J.S., Boundaries, § 124, p. 737, discloses that there are many exceptions to the general rule of apportionment as stated above. "The application of the rule depends on causes that contribute to the error in the original survey or plat, and it must yield to primary evidence of definite description and precise location." (p. 738) It has been held that a shortage of distance in a block will not be apportioned among all lot owners where facts and circumstances specifically locate the shortage, Oneacre v. Moore, 119 W.Va. 10, 191 S.E. 862. Where purchasers bought lots (as in the present case) not by lot number, but by actual measurement from a designated corner, and nothing was shown as to what was done with the remaining lots owned by the vendor, the rule of apportionment was not applied. Atkins v. Pfaffe, 136 Iowa 728, 114 N.W. 187. It is entirely possible that the surplus herein may long ago have been acquired by adverse possession by the owner of lot 43 by respondents or partly by each of the adjoining owners.

[4] It is clear from the record that none of appellants had any knowledge that there was a surplus in the block at any time prior to the survey in July of 1948. The

evidence previously reviewed herein is sufficient to support the finding that "M. S. Sullivan and Bridie Sullivan, predecessors in interest to William Sullivan, intended to construct the said fence on their own true boundary line, and said parties and William Sullivan never intended to claim title to any land not included in their own deed description until the year 1948, when a survey made by said Sullivan disclosed that said fence enclosed a portion of the adjoining property owned by Salvatore and Josephine Balestrieri." It is also sufficient to support the finding that the surplus is not located in the area claimed in this action.

It is urged that since the assessor testified that no taxes were paid on the excess 19 inches of frontage, that the fact that the Sullivans did not pay taxes on the strip claimed cannot be considered as a factor preventing them from acquiring title citing The City of Santa Clara v. Ivancovich, 47 Cal.App.2d 502, 118 P.2d 303, to the effect that where no taxes are assessed on a strip of land claimed adversely, failure to make tax payments thereon will not prevent title being acquired by adverse possession (and, see Ortiz v. Pacific States Properties, 96 Cal.App.2d 34, 215 P.2d 514). However, in the present case the strip claimed by appellants was part of the land included in the legal description of respondents' property on which taxes were levied, and which taxes were paid by respondents. The surplus area untaxed was on the other side of respondents' property between respondents' lot and lot 43.

[5] The record establishes that the elder Sullivans held their property claiming under the legal description in their deeds, and paid the taxes only on the frontage assessed in accordance with that description throughout all the years from 1918 up until at least June, 1947, when construction began on the adjoining lot. Since the original complaint herein was filed on March 25, 1952, five years have not elapsed since that time. The record also establishes that since 1947, they have paid taxes only on the same assessed frontage as they paid on prior to that time. The record shows without conflict that the taxes on the disputed strip were never paid by the Sullivans, but have been paid by the owners of lot 42. There was no proof of a double assessment or double payment of taxes. It therefore appears to be unnecessary to discuss at length the numerous cases cited by the parties dealing with all the other necessary elements of adverse possession, since without a showing that taxes assessed were paid by appellants, title by adverse possession is not established. Code of Civ.Proc., § 325.

This case is distinguishable from Sorenson v. Costa, 32 Cal.2d 453, 196 P.2d 900, cited by appellants, where the adverse possession resulted from a mistaken description in the deeds, and the tax assessment rolls also contained the mistaken description. Therefore the claimant had actually paid the taxes assessed on the property occupied. That is not true in the present case. In Carr v. Schomberg, 104 Cal.App.2d 850, 232 P.2d 597, it was held that where there is a boundary dispute and the parties have agreed on a boundary, the payment of taxes according to the deed descriptions amounts to payment of taxes on the area up to the agreed upon boundary. In the instant case, however, appellants have not offered any evidence of a boundary dispute at any time prior to June, 1947, and no evidence whatever of any agreement on a boundary by respondents or their predecessors in title.

[6] It is urged that in any event, because of appellants' long continued possession of the strip, respondents cannot quiet title, for they must show that they were seized or possessed of the property within five years preceding the action. Section 318, Code of Civ.Proc. Recovery was denied in Cocking v. Fulwider, 95 Cal.App. 745, 273 P. 142, where defendant proved actual possession for thirty years, although defendant was unable to get title by adverse possession because of failure to pay taxes. In that case there was evidence that in the year 1888 the adjoining owners had agreed upon the common boundary, that this boundary had been acquiesced in for more than thirty years by the parties and their predecessors in title. In 1917 a new survey was made under which appellant claimed

title to a strip of land beyond the old boundary.

In People's Water Company v. Boromeo, 31 Cal.App. 270, 160 P. 574, an ejectment action, it was held that findings that defendants were in open, notorious possession of the land for a period of five years preceding the bringing of the action, and that plaintiffs were seized of said land within the last five years as required by section 318, Code of Civil Procedure, where the defendants had not paid the taxes for the requisite years, were not inconsistent. It was said that seisin of plaintiff in the premises was the right of possession which could only be destroyed by defendants' compliance with the requirements for establishing title by adverse possession, and that section 318 is to be read in connection with sections 322, 323 and 325 of the same code which sets forth the legal prerequisites for such title by adverse possession as would defeat plaintiff's seisin in law. In Westphal v. Arnoux, 51 Cal.App. 532, 534, 197 P. 395, an ejectment action, it was said that the requirement of section 318, Code of Civil Procedure was satisfied when it was shown that plaintiff had legal title, and that the burden was then placed on defendant to show that he had held the property adversely for five years. In the recent case of Madden v. Alpha Hardware & Supply Co., 128 Cal.App.2d 72, 75, 274 P.2d 705, 707, it is said that plaintiffs having shown legal title in themselves "it is presumed that they were possessed of the property within the time required by law and that the occupation thereof by defendant is deemed to have been in subordination of plaintiff's title, unless it be shown that defendant's possession was adverse for the statutory period." And, see, Wilkerson v. Thomas, 121 Cal.App.2d 479, 486, 263 P.2d 678.

[7] As for appellant's contention that their claim was under color of title, the evidence shows that the first time the strip of land was included in any deed held by appellants was when William Sullivan on September 10, 1948, included this area in the deed of lot 41 to Patricia Cunningham. She then deeded the same area back to him on the same date. That was less than five years before the commencement of this action.

Appellants contend that even if they have not acquired title by adverse possession to the strip of land, they have acquired a prescriptive easement for maintenance of the fence in its present position. The court found that it had been created by Michael Sullivan as a division fence in 1918. The first evidence of a protest regarding the location of the fence was made by Mr. Frank in 1947, one of respondents' predecessors in title. The fence had then been in existence for about 29 years.

[8–10] The same elements required to establish title by adverse possession of realty are necessary to acquire an easement by adverse possession except payment of taxes in the latter case need be shown only when the easement is separately assessed. Hahn v. Curtis, 73 Cal.App.2d 382, 166 P.2d 611; Dooling v. Dabel, 82 Cal.App.2d 417, 186 P.2d 183; Moots v. Kasten, 90 Cal.App. 2d 734, 203 P.2d 537. The burden of showing that taxes were assessed on the easement is upon the party contesting the prescriptive right, in this case the respondents. Redemeyer v. Carroll, 21 Cal.App.2d 217, 68 P.2d 739. There is no evidence in the present case that an easement was assessed. It is true, as appellants contend, that a prima facie case is established where there is open and uninterrupted use of the easement for the requisite period, without protest or interference. Wallace v. Whitmore, 47 Cal.App.2d 369, 117 P.2d 926; Chapman v. Sky L'Onda, etc., Water Co., 69 Cal.App.2d 667, 159 P.2d 988. However, in the present case the trial court found that M. S. Sullivan intended to construct the fence on the true boundary line and never intended to claim title to any land not in the deed description until the year 1948, that it was never the intention of William Sullivan and his predecessors in interest to claim title to the additional area enclosed by the fence prior to July 1948, unless it was the true boundary line.

Appellants have cited no case wherein an easement has been created for a division fence to be maintained on a line several inches inside the boundary of the adjoin-

ing property where there has been no agreement concerning a disputed boundary.

In Chapman v. Sky L'Onda, etc., Water Co., supra, cited by appellants, it was said that where occupancy was open and exclusive, the occupant exercising control of the property, and *where there was no direct evidence of the nature of the original entry,* the adverse nature of the claim should be presumed. Here Michael Sullivan testified as to the nature of his original entry, and that testimony supports the finding of fact referred to above. It is true that some testimony given by the same witness was conflicting as to his intent, but the trial judge has resolved that conflict.

[11] Appellants Michael and Bridie Sullivan were not record owners of this property after they deeded it to their son, William, in 1946, but they have remained thereon as tenants, and the trial court found that they have remained there with the authority of William Sullivan to do all acts necessary, in the management of said property. Appellants have not directly attacked this finding as unsupported. It appears from the record that such an inference is supported. Therefore, they may be considered parties actively involved in the maintenance of the fence.

[12–14] Respondents' claim herein is not barred by laches since no injury has been shown to have resulted to appellants because of delay in asserting respondents' right. Los Angeles Brick & Clay Products Co. v. City of Los Angeles, 60 Cal.App. 2d 478, 141 P.2d 46; Downs v. Benatar's Cut Rate Drug Stores, 75 Cal.App.2d 61, 170 P.2d 88. Laches must be pleaded if it does not appear on the face of the complaint. Carlson v. Lindauer, 119 Cal.App. 2d 292, 259 P.2d 925, and it has not been pleaded in this case. The lapse of a considerable period of years does not in itself constitute laches as a matter of law.

[15] Finally, it is urged by appellants that damages should not have been awarded. Appellants say that the evidence conclusively establishes the fact that the fence did not cause any damage to respondents' property, and that this was admitted by appellants. However, the evidence clearly establishes that appellants were prevented by the fence from draining the water away from the side of their house, hence it accumulated and seeped through the basement causing visible damage therein, which because of the continuing refusal of appellants to move the fence, grew worse from year to year as they were unable to make necessary repairs. This testimony adequately supports the award of $500 damages to respondents.

Appellants devote several pages of their briefs to argument that the trial court could not award exemplary damages in such a case since there was no finding that appellant's conduct was wrongful. It seems clear, however, that no exemplary damages were awarded, and that the award of general damages is supported.

No prejudicial error appearing in the record before us, the judgment must be affirmed.

Judgment affirmed.

NOURSE, P. J., and DOOLING, J., concur.



142 Cal.App.2d 567

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Roy Herschell CHESTER, Defendant and Appellant.

Cr. 1113.

District Court of Appeal, Fourth District, California.

June 26, 1956.

Defendant was convicted of assault with intent to commit murder, and from the judgment of the Superior Court, Riverside County, Hilton H. McCabe, J., the defendant appealed. The District Court of Appeal, Griffin, J., held, inter alia, that the evi-

dence was sufficient to sustain the conviction, and that the trial court did not commit error in refusing to grant the motion for new trial based on claimed newly discovered evidence where it did not appear that a different verdict would have resulted had the evidence been produced.

Judgment affirmed.

1. Homicide ⇐257(1)

Evidence sustained conviction of assault with intent to commit murder. West's Ann.Pen.Code, § 217.

2. Criminal Law ⇐370, 371(1, 12), 372(1)

Evidence of other crimes may be admitted when it will help to disclose motive, intent, premeditation, guilty knowledge, malice or a common plan or scheme.

3. Criminal Law ⇐371(4)

In prosecution for assault with intent to commit murder, wherein element of offense charged was specific intent to take life of victim, evidence of defendant's previous assaults upon victim's person within a reasonable period of time was admissible for such purpose. West's Ann.Pen.Code, § 217.

4. Criminal Law ⇐1169(2)

In prosecution for assault with intent to commit murder, wherein evidence showed that defendant a few days before showing gun to witness had threatened to kill prosecutrix and her male companion with a gun and followed male companion with possible preconceived idea of doing it in some fashion, no prejudicial error resulted from testimony respecting possession of gun by defendant. West's Ann.Pen.Code, § 217.

5. Criminal Law ⇐824(5)

In prosecution for assault with intent to commit murder, failure of trial court, on its own motion, to give instructions that evidence of oral admission of defendant should be received with caution was not prejudicial, where claimed admissions of defendant were admitted for main purpose of impeaching his testimony and did not amount to confession or admission of fact not otherwise established by evidence, and there was abundant additional evidence connecting defendant with commission of crime, and prosecution placed in evidence prosecution witness' notes from which he testified concerning claimed admissions. West's Ann. Pen.Code, § 217.

6. Criminal Law ⇐823(4)

In prosecution for assault with intent to commit murder, giving of erroneous instruction that to constitute criminal intent it is merely necessary that person intend to do an act which, if committed, will constitute a crime, and when person intentionally does that which law declares to be a crime, such person is acting with criminal intent even though he may not know that such act is unlawful and even though there be no bad motive, was not prejudicial in view of additional instructions. West's Ann.Pen.Code, § 217.

7. Criminal Law ⇐1171(2)

In prosecution for assault with intent to commit murder, prosecutor's opening statement to jury to effect that moral background of prosecutrix should not keep jury from believing that "she was made of flesh and blood and holds life as dear as anyone else", which statement was not an unreasonable deduction to be drawn from evidence, did not constitute prejudicial misconduct. West's Ann.Pen.Code, § 217.

8. Criminal Law ⇐703

In opening statements it is duty of counsel to refrain from referring to facts which he cannot or will not be permitted to prove.

9. Criminal Law ⇐1134(4)

On appeal solely from judgment of conviction appellant was precluded from urging for reversal alleged error in refusing to grant his motion for new trial based on claim of newly discovered evidence. West's Ann.Pen.Code, § 1237.

10. Criminal Law ⇐938(1)

In prosecution for assault with intent to commit murder, refusal to grant motion for new trial based on claimed newly discovered evidence to effect that after final argument to jury some woman from audience approached defendant's counsel and stated that she knew prosecutrix and that prosecutrix had told woman that defendant had attacked her with a knife was not error, where at most it would only constitute pos-

sible impeachment of prosecutrix' testimony in that respect, and it did not appear that different verdict would have resulted had evidence been produced. West's Ann.Pen. Code, § 1237.

Dale C. Miller, Modesto, for appellant.

Edmund G. Brown, Atty. Gen., and Robert S. Rose, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant and appellant was charged with violating section 217 of the Penal Code (assault with intent to commit murder) upon the person of Jewell Forney. It was also charged in the information that he had been twice previously convicted of a felony (forgery and assault with a deadly weapon —three counts) and served terms of imprisonment therefor. Defendant admitted the prior convictions. A jury found him guilty of the offense charged. Defendant and Jewell Forney began living together in December, 1954. There is a conflict in the evidence as to whether the relationship was meretricious or of a lawful marriage union. They lived at the home of defendant's mother in Coachella. Jewell was employed as a waitress. Defendant was on parole and was employed at an ice plant. Jewell threatened to leave defendant on several occasions. On Saturday, before the incident here involved, Jewell moved out of defendant's mother's home and took residence in a nearby cabin. She claims she left the restaurant where she was employed about June 5th and went in a taxi to nearby Thermal to obtain employment and to get away from defendant whose parole did not permit him to visit there. She was interviewed by the restaurateur and about that time defendant appeared on the scene in his car and told her she was not going to work there. She indicated she intended to do so. As she started to leave the premises defendant grabbed her and an argument ensued. Defendant struck her and as she reached the bottom steps he struck her again and knocked her prone to the ground and under his parked car. She was unconscious. Defendant stepped over her body, got into the car and started to back it up to run over her. The restaurateur pulled her from under the car just before the wheels reached her. This testimony was corroborated by the restaurateur. There was testimony that she had previously been seen in the company with one Scrabble, who was employed by a firm across the street from where defendant worked. Scrabble claimed that Jewell told him she was not married. There is also evidence that defendant had previously threatened to kill Jewell and Scrabble. He told her that if Scrabble took her to work any more he was going to get his brother's gun and kill both of them. On June 18th, Scrabble overheard defendant say "he was going to get the party that was going with her". That day defendant followed Scrabble all over town in his car. Scrabble testified he had picked Jewell up in his car on two occasions to take her to her place of employment. The prosecution produced a witness who was with defendant, in defendant's home where his brother also lived just a few days before this and defendant showed him an unloaded German Luger gun which he brought out of a dresser drawer. Defendant admitted possession of the gun but claimed he did not show it to the witness; that the witness saw it, asked about its ownership, and defendant stated it belonged to some other person. Three days before this altercation defendant left his place of employment which was at the rear of the ice plant, in violation of his employer's order, and was seen in front of the plant on several occasions looking across the street where Scrabble was employed. He was told by his employer to return to the rear of the establishment. On Monday, June 20, Jewell, after working her shift at the Coachella restaurant, returned to her cabin which she had padlocked, and discovered that all of her personal belongings had been removed. Accompanied by an officer she went to the home of defendant's mother and there demanded of defendant her clothing and he stated that "You are not getting them". He released them when he found an officer was with her. On June 21, the date of the alleged crime, Jewell worked at the cafe until 4 p. m. She went to her cabin, changed her clothes, returned to the restaurant and there she and another girl met

Scrabble and they took a ride in his car. He returned her to her cabin about 12:30 a. m. She stated they had a few beers but were not intoxicated. She looked to see if defendant's car was parked near by but did not see it. She unlocked the door, turned on the light in the middle of the room and then observed defendant standing behind her. She ordered him to leave and he refused. She threatened to leave and he said "I will see that you don't go any place". According to her testimony he struck her in the mouth with his fist and knocked her back against the wall. She said she heard dishes rattling or breaking and then defendant jumped on her stomach with his feet and she felt him cutting her legs and knees with some sharp object, green in color, and then he "stabbed her in the back", on top of the head and in the eye. After regaining consciousness she found she was bleeding profusely and finally crawled to the nearby oil station. The proprietor noticed her sitting there covered with blood and dressed in a blouse and shorts. She was removed to the hospital and her wounds were treated by a doctor, who testified she suffered 18 lacerations, two on each leg, one above the left breast, one in the left part of her neck, one over the jugular vein, and one above the eye; that ten of the lacerations required suture and penetrated through the skin down to the muscles or bone that was underlying the wounds. He testified that in his opinion the wounds were inflicted by a semi-sharp instrument in a straight line with no marked, jagged edges; and that the bruises could have been caused from falling or a kick or a blunt object. Her upper denture plate was broken. Defendant left the cabin before she gained consciousness and fled to St. Louis, where he was apprehended. Large parcels of blood-stained green and white broken glass dishes were found where she had been lying on the floor.

His story, on the witness stand, was that they were married, but he had reason to believe it was a nullity. He furnished a certified photostatic copy of an application for a marriage license issued in Arizona, apparently signed by defendant and one "Julie Madair" on January 12, 1955. A copy of Jewell's handwriting was received in evidence. Jewell testified she had gone by the name of "Jewel Adair" but did not remember of ever signing such an application or that any marriage ceremony was performed, and if this did happen she must have been under the influence of liquor. Defendant denied the assault upon the prosecutrix. He admitted being in the cabin when she returned that night, but claimed that she was intoxicated; that she fell down and he picked her up and after some discussion Jewell grabbed the knife and cut his arm and then he slapped her; that after he washed and wrapped his arm, he left and drove that night to Arizona where he stopped and had the wound dressed and told the doctor he had cut it changing a tire. He denied he had followed Scrabble on any occasion, and denied knowing Jewell was going with anyone else. He denied the assault on Jewell on June 5, two weeks before this occasion. He told conflicting stories to the investigating officers prior to the trial, and the officers' notes of one of the stories were received in evidence at defendant's request.

[1] It is first claimed that the evidence is insufficient to sustain the verdict mainly because there was no showing of preconceived intent to commit murder. From the above recitation of the evidence, without further elaboration, it is clear that it fully supports the finding of the jury. People v. Martinez, 17 Cal.App. 579, 120 P. 786; People v. Bradley, 71 Cal.App.2d 114, 162 P.2d 38.

[2, 3] It is next argued that the court erred in admitting evidence of the previous assault upon the prosecutrix when she was struck and subsequently dragged from under his car. The claim is that such offense was not relevant to show any common scheme or plan, and not a part of the res gestae. Evidence of other crimes may be admitted when it will help to disclose motive, intent, premeditation, guilty knowledge, malice or a common plan or scheme. People v. Albertson, 23 Cal.2d 550, 576, 145 P.2d 7. An element of the offense charged was the specific intent to take the life of the prosecutrix, and evidence of defendant's previous assaults upon the victim's person, within a reasonable period of time, is admissible for this purpose. Its materiality and relevancy to the facts here in issue are

unquestioned. People v. Mize, 80 Cal. 41, 22 P. 80; People v. Tucker, 104 Cal. 440, 38 P. 195; People v. Bradley, supra; People v. Bolton, 215 Cal. 12, 8 P.2d 116; People v. Peete, 28 Cal.2d 306, 169 P.2d 924, and cases cited therein.

[4] The same claim is made as to the the testimony respecting the possession of the gun by defendant. It is argued that this testimony inflamed the jurors into believing that defendant was a desperate and despicable character. The testimony respecting the gun was incidental to the other testimony of the witness. The evidence shows that defendant, a few days before this occurrence, did threaten to kill both Scrabble and the prosecutrix with a gun, and followed Scrabble with the possible preconceived idea of doing it in some fashion. The fact that he was in possession of a gun, by which means it would naturally be expected to be accomplished, might well bear on the question of the intent of the defendant to take the life of the prosecutrix and show some preparation for its commission. The great bulk of this testimony was admitted before defendant objected to it. No motion to strike it was made. No prejudicial error resulted. People v. Scalamiero, 143 Cal. 343, 345, 76 P. 1098; People v. Hutchings, 56 Cal.App. 397, 205 P. 480.

[5] Next, it is argued that although defendant did not request such an instruction, it was the duty of the trial court, on its own motion, to give an instruction that "evidence of the oral admission of defendant should be received with caution", citing People v. Bemis, 33 Cal.2d 395, 202 P.2d 82, and People v. Deloney, 41 Cal.2d 832, 264 P.2d 532.

The factual backgrounds of the cited cases are dissimilar, and in those cases, to connect the defendant with the commission of the crime, the prosecutor relied mainly upon the oral admission of the defendant. In the instant case the claimed admissions of defendant were admitted into evidence for the main purpose of impeaching his testimony and did not amount to a confession or admission of fact not otherwise established by the evidence. There was abundant additional evidence connecting the defendant with the commission of the crime. Counsel for plaintiff placed in evidence the prosecution witness' notes from which he testified concerning the claimed admissions. No prejudicial error resulted. People v. Riley, 35 Cal.2d 279, 286, 217 P.2d 625.

[6] Defendant criticizes the court's given instruction to the effect that in every crime or public offense there must exist a union or joint operation of act and intent, and to constitute criminal intent it "is merely necessary that a person intend to do an act which, if committed, will constitute a crime. When a person intentionally does that which the law declares to be a crime, such person is acting with criminal intent even though he may not know that such act is unlawful and even though there be no bad motive."

It is claimed that this instruction has the effect of a presumption that the mere doing of the act was sufficient to find criminal intent, citing such authority as People v. Snyder, 15 Cal.2d 706, 104 P.2d 639; and People v. Wong, 83 Cal.App.2d 60, 187 P.2d 828. This instruction has been held to be erroneous where a specific intent is involved. People v. Zerillo, 36 Cal.2d 222, 223 P.2d 223. It was there concluded that the jury could not have been misled where the other given instructions sufficiently qualified it. The additional instructions here given clearly indicated that before the jury could convict the defendant of the crime charged, one of the necessary elements is "the existence in the mind of the perpetrator of the specific intent to commit murder and, unless such intent so exists that crime is not committed". And further that "if the jury should find that he committed the assault but that he did not do so with a specific, preconceived intent to kill, the defendant may be found guilty only of the lesser offense", and that "In the crime of assault with intent to commit murder, there must exist in the mind of the perpetrator the specific, preconceived intent to kill a human being, and a person may not be convicted of such an offense if that specific intent is not established by the evidence." We conclude that prejudicial error did not result in the giving of the erroneous instruction. People v. Zerillo, supra.

[7, 8] Defendant next cites as prejudicial misconduct a statement made by the prose-

cutor in his opening statement to the jury to the effect that the moral background of the prosecutrix should not keep the jury from believing that she was made of flesh and blood and holds life as dear as anyone else. This statement was not an unreasonable deduction to be drawn from the evidence. The proper rule is that in opening statements it is the duty of counsel to refrain from referring to facts which he cannot or will not be permitted to prove. People v. Planagan, 65 Cal.App.2d 371, 406–407, 150 P.2d 927. No exception was taken to the remark. It does not appear that prejudicial error resulted. People v. Gray, 52 Cal.App.2d 620, 127 P.2d 72.

[9, 10] Lastly, defendant claims that the trial court erred in refusing to grant his motion for new trial based on claimed newly discovered evidence. Defendant did not appeal from the order denying the motion for new trial but only from the judgment. On an appeal solely from the judgment, he is precluded from urging this ground for a reversal. Penal Code Sec. 1237; People v. Ingersoll, 21 Cal.App. 763, 132 P. 1052. However, the order denying the motion for new trial on this ground is sustainable. Counsel for defendant, at the hearing on the motion, made some showing to the effect that after his final argument to the jury, some woman from the audience unknown to him approached him and stated she knew the prosecutrix and that the prosecutrix had told her that defendant had attacked her with a *knife*. This showing, if properly and timely made, would not have been sufficient grounds to reverse the order denying the new trial since, at most, it would only constitute possible impeachment of the prosecutrix' testimony in this respect. At the time the remark was claimed to have been made she may well have believed that such was the case. It does not appear to us that a different verdict would have resulted had the evidence been produced. People v. Yankee, 79 Cal.App.2d 431, 437, 179 P.2d 582; People v. Mandell, 48 Cal.App.2d 806, 120 P.2d 921.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

142 Cal.App.2d 575

Harry ATHERLEY, Plaintiff and Respondent,

v.

MacDONALD, YOUNG & NELSON, Inc., a corporation, and Stoneson Development Corporation, a corporation, Defendants and Appellants.

Civ. 16740.

District Court of Appeal, First District, Division 1, California.

June 27, 1956.

Hearing Denied Aug. 21, 1956.

Action for injuries sustained by plaintiff as an employee of an electrical subcontractor when he fell down a stairway while working on a building under construction, brought against the owner, the construction managers, and a subcontractor. Plaintiff recovered judgment for $45,000 against the first two defendants in the Superior Court, City and County of San Francisco, William F. Traverso, J., and such defendants appealed. The District Court of Appeal, Peters, P. J., held that the question of the plaintiff's contributory negligence was properly submitted to the jury, that the doctrine of assumption of risk was not applicable and that the trial rulings were not reversibly erroneous and that the damages awarded were not excessive.

Judgment affirmed.

See also 135 Cal.App.2d 383, 287 P.2d 529.

1. Appeal and Error ⇐1011(1)

Conflict in testimony was for the trial court.

2. Negligence ⇐32(1)

An invitee to a building under construction is only invited to use the building in its then incomplete condition.

3. Negligence ⇐44

In action by employee of electrical subcontractor who fell down a stairway while working on a building under construction brought against the owner and the construction managers, it was the duty of defendants to install wooden treads on the stairway and such duty was nondelegable. West's Ann.Labor Code, § 6400.

4. Master and Servant ⇐6, 276(3), 278(8)

In action by employee of electrical subcontractor for injuries sustained when he fell down a stairway on a building under construction brought against the owner and construction managers, evidence established that the defendants were "employers" under the statute and that as such they failed to furnish safe place of employment to "employees" as required by the statute in that they failed to comply with the applicable safety order and that the violation thereof was a proximate cause of the accident. West's Ann.Labor Code, §§ 6304, 6400.

5. Master and Servant ⇐267(1)
Workmen's Compensation ⇐1389

The statute providing that neither the "order nor recommendation" of the industrial division shall be admitted as evidence in any action for damages or compensation proceeding arising out of such injury or death referred not to the standard general orders of the division relating to safety requirements, such as safety orders, but to those arising out of and made in connection with specific accidents. West's Ann. Labor Code, § 6313.

See publication Words and Phrases, for other judicial constructions and definitions of "Orders or Recommendations".

6. Trial ⇐82, 105(1)

When inadmissible evidence is offered the opposing party must object and specifically state the grounds of his objection.

7. Trial ⇐84(1)

A general objection to the admissibility of evidence does not raise specific grounds such as that the statute precluded the admission of the orders involved. West's Ann.Labor Code, § 6313.

8. Trial ⇐83(1)

An objection specifying the wrong ground is as bad as a general objection, and amounts to waiver of all grounds not urged.

9. Trial ⇐83(2)

Where sole objection to safety order of the industrial division was that it was incompetent, irrelevant, immaterial and not binding on the owner or each of the owners, and the statute was not mentioned, the safety order was properly admitted into evidence. West's Ann.Labor Code, § 6313.

10. Appeal and Error ⇐996

Where different conclusions may be reasonably drawn by different minds from the same evidence the decision must be left to the jury.

11. Negligence ⇐67

An invitee is under a duty to look where he is going and to observe that which is in plain sight in front of him.

12. Negligence ⇐136(27)

Whether the danger to an invitee is obvious is a question of fact for the jury.

13. Negligence ⇐136(26)

In action by employee of electrical subcontractor for injuries when he fell down a stairway while working on a building under construction, brought against the owner and the construction managers, whether the plaintiff was contributorily negligent was a question for the jury.

14. Negligence ⇐136(26)

In action for injuries sustained by employee of electrical subcontractor, when he fell down stairway while working on a building under construction, brought against the owner and construction managers, whether the plaintiff assumed the risk of injury was for the jury.

15. Negligence ⇐105

In cases of violation of safety regulation the defendant cannot defend on the ground that the plaintiff for whose protection the regulation was passed assumed the risk.

16. Negligence ⇐31

In action for injuries sustained by employee of electrical subcontractor when he fell down a stairway in a building under construction, brought against the owner and construction managers, under the statute the defendants owed the statutory duty to the plaintiff to furnish him a safe place of employment, and breach thereof was negligence per se. West's Ann.Labor Code, §§ 6304, 6400.

17. Negligence ⇐139(1)

In action for injuries sustained by employee of electrical subcontractor when he

fell down a stairway while working on a building under construction, refusing instructions that if danger was obvious the defendants were not negligent was not error, since the instructions were inapplicable. West's Ann.Labor Code, §§ 6304, 6400.

18. Trial ⇐260(8)

In action for injuries sustained by employee of electrical subcontractor falling down a stairway in a building under construction, brought against the owner of the building and construction managers, while defendants were entitled to instructions on their theory they were not entitled to have their defense of contributory negligence stated in various ways and in the language they desired.

19. Negligence ⇐141(3)

In action for injuries sustained by employee of electrical subcontractor falling down stairway in building under construction brought against the owner and construction managers, instruction that plaintiff was under duty to exercise reasonable care for his safety, etc., was sufficient on the question of contributory negligence.

20. Appeal and Error ⇐1068(5)

Defendants could not claim prejudicial error in failing to instruct that they were not liable for negligence of a subcontractor where the jury exonerated the subcontractor.

21. Trial ⇐260(8)

Failure to give an instruction on "unavoidable accident" was not error in view of instructions given.

22. Negligence ⇐141(3)
Trial ⇐252(7)

Refusal to give requested instruction that for a momentary lapse to excuse contributory negligence it must be produced by some sudden and adequate disturbing cause was proper, since the proffered instructions did not correctly state the law and there was no evidence to support them.

23. Negligence ⇐138(4)

Refusing requested instructions that if plaintiff had the choice of using available ladders and an incomplete stairway, and the stairway was the more dangerous, plaintiff, if he chose the unfinished stairway, was contributorily negligent, was not error under the evidence.

24. Trial ⇐261

The trial court is under no duty to revise an incorrect instruction.

25. Appeal and Error ⇐1067
Damages ⇐212

An instruction that any damages that might be awarded for personal injuries were not subject to payment of federal or state income taxes and accordingly should not be diminished thereby was properly refused, and was not prejudicial in any event, where the court specifically instructed that speculative, conjectural or remote damages could not be recovered.

26. Continuance ⇐6

In action for injuries, where defendants had cross-complained against a subcontractor, whose demurrer was sustained, and the defendants appealed, denying defendants a continuance until that appeal was decided was not error, where the right between the plaintiff and defendants were separate and distinct from the rights between the subcontractor and the plaintiff.

27. Damages ⇐132(8)

$45,000 for injuries sustained by electrician, consisting of fractures of both wrists, causing permanent injury and hospitalizing him for three and one-half months with doctor bills of over $2,600, and who was prevented from following his occupation, was not excessive.

28. Damages ⇐128

For the court to hold that an award of damages for personal injuries is excessive the court must find that it was so large as to indicate passion or prejudice by the jurors.

Hadsell, Murman & Bishop, San Francisco, for appellants.

W. A. Lahanier, Frank B. Blum, John F. Gallen, San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff, Harry Atherley, brought this action for personal injuries received by

him when he fell down a stairway while working on the Emporium building then under construction in the Stoneson shopping district in San Francisco. The defendants are the Stoneson Development Corporation, the owner of the building, MacDonald, Young & Nelson, Inc., the construction managers for the owner, and the Fair Manufacturing Company, a subcontractor on the job. The jury awarded the plaintiff $45,000 against the first two named defendants, but exonerated the Fair Manufacturing Company. The first two named defendants appeal.

The accident occurred on a stairway located on the northeast corner of the building, and leading from the ground floor to the next higher floor. The Fair Manufacturing Company had the subcontract to install this and the other metal stairways required by the plans and specifications. The stairway in question, going upward, first has about eight steps, then a small landing, then 12 to 14 steps leading to a large landing. Here the stairway reverses itself and goes up an additional seven steps. Such metal stairways are designed so that the tread of the step ultimately is filled in with cement or asphalt or similar substance. At the time of the accident the fill had not been inserted, the stairway then consisting simply of the metal framework. To accommodate the fill there is a metal lip on the front of each step that projects upward about an inch and a half and then hooks over. The fill is poured to the level of this lip.

[1] There is evidence that at the time of the accident the stairway was completely installed with the exception of the fill in the treads, and the installation of the handrails. This is challenged by appellants. They presented witnesses who testified that at the time of the accident several steps were still missing between the large landing and the upper level. The foreman of Fair Manufacturing Company testified that by June 21, 1951, his company had completed the stairway, except for the handrails, and that on that date he told the foreman of MacDonald, Young & Nelson that the stairway was completed and turned it over to him. This conflict was for the trial court, and must be resolved against appellants.

The treads of a metal stairway are not filled in until the building is completed, and the handrails are not installed until the lathing and plastering is completed. Admittedly, it was not the responsibility of Fair Manufacturing Company to install the fill, that being the responsibility of appellant MacDonald, Young & Nelson.

The respondent was employed as an electrician by the electrical subcontractor, and had been assigned, by his employer, the duty of running the fire alarm system on the northeast side of the building. On the day before the accident respondent and his foreman went up the stairway here involved as far as the large landing to look over the area where the fire alarm system was to be installed. The next morning about 10 a. m., June 27, 1951, respondent walked up the stairway as far as the large landing and installed the required conduit pipe for the fire alarm system. Using the stairway was the most practical way to reach the point where the fire alarm system was to be installed. He then proceeded to descend the stairway. He placed his left foot on the top step and, as he brought his right foot forward, the heel of this foot caught on the top or next lower stair. This threw him forward. There was nothing to grab. Respondent put his arms up to protect his face and fell some 18 feet before hitting on the small landing. As a result of this fall he admittedly suffered severe fractures of both wrists. For these injuries he was hospitalized for six weeks. In April of 1952 he again severely injured his right wrist while cooking. There is medical testimony to the effect that the second injury was probably the result of an incomplete union of the first injury. This second injury kept respondent in the hospital two months.

At the time of respondent's fall there were no barriers in front of the stairway. There was substantial evidence that, prior to the accident, various other workmen had used the stairway.

Respondent, as already pointed out, brought this action against the two appellants and the Fair Manufacturing Company,

charging them with negligence. Defendants denied the pertinent allegations and pleaded, as affirmative defenses, contributory negligence and assumption of risk. The jury brought in a unanimous verdict of $45,000 against the two appellants, but found in favor of the Fair Manufacturing Company.

[2] Appellants first contend that as to them respondent was at most a business invitee to whom appellants only owed the duty to warn of known latent dangers, and were under no duty to warn of obvious dangers. They point out that an invitee to a building under construction is only invited to use the building in its then incomplete condition. This is undoubtedly the law. Kolburn v. P. J. Walker Co., 38 Cal.App. 2d 545, 101 P.2d 747; Mitchell v. A. J. Bayer Co., 126 Cal.App.2d 501, 272 P.2d 870. This argument, however, is predicated on the unwarranted assumption that section 6400 of the Labor Code is not applicable to appellants. That section provides that: "Every employer shall furnish employment and a place of employment which are safe for the employees therein." This section, if applicable, adds this statutory duty to the normal duties of an invitor.

The trial court refused to instruct on the normal duties owed by an invitor to an invitee, but instead instructed that section 6400 was applicable and therefore there was also applicable a construction safety order of the Division of Industrial Safety, No. 1586 which, in subdivision (e), provides: "Stairways on which the treads have to be filled in later with cement or other material shall have wooden treads not less than ⅞ inches (⅞") thick, full width of the tread, firmly fitted in place and replaced when worn below the level of the metal nosing. Where skeleton iron stairs are installed, they shall have wooden treads and landings not less than one and one-fourth (1¼") thick."

Admittedly, the wooden treads required by this rule had not been installed at the time of the accident. The duty to install them was on appellants.

The trial court instructed that a violation of this safety order would constitute negligence as a matter of law; that if the jury found a violation of this safety order and that such violation proximately contributed to respondent's injuries, and that respondent was not guilty of contributory negligence, then their verdict should be against appellants. The trial court further instructed that the duty of complying with a safety order designed to protect members of the public rightfully on the premises could not be delegated to a third person or contractor.

Appellants objected to the introduction of this safety order into evidence on the ground that it was "incompetent, irrelevant, immaterial, not binding upon the owner or the agent of the owner but binding only upon the constructor of the steel stairway in question." The safety order was admitted.

Appellants now urge that it was error to admit the safety order into evidence as against appellants because appellants were not the "employers" of respondent, or of the electrical subcontractors, within the meaning of section 6400 of the Labor Code. Appellants cite cases which are not applicable to the factual situation here presented. Thus, they cite Neuber v. Royal Realty Co., 86 Cal.App.2d 596, 195 P.2d 501, holding that a lessor is not liable for non-compliance with an industrial safety order by a tenant who had employed the plaintiff, and Hayden v. Paramount Productions, Inc., 33 Cal.App.2d 287, 91 P.2d 231, holding that a general contractor was not liable for injuries suffered by an employee of a subcontractor where the general contractor had no right of control over the activity prohibited by the safety order. Obviously, in these cases, the defendants were not "employers" of the injured party within the meaning of section 6400 of the Labor Code.

Similar to the Hayden case is Hard v. Hollywood Turf Club, 112 Cal.App.2d 263, 246 P.2d 716. There the employee of a subcontractor, using a scaffolding of his employer, attempted to sue the general contractor for injuries caused when the scaffolding collapsed. There was no evidence of any control by the general contractor over the employees of subcontractors, nor did the general contractor have anything to do with the construction of the scaffold.

Under such circumstances the court properly held that the "duty to furnish safe place of work" section had no application to the general contractor insofar as the injured employee of the subcontractor was concerned. This conclusion was based on the reasoning that the safety scaffolding sections of the Labor Code which were violated were not in the same portion of the Labor Code as the duty of employer sections of that Code, and were not included within the statutory definition of employer there contained. The Hard case was discussed and distinguished in Snyder v. Southern California Edison Co., 44 Cal.2d 793, 285 P.2d 912.

In the instant case the statutory duty to provide a safe place to work is embodied in section 6400 of the Labor Code which is in Part I of Division 5 of that code. In the same part and division of the code is section 6304 which defines employer as follows:

" 'Employer' shall * * * include every person having direction, management, control, or custody of any employment, place of employment, or any employee."

As already pointed out, although the evidence is conflicting on the issue, there is substantial evidence to support the finding that at the time of the accident both appellants had the "direction, management, control" of the stairway on which respondent was injured. This is quite clear as to MacDonald, Young & Nelson, the contractor to whom the stairway had been turned over by respondent's employer, and whose duty it was to install the wooden treads. The legal responsibility of Stoneson Development Company is also clear. The evidence shows that it was not only the owner of the premises, it was also the builder. Its agreement with its co-defendant made MacDonald, Young & Nelson its construction manager, that is, its agent, and not an independent contractor. Thus, the agreement provides that the MacDonald firm shall be construction manager, that is, the manager or agent of Stoneson. The construction manager was to enter into subcontracts and purchase orders in the name and subject to the approval of Stoneson. Stoneson reserved the right to elect to perform the work by other means than provided in the agreement by giving notice in writing. Under the agreement the employees were carried on Stoneson's payroll and expressly designated as the employees of Stoneson, and not those of the construction manager. The compensation of the construction manager was based on a percentage of the construction cost. Other provisions of the agreement and portions of the evidence could be referred to to demonstrate that Stoneson was the builder as well as the owner, with the MacDonald firm its managerial agent, but enough has been cited to show that both appellants at the time of the accident had "control" over the stairway either as the builder, owner or supervisor of the work.

[3] It has already been pointed out that it is an admitted fact that it was the duty of the MacDonald firm to install the wooden treads. This was also the duty of Stoneson. It was a non-delegable duty. Snyder v. Southern California Edison Co., 44 Cal. 2d 793, 285 P.2d 912. Appellants' witnesses testified that such treads were in fact installed by MacDonald 10 days to two weeks after the accident. Respondent's helper, however, testified that MacDonald's workmen, in fact, started to install the wooden treads immediately after the accident, and before respondent had even reached the hospital. There is substantial evidence that the wooden fillers could be inserted as soon as the stairway was completed and even before completion.

[4] Under this evidence it is clear that appellants were "employers" under section 6304 of the Labor Code, and that as such they failed to furnish a safe place of employment to "employees" as required by Labor Code, section 6400, in that they failed to comply with the safety order above quoted. See generally Bickham v. Southern California Edison Co., 120 Cal.App.2d 815, 263 P.2d 32; Snyder v. Southern California Edison Co., 44 Cal.2d 793, 285 P.2d 912; and dicta in Mula v. Meyer, 132 Cal.App.2d 279, 283, 282 P.2d 107. It is equally clear that the jury could find that violation of the safety order was at least a proximate cause of the accident.

[5] Appellants next contend that there is a statutory prohibition against the admission into evidence of safety orders of the Industrial Accident Commission. The statute relied upon is section 6313 of the Labor Code which provides: "The division may investigate the cause of all industrial injuries resulting in disability or death which occur within the State in any employment or place of employment. * * *

"The division may make orders or recommendations with respect to the cause of such injuries which are just and reasonable; *but neither the order nor the recommendation of the division shall be admitted as evidence in any action for damages* or any proceeding to recover compensation, based on or arising out of such injury or death." (Italics added.)

It is quite apparent that "orders or recommendations" referred to in this section are not the standard general orders of the commission relating to safety requirements, such as the safety order here involved, but are the "orders or recommendations" arising out of and made in connection with specific accidents. This is clearly indicated by the first paragraph of the quoted section empowering the "commission" to "investigate the cause of all industrial injuries," and by the second paragraph which authorizes the commission to "make orders or recommendations with respect to the cause of such injuries." It is these "orders or recommendations" that are not admissible.

There is an obvious distinction, and should be, between a general order fixing a safety standard for all employers affected by it, and an order made in respect to a specific investigation of a past accident. The general safety order establishes a minimum standard for all employers affected, and operates prospectively. But the order made as the result of a specific accident is based on hindsight. If a cloak of protection were not extended around an investigation the parties affected would be reluctant to discuss the cause of the accident and how such accidents could be prevented in the future. The inadmissibility provision thus encourages and permits a proper investigation. No such public policy requires the exclusion of a general safety order such as the one here involved.

[6–8] It is worthy of note that when the safety order was offered in evidence appellants' sole objection was that it was "incompetent, irrelevant, immaterial, not binding upon the owner or the agent of the owner, but binding only upon the constructor of the steel stairway." Section 6313 of the Labor Code was not mentioned. Of course, when inadmissible evidence is offered the opposing party must object and specifically state the grounds of his objection. Perry v. McLaughlin, 212 Cal. 1, 297 P. 554. A general objection does not raise specific grounds not urged, Bundy v. Sierra Lumber Co., 149 Cal. 772, 87 P. 622, and an objection specifying the wrong ground is as bad as a general objection, and amounts to a waiver of all grounds not urged. In re Estate of Huston, 163 Cal. 166, 124 P. 852; Reardon v. Richmond Land Co., 21 Cal.App. 357, 131 P. 894.

[9] For these various reasons the safety order here involved was properly admitted into evidence.

[10–13] The next contention of appellants is that respondent was guilty of contributory negligence as a matter of law. It is a rare case in which it can be said that the plaintiff is guilty of contributory negligence as a matter of law. Normally, of course, this defense is one of fact for the trier of the fact. "Where different conclusions may be reasonably drawn by different minds from the same evidence, the decision must be left to the jury." McStay v. Citizens' Nat. Trust & Savings Bank, 5 Cal.App.2d 595, 600, 43 P.2d 560, 562; see also Rau v. Redwood City Woman's Club, 111 Cal.App.2d 546, 245 P.2d 12. It is of course true that a plaintiff is under a duty "to look where he was going and to observe that which was in plain sight in front of him." Curland v. Los Angeles County Fair Ass'n, 118 Cal.App.2d 691, 695, 258 P.2d 1063, 1065. But the same case on the same page also pointed out: "Whether the danger was obvious to plaintiff was a question of fact for the jury. [Citations.] Whether a person, under the circumstances, made a reasonable use of

his faculties is also a question for the jury."

[14] Applying these rules to the facts of the instant case it is apparent that the question of respondent's contributory negligence was one of fact and not of law. Appellants point to the evidence that the lip over which respondent tripped is about an inch and a half high and then hooks over about half an inch. The lighting in the area was "sufficient." Appellants also emphasize that respondent had been an electrician for 40 years, and during that period frequently worked on heavy construction similar to that here involved. The type of stairway here installed was a common type. It is also argued that respondent had an opportunity to observe the exposed lip not only on the day of the accident, but on the day before when he ascended and descended the stairway. Appellants also produced their accident prevention adviser who testified that he thought that he had posted on this job one or two posters on stairway safety prior to the accident. He also testified as to what he considered the standard practice and the one generally followed in using a metal stairway on which the wooden treads had not been installed. He stated that a workman should walk with the ball of his foot a little back of the lip so that the toe of the shoe extends over the lip. This minimizes the danger of catching the heel. From a safety standpoint it would be unsafe practice to so place the foot that the toe of the shoe is in front of the lip.

Respondent testified that when he and another workman used the stairway the day before the accident that he "did not pay any particular attention to the stairs," that is, he "glanced at them, as you normally would." When he walked down the stairs that day he "looked down the stairs as one would normally look," and proceeded to go down the stairs "normally." On the day of the accident he ascended the stairway as one would normally ascend a stairway of that type just as he had done the day before. When he finished his job, he crossed the landing and started to descend. He glanced down at the stairs and put his left foot on the first step. In bringing his right foot forward the heel caught on the lip of either the first or second step, that is, either on the landing or the next step down. At that moment he "was looking as you would normally look downward," that is, ahead of where he was going. He was "coming down the stairs just as [he] did the day before in a normal fashion on that type of stair." After he fell he noticed the absence of the wood planking.

These facts are quite different from those in Mitchell v. A. J. Bayer Co., 126 Cal. App.2d 501, 272 P.2d 870, where it was held that a person who deliberately walked into an unfamiliar pitch dark area was guilty of contributory negligence as a matter of law. Equally distinguishable is Fletter v. City & County of San Francisco, 110 Cal. App.2d 820, 244 P.2d 59, in which a plaintiff, knowing of the existence of an opening, stepped across it, but misjudged the distance. In the instant case, unlike the two cited cases, reasonable minds can differ as to the obvious nature of the dangerous condition, and as to whether respondent used the stairway in a reasonable fashion. This being so, the issue was properly left to the jury.

The contention that it was contributory negligence as a matter of law to use the stairway before the wooden treads were installed is untenable. While other means of access to the work area could have been used, the evidence shows that the stairway provided the easiest method of access. Plaintiff testified that it was the only "humanly possible" method of access to the work area.

[15, 16] The contention that, as a matter of law, respondent assumed the risk of injury is clearly without merit. It is elementary law that "in cases of violation of a safety regulation the defendant cannot defend on the ground that the plaintiff for whose protection the regulation was passed assumed the risk." Mula v. Meyer, 132 Cal.App.2d 279, 284, 282 P.2d 107, 110; see also Finnegan v. Royal Realty Co., 35 Cal.2d 409, 218 P.2d 17; Bickham v. Southern California Edison Co., 120 Cal.App.2d 815, 263 P.2d 32.

[17] The appellants submitted a series of instructions to the effect that if the danger was obvious, then appellants were not negligent in their duty to respondent. Such instructions might be permissible in an invitor-invitee case, but in this case, as already pointed out, the duty owed by appellants to respondent was greater than the duty existing between an ordinary invitor and invitee. Under Labor Code, sections 6304 and 6400, appellants owed the statutory duty to respondent to furnish him a safe place of employment. The breach of this duty was negligence *per se*. Mula v. Meyer, 132 Cal.App.2d 279, 282 P.2d 107; Finnegan v. Royal Realty Co., 35 Cal.2d 409, 218 P.2d 17; Bickham v. Southern California Edison Co., 120 Cal.App.2d 815, 263 P.2d 32. Thus, the standard of care is fixed by the safety order. The "obviousness" of the defect, if it existed, relates not to the duty of appellants, but to the contributory negligence of the respondent, and the jury was so instructed. The jury was instructed that violation of the safety order was negligence *per se*, that the duty imposed by the safety order could not be delegated, and that the one owing such duty is liable, in the absence of contributory negligence by the injured person, for injuries proximately caused by the violation of the safety order, and that if Fair Manufacturing Company had completed the stairway and was no longer in control of it, then it should be exonerated.

Obviously, the jury must have found that the stairway was not in the Fair Manufacturing Company's control, but was in the control of appellants.

[18] The court instructed at length, and correctly, on contributory negligence. This was all that appellants were entitled to. While they were legally entitled to instructions on their theory of the case, they were not entitled to have their defense of contributory negligence stated in various ways and in the language they desired. They were entitled to instructions on contributory negligence. The trial court instructed on this doctrine, at length. This was all appellants had the legal right to expect.

[19] Moreover, the court did instruct that the respondent was under a legal duty to exercise reasonable care for his own safety, and then instructed that "general human experience justifies the inference that when one looks in the direction of something clearly visible, he sees it. When there is evidence to the effect that one did look, but did not see what was in plain sight, it follows that either there is an irreconcilable conflict in such evidence or the person was negligently inattentive."

[20] Appellants claim that it was error to fail to instruct that they were not liable for the negligence of Fair Manufacturing Company, a subcontractor. If it be assumed that such an instruction should have been given, failure to give it could not possibly have been prejudicial. The jury exonerated Fair Manufacturing Company. Thus, the jury found that that defendant was not negligent. Therefore, appellants' liability could not be based on imputed negligence.

[21] The failure to give an instruction on "unavoidable accident" was not error. The jury was instructed that defendants' liability, if any, was predicated on negligence proximately causing the accident. Negligence and proximate cause were fully explained as was burden of proof. These instructions covered the relevant issues adequately.

[22] The court properly refused to give appellants' proffered instruction that for a momentary lapse to excuse contributory negligence it must be produced by some sudden and adequate disturbing cause, because the proffered instruction did not correctly state the law, Austin v. Riverside Portland Cement Co., 44 Cal.2d 225, 282 P.2d 69, and because there is no evidence in this case of forgetfulness of a known danger.

[23, 24] Appellants also object to the refusal to give their instruction to the effect that if plaintiff had the choice of using available ladders and an incomplete stairway "to go between the floors," and if the stairway was the more dangerous method, and if plaintiff then chose the unfinished stairway, then he was guilty of contributory negligence. This instruction was properly refused for several reasons. There is no evidence at all that respondent used the

stairway "to go between the floors." Respondent went up only as far as the large landing, at which point he had work to do. If the evidence shows that some of the treads had not been installed prior to the accident (the evidence is conflicting on this issue) those stairs were above that landing. The court was, of course, under no duty to revise the instruction. Huggans v. Southern Pacific Company, 92 Cal.App. 2d 599, 207 P.2d 864.

[25] Appellants proposed an instruction to the effect that any damages that might be awarded "are not subject to payment of Federal or State Income Tax, and accordingly are diminished thereby." The court failed to give the instruction. This was not error. Two out-of-state cases are cited in support of the instruction. In Hall v. Chicago & N. W. Ry. Co., 349 Ill.App. 175, 110 N.E.2d 654, it was held that it was proper for the defense to argue to the jury that in determining damages the jury should consider the plaintiff's net income and not his gross income. Dempsey v. Thompson, 363 Mo. 339, 251 S.W.2d 42, recommended that the very instruction here offered should be given, but also held that the giving or refusing to give such a cautionary instruction was within the discretion of the trial court, and that the failure to give it was not reversible error.

In the instant case the court instructed at some length on the proper measure of damages. The jury, without equivocation, was told that it could award compensatory damages only, that is, those damages which would fairly compensate plaintiff for his pecuniary loss. The items of recoverable damage were itemized. The court specifically directed that "speculative," or conjectural," or "remote" damages could not be recovered. Thus, even though it would have been proper to give the proffered instruction, it was not reversible error to fail to do so.

[26] Appellants next complain of the refusal of the trial court to grant them a continuance. The request for a continuance arose out of the following facts: Appellants had cross-complained against Fair Manufacturing Company. Fair demurred. The demurrer was sustained and the cross-complaint stricken. Appellants appealed, and sought a continuance until that appeal was decided. It was also urged that the California Casualty Indemnity Exchange was representing Fair Manufacturing Company and also by virtue of a subrogation lien for respondent's hospital expenses, had an interest in the recovery. It is obvious that these facts in no way prejudiced appellants insofar as their defense against Atherley was concerned. Obviously, the rights between respondent and appellants were separate and distinct from the rights between Fair Manufacturing Company and Atherley. It should be also pointed out that the record shows that the California Casualty Company took no active part in respondent's case. There was no error in denying the continuance.

[27, 28] The contention that the damages are excessive as a matter of law is clearly unsound. The plaintiff suffered severe fractures of both wrists. Because of the unhealed condition he seriously reinjured his right wrist. He has a limitation in the twisting ability of both forearms, and his gripping abilities have been so reduced that he can no longer do the heavy work required of an electrician. These conditions are permanent. He was hospitalized for a total period of 3½ months, and his doctor bills totaled $2,602.-04. He suffered severe pain. When injured respondent had a life expectancy of nearly 20 years. His rate of pay was then $110 a week. He can no longer work at his chosen occupation. The jury verdict was for $45,000. Under these facts we cannot hold that the verdict is excessive as a matter of law. "For us to hold the award excessive we must find that it was so large as to indicate passion or prejudice on the part of the jurors." Newton v. Thomas, 137 Cal.App.2d 748, 769, 291 P.2d 503, 516; see also Holder v. Key System, 88 Cal.App. 2d 925, 200 P.2d 98. That is not this case.

The other contentions raised do not merit consideration.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

142 Cal.App.2d 527

Mary Royal MONIZ, Plaintiff-Appellant,

v.

Louis G. MONIZ, Defendant-Respondent.

Civ. 16802.

District Court of Appeal, First District, Division 2, California.

June 26, 1956.

Hearing Denied Aug. 21, 1956.

Child custody proceeding. The Superior Court, Alameda County, Richard H. Chamberlain, J., awarded divorced husband complete custody of parties' children and denied divorced wife counsel fees and costs, and divorced wife appealed. The District Court of Appeal, Devine, J. pro tem., held that, where divorced wife, who had custody of parties' children under California interlocutory divorce judgment, was found by California court to be in contempt when she refused to comply with subsequent California court order requiring her to deliver to divorced husband physical custody of the children, whom divorced wife had taken to New Mexico, New Mexico decree, which found divorced wife to be fit and proper person to have custody of the children on basis of purported new and altered circumstances, was not entitled to comity in subsequent California child custody proceeding between the parties, in view of fact that, at time New Mexico decree was made, divorced wife was acting in open defiance of California court's decree.

Order affirmed.

1. Judgment ⇐822(1)

Where divorced wife, who had custody of parties' children under California interlocutory divorce judgment, was found by California court to be in contempt when she refused to comply with subsequent California court order requiring her to deliver to divorced husband physical custody of the children, whom divorced wife had taken to New Mexico, New Mexico decree, which granted divorced wife custody of the children, was not entitled to comity in subsequent California child custody proceeding between the parties, in view of fact that, at time New Mexico decree was made, divorced wife was acting in open defiance of California court's decree.

2. Judgment ⇐822(1)

California court was not bound to follow the decree of another state in matter of custody of children of parties who had been granted divorce by California court, but might itself, as parens patriae, determine that which was for best interest of such children.

3. Judgment ⇐822(1)

Ordinarily, after child custody order has been made in another state, California courts will not change it unless there has been a change in circumstances because orderly administration of justice will prevent vexatious and interminable litigation and because of application of the doctrine of comity.

4. Infants ⇐19

The change of circumstances rule, applicable in child custody proceedings, is not hard and fast but will yield to other considerations.

Haley & McInerney, Oakland, C. O. Heffernan, San Leandro, for appellant.

Stanley Block, San Leandro, Henry Muller, Oakland, for respondent.

DEVINE, Justice pro tem.

Appellant, Mary Royal Moniz, appeals from an order of the superior court awarding to respondent the complete custody of the children of the parties and denying counsel fees and costs to appellant.

Appellant obtained an interlocutory judgment of divorce in the Superior Court of Alameda County on March 24, 1953, which awarded to her the care, custody and control of the two minor children of the parties with certain visitation rights in respondent and ordered her to reside with said children within a radius of fifty miles of the City and County of San Francisco, but permitted her to make visits with them out of the state not in excess of thirty days in any one calendar year. The decree also required monthly payments for support of the children and approved and incorporated

by reference a certain property settlement agreement.

On Septemper 3, 1953, appellant having taken the children to Santa Fe, New Mexico, she executed there an affidavit for an order to show cause to be heard by the Superior Court in and for the County of Alameda asking that the provisions of the decree giving respondent visitation rights and requiring appellant to reside within a fifty mile radius of San Francisco, be stricken from the decree. Respondent thereupon filed an affidavit for an order to show cause as to modification alleging that the mother had failed in certain of her maternal duties. Both orders came on for hearing before Honorable S. Victor Wagler, in the Superior Court of Alameda County, on September 21, 1953. After a two day hearing at which both parties appeared and witnesses were heard on behalf of each, the court found that the allegations of respondent's affidavit were true, and that Mrs. Moniz was not a fit and proper person to have the children. She was ordered forthwith to deliver the physical custody of the children to Mr. Moniz. The court found that they were then in Santa Fe, New Mexico in violation of the order of the court. Mrs. Moniz took no appeal from the order.

As appellant did not deliver the children to respondent, she was on October 23, 1953, adjudged in contempt, but this order was never executed because she remained in New Mexico. Respondent made trips to New Mexico after the order of September 23 and again after the contempt order of October 26, but appellant refused to deliver custody of the children to him and denied him the opportunity to see them.

On January 5, 1954, respondent filed in the District Court at Santa Fe, a petition setting forth all of the above facts with copies of the orders of the Alameda County Superior Court attached thereto, and requested an order directing appellant to deliver the children to him. Appellant filed an answer and cross-petition admitting her failure to comply with Judge Wagler's order and alleged that at the hearing before said judge she had been denied an opportunity to present her case fully and had been prevented from showing the falsity of the statement relative to her fitness, and that the modifying order had not been based on the true facts. The New Mexico Court found that there had been a substantial change in circumstances and that appellant was then a fit and proper person to have the children, that the custody should be divided between the parents so that appellant would have them for nine months and respondent for three months, and that respondent should pay certain amounts for child support. Mr. Moniz was required to file a bond in the sum of $1,000 and Mrs. Moniz a bond in the sum of $2,500, as guarantees of the return of the children to each other. On August 10, 1954, Mr. Moniz moved for an appeal of the order but on the same day abandoned it. On August 12, 1954, Mrs. Moniz petitioned the New Mexico court for the complete care, custody and control of the children and alleging the respondent was in arrears in payments under the property settlement agreement and in child support ordered by the Superior Court of Alameda County. Respondent thereupon paid $500 into court, stating that his arrears in the property settlement agreement was due to the fact that appellant was still in contempt of said court for removing the children from its jurisdiction.

On August 28, 1954, the New Mexico court denied appellant's petition and ordered her to deliver the children to respondent on September 1, 1954. Respondent received the children on September 1 and brought them to his home in Oakland where they have since been living with himself and his mother.

On October 13, 1954, respondent filed his notice of motion for an order confirming custody of the children in him as decreed by the Alameda County Superior Court on September 29, 1953, and also requesting any other relief which the court might deem just and equitable. The affidavit in support thereof related most of the facts outlined above.

On November 3, 1954, when the hearing on respondent's motion began, appellant presented herself for sentence for contempt of which she had been adjudged guilty on October 23, 1953. She was fined $200 and

ordered purged of her contempt. Although respondent asked that appellant be not heard because of her contempt, the court gave her a full opportunity to present her opposition through affidavits and witnesses, the court being of the view that the paramount question was the welfare of the children.

After an extensive hearing lasting three days, at which the present home conditions provided by the father and those provided by the mother were testified to in great detail, the court granted respondent's motion for an order awarding to him complete custody of the children, and declaring and confirming that the prior order of September 23, 1953 is in full force and effect, and further ordering appellant to pay her own attorneys' fees and costs.

The trial court made detailed findings as to present circumstances, concluding that appellant was not a fit and proper person to have custody of the children in view of her persistent defiance of court orders, and the court also wrote a very helpful opinion. It was found that her allegation in her answer to respondent's petition in the New Mexico court that she had not been afforded an opportunity to present the true facts "was utterly false, in that she herself had testified before Judge Wagler, had produced a number of witnesses in her behalf, and had been accorded every opportunity to be heard."

The court held that the New Mexico decree did not preclude the order that is the subject of this appeal, and, as an alternative holding, adjudged that there had been a change of circumstances since the rendering of the New Mexico order which would justify the change of custody.

Appellant contends that the New Mexico decree is entitled to be recognized on the ground of comity. Appellant argues that the New Mexico decree was not based upon a finding by the court of that state that there had not been a fair hearing in the Alameda County Court, but that there had been a change of circumstances since that hearing, in that the evidence at the time of the New Mexico decree showed that Mrs. Moniz was then a fit and proper person to have custody of the children. Thus, she argues, the New Mexico decree being based on new and altered circumstances, was not in derogation of the California decree.

Although appellant, in her counter-petition before that court did not allege changed circumstances, but alleged unfairness of the hearing in California, the court found such altered circumstances namely, that appellant then was a fit and proper person to share the custody of the children.

[1] The doctrine of comity does not apply in this case. In the first place, there is a personal bar against the invoking of the doctrine by appellant, because when the New Mexico decree was made, she was acting in open defiance of the decree of the California court. It was her own contumacious conduct which kept the children in New Mexico and without their presence in that state, the decree on which she relies would not have been made.

In Brown v. Brown, 104 Cal.App.2d 88, 230 P.2d 651, the mother had removed the children surreptitiously to the State of Oregon in defiance of a decree of a California court, and, having obtained a decree in Oregon awarding custody to her, attempted to invoke that decree when seeking to obtain the custody of the children, who had been removed by stealth by the father from Oregon. It was held that the mother's position necessarily was inconsistent, in that she succeeded in having the Oregon court ignore the California decree, and then sought to have the California court respect the Oregon decree as that of a sister state.

It is argued by appellant that she had purged herself of contempt; but we do not regard the payment of the fine which satisfied the punitive aspect of the contempt proceeding as correcting her prior actions.

Not only is there incongruity in the position of appellant personally in relying on a foreign decree which was made possible only by her own flouting of the orders of the court of this state, but also there would have been a failure of the superior court of this state to show respect for its own dignity were it to have yielded to a foreign decree so obtained.

[2] That the California court was not bound to follow the decree of another state in the matter of the custody of children, but might itself as parens patriae determine which was for their best interest, is well established. Titcomb v. Superior Court, 220 Cal. 34, 39, 29 P.2d 206; Foster v. Foster, 8 Cal.2d 719, 726, 68 P.2d 719; Sampsell v. Superior Court, 32 Cal.2d 763, 780, 197 P.2d 739; In re Kosh, 105 Cal.App.2d 418, 233 P.2d 598; Stout v. Pate, 120 Cal.App.2d 699, 261 P.2d 788, certiorari denied 347 U.S. 968, 74 S.Ct. 776, 98 L.Ed. 1110; Brown v. Brown, supra.

[3] Ordinarily, after a custody order has been made in another state, the courts of this state will not change it unless there has been a change in circumstances, upon the grounds of orderly administration of justice which will prevent vexatious and interminable litigation and of recognition of the doctrine of comity. In re Wenman, 33 Cal.App. 592, 165 P. 1024; Foster v. Foster, supra, 8 Cal.2d at page 727, 68 P.2d at page 722; In re Marshall, 100 Cal.App. 284, 279 P. 834; In re Livingston, 108 Cal.App. 716, 292 P. 285; In re Kyle, 77 Cal.App.2d 634, 176 P.2d 96; In re Memmi, 80 Cal.App. 2d 295, 299, 181 P.2d 885; Sorrels v. Sorrels, 105 Cal.App.2d 465, 469, 234 P.2d 103.

[4] The change of circumstance rule, however, is not hard and fast, and will yield to other considerations. Foster v. Foster, supra, 8 Cal.2d at page 728, 68 P.2d at page 723; Bogardus v. Bogardus, 102 Cal.App. 503, 283 P. 127; Peterson v. Peterson, 64 Cal.App.2d 631, 633, 149 P.2d 206; Kelly v. Kelly, 75 Cal.App.2d 408, 410, 171 P.2d 95; Cornwall v. Cornwall, 108 Cal. App.2d 95, 110, 238 P.2d 8; Disney v. Disney, 121 Cal.App.2d 602, 607, 263 P.2d 865. In the case before us, orderly administration of justice does not demand application of the rule, but rather would have caused the New Mexico court to have abstained from changing the order of the California court. Nor does comity call for bringing the "changed circumstance" rule into play. Comity being based on mutual respect, can have no firm basis unless a state has regard for its own decrees not less than it has for those of other states.

It is argued that respondent, having invoked the jurisdiction of the New Mexico court (which he could not avoid doing in the circumstances), has submitted to its jurisdiction. Assuming, however, that the New Mexico court had jurisdiction, we believe it did not act with due regard for the decision of the California court and that, therefore, recognition of its decree is not impelled by the deference which commonly is granted to decisions of courts of other states. The children's presence in New Mexico at least since 30 days after they were brought there was accomplished by defiance of the California decree, and the father had pursued his rights under that decree with all diligence.

The Supreme Court of New Mexico has recognized the propriety, in such a case, of abiding by the earlier decree of another state.

In Evens v. Keller, 35 N.M. 659, 6 P.2d 200, 204, there was a situation not unlike the case before us. Both parents of the child being deceased, a sister of its mother and a brother of its father sought custody of the child in the State of Colorado and custody was awarded to the latter. In spite of the decree, the mother's sister fled to New Mexico with the child, and secured a decree of adoption. The supreme court, overruling the trial court, directed that custody be awarded to the father's brother, saying:

> "But the cases holding that another court on the same facts may make a different award of a child's custody from that previously made in another hearing between the same parties on the same subject-matter overlook the decisive consideration that what is best for the child's welfare already has been adjudicated in the prior proceeding. So, in giving effect to a prior adjudication, the court does not depart from the doctrine contended for. It merely recognizes that the question already has been settled and determined.
>
> "Any other rule would be disastrous in the extreme, would reward contempt, and place a premium on abduction. The courts of any one of forty-eight different states would, in the

mind of a designing claimant to a child's custody, offer hope that there could an adverse decision elsewhere be circumvented and a tortious custody of the minor made lawful. Fortunately the jurisprudence of our country has not so moulded the law."

In view of the above, it is not necessary for us to discuss the subject whether or not there were changed circumstances since the New Mexico decree.

The court's order denying counsel fees to appellant because her refractory conduct had made the procedure necessary, was justified.

The order is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

Hearing denied; CARTER, J., dissenting.



142 Cal.App.2d 267

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Fred J. ALLEN and Anthony F. Meyer, Defendants and Appellants.

Cr. 5523.

District Court of Appeal, Second District, Division 2, California.

June 15, 1956.

Rehearing Denied June 27, 1956.

Hearing Denied July 11, 1956.

Prosecution for forgery of fictitious names and for criminal conspiracy. Defendants were convicted in the Superior Court, Los Angeles County, Herbert V. Walker, J., and appealed. The District Court of Appeal, Moore, P. J., held, inter alia, that evidence was sufficient to meet corroboration requirements as to testimony of accomplices.

Affirmed.

1. Searches and Seizures ⇐7(10)

Where officer who stopped flight of defendant did not have knowledge of the crime, seizure of payroll record and tax statement from defendant's person was not legal. West's Ann.Const. art. 1, § 19; U.S.C.A.Const. Amend. 4.

2. Arrest ⇐63(4), 71

Where officers had reasonable cause to believe that defendant had committed a felony, arrests were lawful, and searches and seizures incidental thereto were legal. West's Ann.Const. art. 1, § 19; U.S.C.A. Const. Amend. 4.

3. Criminal Law ⇐1158(4)

Implied finding, in criminal prosecution, that check protector and payroll record were seized after defendant's arrest was binding on appeal. West's Ann.Const. art. 1, § 19; U.S.C.A.Const. Amend. 4.

4. Searches and Seizures ⇐3(1)

Merely because officers could have obtained search warrant did not render illegal their seizure without one. West's Ann. Const. art. 1, § 19; U.S.C.A.Const. Amend. 4.

5. Arrest ⇐71

If defendant's arrest is justifiable, a search of his premises and his person is reasonable as incidental thereto. West's Ann.Const. art. 1, § 19; U.S.C.A.Const. Amend. 4.

6. Searches and Seizures ⇐7(1)

Fourth Amendment to federal Constitution does not forbid all searches, but only unreasonable searches. West's Ann.Const. art. 1, § 19; U.S.C.A.Const. Amend. 4.

7. Criminal Law ⇐1158(4)

Where all conflicts in evidence with reference to defendant's consent to seizure of evidence were resolved by trial court, such resolution was final. West's Ann. Const. art. 1, § 19; U.S.C.A.Const. Amend. 4.

8. Searches and Seizures ⇐7(27)

No seizure for which consent has been given can be unreasonable. West's Ann. Const. art. 1, § 19; U.S.C.A.Const. Amend. 4.

9. Criminal Law ⇐1158(4)

Whether a search or seizure was legal is a question of law to be determined by trial court in first instance, and only way to obviate such determination is to show that there was no substantial evidence in support of it. West's Ann.Const. art. 1, § 19; U.S.C.A.Const. Amend. 4.

10. Searches and Seizures ⇐7(27)

If officers searched before defendant's consent was given, his consent amounted to ratification and search was legal. West's Ann.Const. art. 1, § 19; U.S.C.A. Const. Amend. 4.

11. Searches and Seizures ⇐7(27)

Forged checks obtained from bank on which drawn were not obtained by illegal search. West's Ann.Const. art. 1, § 19; U.S.C.A.Const. Amend. 4.

12. Criminal Law ⇐404(4, 5)

In prosecution for forgery of fictitious names and for conspiracy, testimony of expert witness identifying typewriter as one he had used in writing an exemplar at police crime laboratory was sufficient foundation for introduction of both typewriter and the exemplar. West's Ann. Pen.Code, §§ 182, 470.

13. Criminal Law ⇐1158(4)

Reviewing court accepts the implied finding of the trial court with reference to the veracity and truth of a witness who has testified concerning authenticity of a questioned document or to identity of machine on which document was written. West's Ann.Pen.Code, § 470.

14. Criminal Law ⇐511(1)

In prosecution for forgery of fictitious names and for conspiracy, evidence was sufficient to meet requirements as to corroboration of testimony of accomplices. West's Ann.Pen.Code, §§ 182, 470, 1111.

15. Criminal Law ⇐511(2)

Corroborating evidence is not required to support every fact testified to by an accomplice, but has served its purpose if it merely connects the defendant with commission of the crime, and is sufficient if its combined accumulative weight tends to connect him with the crime charged even though no single isolated act is sufficient. West's Ann.Pen.Code, § 1111.

16. Criminal Law ⇐780(3)

In criminal prosecution, instruction to effect that jury should give to testimony of an accomplice the weight to which jury found it to be entitled after examining it with care and caution and in light of all evidence in the case was not erroneous as omitting phrase "if any" or implying that weight should be given to testimony of accomplice. West's Ann.Pen.Code, § 1111.

17. Criminal Law ⇐1137(3)

He who induces an error by his own proposed instruction is estopped from attacking it.

18. Criminal Law ⇐511(3)

Corroborating evidence required by law may be circumstantial as well as direct, and entire conduct of accused himself, both as witness in his own behalf and at times other than at the trial, as shown by evidence, along with all other evidence in the case, may be looked to for corroborative circumstances. West's Ann. Pen.Code, § 1111.

19. Criminal Law ⇐780(4)

In criminal prosecution, instructions including statement that corroborating evidence required by law may be circumstantial evidence as well as direct was not susceptible of construction that jury was instructed to believe that corroborative evidence was sufficient although it proved only circumstances of the offense. West's Ann.Pen.Code, § 1111.

20. Criminal Law ⇐511(3)

Evidence of circumstances is sufficient corroboration of an accomplice's testimony, and corroborating evidence may be inferences drawn from circumstances of the crime. West's Ann.Pen.Code, § 1111.

21. Criminal Law ⇐511(3)

Any circumstantial evidence is sufficient to corroborate testimony of accomplice if it proves that accused was connected with the criminal act. West's Ann. Pen.Code, § 1111.

22. Criminal Law ⇐1186(4)

Where appellants did not show injury resulting from instruction, reversal could not be ordered because of contents of the instruction. West's Ann.Const. art. 6, § 4½.

23. Criminal Law ⇐406(3)

If defendant's admissions were made freely and voluntarily at any time after arrest, they were admissible, even if he was not speedily taken before magistrate.

Charles B. Taylor, Los Angeles, for appellant Fred J. Allen.

Morris Lavine, Los Angeles, for appellant Anthony F. Meyer.

Edmund G. Brown, Atty. Gen., Rudolph Pacht, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appellants were convicted of criminal conspiracy in violation of section 182 of the Penal Code (Count I) and for forgery of fictitious names, (Counts II through V) in violation of section 470. The conspiracy was with Titus, Tyhurst and Ogan to print, forge and pass forged checks. The remaining counts charged appellants with forgery of fictitious names by making, passing and uttering and with aiding and abetting in the making, uttering and passing of specific fictitious checks, each in the sum of $92.73 on November 26, 1954, with intent to defraud specified persons.

They base their appeal on the alleged insufficiency of the evidence, admission of allegedly illegal evidence; conviction on the uncorroborated testimony of accomplices; illegal instructions with reference to the testimony of accomplices.

Evidence Sufficient

In November 1954 appellant Meyer worked with Robert Titus for the same firm. Meyer was the credit manager; Titus was the collector. In September, Titus told Meyer that he, Titus, was "broke" and must supplement his income. They discussed the possibility of uttering some fictitious checks. Meyer considered the matter and told Titus it was possible for the latter to acquire the checks needed and that some of Meyer's acquaintances were engaged in that line of business. Such and similar conversations became frequent thereafter until November 26, 1954. After they had agreed upon the possible success of the wayward enterprise, Meyer promised to get the checks. Allen, an associate of Meyer, joined in their conversations in late October, after which they agreed upon where and how to get the required paper, who would type the checks, who would cash them and how they should divide their sinfully gained wealth. Meyer and Titus discussed the appearance of the checks, the houses against which they should be drawn and agreed to have between 80 and 100 cashed in specified areas. Meyer told Titus "he had a printer who could print these checks up so they would be very good." Also, he told Titus that whoever the latter chose to cash the checks should have 50 per cent of the collections and that Meyer should keep the other half of such proceeds out of which the costs incurred for printing and paper should be paid. Titus then told Meyer he would induce his friend Tyhurst who was penniless and unemployed, to pass the checks. But Meyer required of him that any person selected should be so well known to Titus that the latter would know that such person would keep his mouth shut, not know much about their scheme and would follow orders. As further inducement, Meyer assured Titus that if the latter should be arrested, he and Allen would post bail and retain a lawyer for his defense.

Pursuant to instructions, Titus, about November 1 conferred with Allen about the details for carrying out the plans and how to pass the checks. They discussed the methods and the localities for cashing the checks and the types of stores to be victimized. By this time the printer had the checks ready to go. Titus had introduced Tyhurst to Meyer and had talked with both of them about the plan, but Tyhurst witnessed no conversation between Allen and Titus until the checks were in a condition for use.

About the time the checks were ready, Lew Ogan was employed by a phototypography company. He had done some work for Allen. When Meyer asked him to

print some pay-roll checks, he refused. Such request was repeated in a number of conversations during which Meyer told Ogan "he was desperate for money and this was one way to make money." Finally, after Ogan's share of the fruits of their crimes had been agreed to, Ogan promised to order the paper and print the checks.

On November 23, 1954, Ogan, pretending to be Don George, ordered fifty sheets of the selected paper for $2.00. He telephoned Meyer that the paper could be got at the Kelly Paper Company, and Meyer told Titus to remind Allen to pick up the paper to be used for printing the checks. Titus followed his instructions and he was told by Allen that he had called the order in and it was ready. Allen gave Titus some money and a memorandum containing only "Don George" and "Kelly Paper Company."

Titus called for the paper, found it wrapped in wrapping paper with a sample on the outside which appeared similar to that on which some of the forged checks were printed. Titus took the paper to Allen's office which the latter operated under the name *National Business Counsellors* on Melrose Avenue about ten days before the checks were made ready for use. Allen told Titus he would send the paper out to be printed and that Titus would be advised when the checks were ready but to keep in touch with Meyer. On an afternoon in late November, Allen admitted that Titus had brought him a package and that Ogan had called for it about Thanksgiving day.

Ogan took the paper to his shop; printed four checks on each sheet, used the names of companies selected by Meyer at random from the telephone directory. Titus telephoned Meyer that the ink was still wet on the checks and that the passing of them would have to be postponed until the day after Thanksgiving. But when that day arrived Meyer telephoned Titus the checks were ready and that Tyhurst and Titus should report to Allen's office. This they did.

On their arrival, Allen was already there. He had telephoned Titus and Tyhurst that Lew Ogan was the printer and was on his way with the checks. The latter soon arrived with the checks in uncut sheets. Also, he brought a paper cutter with him. He found Allen, Titus and Tyhurst there with the package of checks and a paper cutter. The sheets of check forms were on paper similar in color to that Titus had chosen at Kelly Paper Company. They were drawn on four different companies of Los Angeles and were in different colors which were similar to those of the checks in evidence. (Exhibits 4, 5, 6, 7.) The check forms purported to be those of the purported makers thereof. The printing on the check forms was similar to that on exhibits 1, 2, 4, 5, 6, 7 and 13 [1], but there was neither typewriting, hand writing nor check protector impressions on them.

Allen had Tyhurst and Titus take the check forms, paper cutters and typewriter downstairs where they cut and typed the checks. Allen identified exhibit 10 as his typewriter which had been in his own office in the very month the checks were written. He gave Titus and Tyhurst his key to the downstairs room where they were joined by Ogan as they cut and typed the

1. Exhibit 1, check purportedly given by LaBrea Plumbing Service to "Robert S. Gordon", dated November 26, 1954, sum of $92.73, passed at May Company by Titus. Count II.

Exhibit 2, check passed at Hollywood Ranch Market by Tyhurst, referred to in Count III.

[Exhibit 3, photograph taken of Tyhurst at Hollywood Ranch Market at time he passed exhibit 2.]

Exhibit 4, purported payroll check of "Elite Glass & Paint Co" to "Phil L. Bonardi", cashed at Hotel Green, Pasadena. Count IV.

Exhibit 5, check passed at Hattie's Bar in Pasadena, Count V.

Exhibit 6, purported "Ames Harris Neville Co." payroll check to "Robert S. Gordon" dated November 26, 1954, for $92.73.

Exhibit 7, purported "Pacific Iron Products" payroll check.

Exhibit 13, includes 69 checks payable either to "Robert S. Gordon" of "Richard A. Williams" on November 26 for $92.73 each, all signed with "R. A. Morris" but in different penmanships.

checks and inserted the amounts on them. Allen identified exhibit 9 as his check protector.

The checks were signed principally by Titus and Tyhurst. Each affixed the name "R. A. Morris" as maker of the checks. Titus typed the amount, $92.73 and a variety of fictitious names of the payees. Allen had Titus insert "Phil L. Bonardi" as payee in some 25 of the checks and at the same time presented a driver's license issued to that name. Also, Allen designated which checks were to have "Bonardi" as payee for he had a party who would cash them in Pasadena. At the same time, Allen gave them other drivers' licenses and other identification devices for "Robert S. Gordon" and "Richard Williams." One such device was a "payroll record and tax statement" showing a payment to Richard A. Williams in the sum of $92.73. It was not prepared by anyone of the confederates present. Three checks prepared on the occasion last related were received in evidence as exhibits 1 and 7 and 13. Meyer entered the room and engaged in a conference with Allen and Titus on the matter of the disposition of the money Titus would receive from passing the checks. Before they dispersed, Meyer and Allen returned the paper cutter to Ogan.

Cashing the Checks

Booted and spurred for the consummation of the crimes, Titus and Tyhurst left Allen's office with 80 beautiful checks that in color and design might have reflected credit upon the Standard Oil Company. They purported to have been issued by the firms whose names appeared as makers on exhibits 1, 2, 4 and 5. Titus presented exhibit 1 to May Company Crenshaw, identified himself as "Robert S. Gordon" and collected $92.73. About midnight of the same day, Tyhurst cashed a check, exhibit 2, at the Hollywood Ranch Market after he identified himself as "Richard A. Williams" by use of a driver's license for that name.

On the following day, Titus and Tyhurst moved in on the peaceful community of Westchester. After an unsuccessful attempt at the store of X, they entered the store of Y. Thereupon, the manager of X, having become suspicious, followed them into Y at the moment Titus was negotiating to cash a check. Tyhurst, wary and alarmed, entered Y and observed to his companion that "something is definitely amiss." Both thereupon took flight. As an alert officer attempted to apprehend the two, Titus made his escape, but Tyhurst was caught after he had cast some checks and money into a trash can. But he still had one check, exhibit 4, at the time of his arrest. He had taken exhibit 14 from Allen's office as he and Titus left on their brief criminal career.

Although thwarted, the law was not long delayed in bringing the authors of that conspiracy to an accounting. Titus drove from Westchester into Baldwin Hills, buried a check, exhibit 13, under a piece of asphalt, reached his home, changed his apparel, returned to Allen's office, and reported their encounter with the officers. Allen directed him to hide out and get rid of the typewriter. Titus gave Allen the $91 he had and reported how Tyhurst had put his money and checks into an ash can behind a store. He hid the typewriter on a vacant lot about three miles distant.

During the ensuing days, Titus talked telephonically with Meyer and Allen to whom he had reported exactly what had happened at the Westchester store and he testified to the same facts in court. When he reported it to Allen, the latter promised he would attempt to get Tyhurst out of jail. Impatient at the promised attempt, Titus called at Tyhurst's home, visited with his own family, inquired whether Tyhurst's mother had heard from her son. Plainclothed detectives thereupon took Titus away for further questioning.

They searched his office and seized six pieces of paper with pencil writing on them. Such writing was the repeated "signatures" of names the men had used on their fictitious checks and had been written within the two weeks preceding Titus' visit to May's Crenshaw.

Titus Confesses

Two days after the search of Titus' office, the detectives returned and took him away to jail. There he told the officers of all that had transpired between appellants and himself and gave them his signed written state-

ment. Also, with the officer he visited the scene of the hidden typewriter and buried check and the places where Tyhurst had cashed checks. The officers took into custody all objects used during the conspiracy and in passing the checks. Titus identified exhibit 10 as probably the typewriter used in typing the amounts on the checks and the names of the fictitious payees and as the machine he had removed from Allen's office and thrown over the fence.

Was there Illegal Search and Seizure?

Appellants contend also that exhibits 9, 10, 11, 12–A, 12–B, 12–C, 14 and 23 were evidence seized as a result of an unreasonable search and seizure in violation of the 4th Amendment to the federal Constitution and of article I, § 19 of the California Constitution. Their argument is that prior to Allen's arrest, the police had called at his office and seized the check protector (ex. 9) and a payroll record slip (ex. 11) and took them away. The circumstances of the seizing of those exhibits were testified to by witnesses for the People, which testimony was adopted in preference to that of defense witnesses.

After the officers had taken Meyer into custody December 16, 1954, they arrived at Allen's office about 10:00 a. m. Officers Anderson and Wallace went upstairs. Mrs. Mollot, the "legal" secretary, met them in the reception room. After some conversation, Mrs. Mollot had Mrs. Allen join her in a conference with the men. Mrs. Mollot told the officers that Mr. Allen was not in, one officer asked to see the place. They told her they had no search warrant, but that they were policemen. "We don't need it." They brushed Mrs. Mollot aside, and entered Mr. Allen's personal office at the rear.

Both ladies followed the officers into Allen's office and remained more than an hour. Officer Wallace without express permission took the check protector from the cabinet. Allen had not specifically authorized anyone to release the device to the officers. Mrs. Allen and Mrs. Mollot both identified exhibit 9 as similar to the check protector removed from Allen's office. The detectives removed also from Allen's desk, without permission, a pad of payroll record slips on which they had Mrs. Mollot place her autograph. (Ex. 11.) Allen had never specifically given consent to its removal. The officers did not ask permission to remove anything from Allen's office, but when Allen's attorney arrived 45 minutes after the officers had entered, he approved of Mrs. Mollot's signing the payroll slip after she had done so. Also, while the lawyer was present, a specimen of the impression of the typewriter was taken without objection. The lawyer did not protest when the officers departed with the specimen, the check protector and the payroll slip.

Mrs. Mollot identified exhibit 10 as the typewriter that had been in Allen's office.

While the officers were upstairs with Mrs. Allen and the lawyer, Allen was himself seated in an automobile, back of the building in the custody of an officer. His wife saw him there, but she testified that before he arrived, the officers had removed the check protector.

Allen had been arrested about five miles from his office at 10:30 a. m. He did not recognize the typewriter in the police car, but after his release, he discovered that one of his typewriters was missing.

The officers gave a slightly different version of their meeting with Mrs. Mollot and Mrs. Allen. Anderson denied that anything was said about a search warrant; he said he did not need a warrant for Allen yet; a search warrant was not mentioned. Anderson and Mollot together went into Allen's office, looked around and walked out. Wallace listened in on a telephone call and heard a woman warn a man: "The police are looking for you." At the second ring, a male voice said the police were in his office but he was at the barbershop.

Officer Smith testified that while Wallace and Anderson were inside Allen's office, he sat in a police car with Meyer and Whiteaker; that as Wallace came out he gave Smith a telephone number for the latter to get its address. Thereupon Smith and Wallace called at the barbershop and arrested Allen and had him inspect the typewriter in Smith's car. They drove to a point a short distance from Allen's office. Leaving Allen with Smith, Wallace approached the office where he met Allen's attorney with Anderson who [when Wallace informed

Anderson that Allen was in custody, Anderson] told him to bring Allen upstairs where he wished to get the check protector and other items. When Wallace asked Allen to accompany him upstairs to get the check protector, Allen said he was suffering from an injured back and preferred not to climb the stairs. When informed that his attorney was upstairs, he said that is okay; that he cared nothing about the check protector. "It won't do you any good."

On his return to Allen's office, Wallace found Attorney Duffy, Mrs. Mollot, and Officer Anderson searching Allen's desk for a withholding form Anderson had requested. Upon their discovery of a pad of such forms, Mrs. Mollot signed one (Ex. 11) with Duffy's approval.

After Allen had remained in the police automobile for about 20 minutes, he accompanied the officers to the front. Smith took the exemplar from the typewriter on Allen's desk, wrote the serial number of the machine on a scrap of paper and Mrs. Mollot signed it. She supposed that the parts of the typewriter were in Allen's desk. Only he had the key. Smith asked Allen for the key to his desk and asked him to return with him to his office to do a little checking. Allen declined with the excuse that he had been in an accident and was sore and bruised; did not care to face his employees; Smith might go ahead and look; he would find nothing; he could do what he wished and gave Smith the key to his desk.

Allen's denial of such conversation was rejected by the jury.

Nothing was found in the desk. During the entire search and removal of things from the office, Allen's attorney was present but made no protest. Wallace and Allen entered Smith's car but inside, Smith, Anderson and Whiteaker searched the downstairs room where the checks had been prepared and brought forth the check protector and typewriter exemplar. Then they departed with appellants for the jail.

Allen denied having seen the check protector at any time from his arrest to his arrival at the Venice station, but he never told Smith or any officer to refrain from taking anything.

It was stipulated that prior to December 16, 1954, the officers had reasonable cause to believe that Allen had committed a felony, forgery of fictitious name, and that prior to December 16, 1954, they had time within which to obtain a search warrant.

Other Evidence

Titus

Titus identified the check protector (Ex. 9) as the instrument used in preparing the checks. He identified the batch of checks (Ex. 13) as those he had hidden in the Baldwin Hills.

Allen kept a checking account at the Bank of America in the name of his "National Business Counsellors." Three of his checks (Ex. 12) were signed by him and debited to such account on November 29, 1954. An expert testified that the same check protector used on them was used also on exhibits 1, 2, 4, 5, 6, 7 and other checks. An expert on questioned documents identified the exemplar from the typewriter (Ex. 10) as having been written on the same machine that produced exhibits 1, 2, 5, 6, and 7.

Ogan

In the presence of Meyer, Titus and Tyhurst and the other officers, Smith elicited certain statements from Ogan on December 16, 1954, and testified substantially as follows:

Ogan said Meyer asked him whether he would print some checks for him, but he refused. Again Meyer asked him to print the checks. Finally, he agreed to do so. He said Meyer wanted one hundred checks on four companies; he would receive $50 when he made the checks and if they were passed, he would get more. He said he telephoned a paper company under a fictitious name and ordered the paper; telephoned Meyer where the paper could be had; later, Allen telephoned him and he called on Allen and got the paper and instruction to fix them up; he took the package back to his place; scanned the yellow pages and picked four firms to use on the checks; after he had printed them but before they were cut, Allen telephoned to know whether they were ready; he told Allen they were in sheets of four and

that Allen would have to cut them; Allen asked him to bring his paper cutter and the checks to Allen's office; on arriving there he met Titus and Tyhurst, both strangers then; Allen told Titus to take the check protector, the typewriter and the checks to a basement office and fix them up; he accompanied the men to the basement and showed them how to operate the cutter as well as to clear the check protector of the plate that stamped "National Business Counsellors" and to insert in its stead "The sum of"; he returned to his work and later Meyer telephoned him that Titus and Tyhurst had been arrested.

Meyer Interviewed

Further, Smith continued, Meyer said that Ogan's statement was true wherever he, Meyer, was mentioned; Meyer said he did not know whether the idea of having the checks printed was his own or that of Titus; the latter had come to him saying that he needed money and in a few days one or the other suggested passing these checks; he did not recall telling Ogan to print any particular company on them; he was at Allen's office November 26 and saw Titus and Tyhurst working at something with a typewriter; he did not see what they were doing; he didn't wish to see; he contacted Ogan to print the checks, but did not remember how many checks he asked him to print; he did not remember what had been promised Ogan for printing the checks; that he had made several telephonic calls in reference to the checks; he had first been approached by Titus about passing the checks, had at first declined the proposal in early November, but later he told Titus he had known a party that might be available, and he contacted Ogan.

Meyer's Testimony

Meyer testified that he told Ogan a friend desired to pass some checks and wished to have Ogan make them for him; that Ogan declined the job; did not wish to get involved in such a scheme. Also, he testified that after his talk with Ogan, he had a conversation with Titus and that the latter had telephoned him to make another attempt; that he did so and again Ogan rejected the offer saying he would have nothing to do with it; that he had in several conversations asked Ogan to print the checks and had told the officers at the Venice station that Ogan had notified him that the paper was ready; that he had told the officers he was present while Titus and Tyhurst were typing in Allen's basement office November 26, 1954; that the only part he had played was his arrangement with Ogan to print the checks.

Prior to the trial, Titus and Tyhurst had pleaded guilty to one count of forgery of fictitious name and been placed on probation for five years.

No Illegal Search or Seizure

[1] Appellants contend that they were prejudiced by the admission of documents and other items of personal property taken from their possession by an illegal search.[2] There was neither illegal search of any defendant nor illegal seizure of any of the items with the lone exception of exhibit 14. It was taken from Tyhurst's person while in flight from the policeman at Westchester. At that time the officer did not have knowledge of the crime or that Tyhurst was involved in a felony. The payroll record was obviously admitted through inadvertence. However, neither appellant bases his argument upon that exhibit.

[2] As to all other exhibits, they were taken in searches incidental to the arrests. At the time of the search of Tyhurst and Titus, they were in the act of committing a felony and when Allen's office was searched and the items seized, the officers

2. The Exhibits objected to were:
9 The check protector.
11 The Ideal Payroll Record and Tax Statement form taken from National Business Counsellors.
12 The three National Business Counsellors' checks.
14 The Ideal Payroll Record and Tax Statement made out for "Richard A. Williams" indicating a payment of $92.73, and taken from Tyhurst's possession at the time of his apprehension.

had good reason to believe that he was equally guilty. But for all that, it was stipulated that prior to December 16, 1954 "the officers had reasonable cause to believe that Allen had committed a felony." (See supra.) Therefore, the arrests were lawful and the searches and seizures, being incidental thereto, were legal. In re Dixon, 41 Cal.2d 756, 761, 264 P.2d 513; Agnello v. United States, 269 U.S. 20, 36, 46 S.Ct. 4, 70 L.Ed. 145.

[3–6] Exhibits 9 and 11 were not illegally removed. Both were taken after Allen's codefendants had disclosed the entire scheme to the officers and the latter knew sufficient of the facts to warrant Allen's arrest. In fact, he was under arrest at the time his office was searched and those items were seized. Also, Mrs. Mollot testified that Allen's attorney advised her to sign her name on exhibit 11. The contradiction of the People's witnesses on the incidents of the arrests and the searches is no longer of any value, the trial court having resolved such contradictions against appellants. The implied finding that exhibits 9 and 11 were seized after Allen's arrest is binding on appeal. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778; People v. Frankfort, 114 Cal.App.2d 680, 701, 251 P. 2d 401. The contention that the admission of exhibits 9 and 11 was error because they were taken in Allen's absence is without merit. Neither was it unreasonable to remove such exhibits without a search warrant. Merely because the officers could have obtained a search warrant does not render illegal their seizure without one. Even though officers have time to procure a search warrant to search the person or premises of a suspect, if his arrest is justifiable, a search of his premises and his person is reasonable as incidental to a lawful arrest. United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653; Trupiano v. United States, 334 U.S. 699, 68 S.Ct. 1229, 92 L.Ed. 1663. The Fourth Amendment does not forbid all searches but only unreasonable searches. The authors of the Bill of Rights did not suggest or imply that when law enforcing agencies have learned that a person has committed a felony, they must await the convenience of the offender before moving into his lair. They were wrestling with the problems that had arisen from the arbitrary searches by the minions of an arbitrary despot. They had not conceived of the difficulties to be encountered by a generous government in dealing with arbitrary criminals in a complex society with countless avenues whereby to secrete the evidences of their crimes. But clearly they did reckon upon the apprehension of criminals and did not aim to inhibit prompt, reasonable searches to the end that after the robber has been arrested the officer might without a search warrant make a search as an incident of the arrest. United States v. Rabinowitz, supra, 339 U.S. at page 64, 70 S.Ct. at page 434. While the court condemned "general, exploratory searches," it did not suggest as violative of the constitution a reasonable search for specific evidence at the locale of the crime.

In the case at bar, the officers knew that a series of vicious crimes had been undertaken. While they had the confessions of some accomplices, in order to gain convictions they knew that concrete evidence would be essential to a satisfactory corroboration. They knew the check protector and the payroll record and tax statement such as they had found on Tyhurst would advance the cause of justice.

[7–9] The claim that exhibits 9 and 11 were seized without Allen's consent is to ignore the implied finding that the officers knew that Allen had consented to the removal of both exhibits. See People v. Gorg, 45 Cal.2d 776, 783, 291 P.2d 469. He himself practically consented to the removal [3] of the check protector (Ex. 9) and his secretary inscribed her name on the Ideal Payroll (Ex. 11) as the officers took having been resolved by the trial court, it is final here. Dillard v. McKnight, 34 Cal. 2d 209, 223, 209 P.2d 387, 11 A.L.R.2d 835. it away. All conflicts in the evidence with reference to Allen's consent to the seizure

3. When Anderson told Smith to bring Allen upstairs, attempt at compliance was frustrated by Allen who said, "I don't want to go upstairs; whatever happens is OK." Also, he gave his desk key to the officers.

No seizure for which consent has been given can be unreasonable. People v. Michael, 45 Cal.2d 751, 753, 290 P.2d 852. Whether a search or seizure was legal is a question of law to be determined by the trial court in the first instance. The only way to obviate such determination is to show that there was no substantial evidence in support of it. See People v. Newland, supra, 15 Cal.2d 678, 681, 104 P.2d 778; People v. Camargo, 130 Cal.App.2d 543, 549, 279 P.2d 194.

[10] The contention that the search was illegal has no basis in fact. Even though the officers might have entered his office in his absence, they took nothing away until after his arrest and his consent to the removal of the exhibits in question. If the officers inspected and stood by to prevent a spoliation of evidence, the search was ratified by him and was therefore legal. See People v. Winston, 46 Cal.2d —, 293 P.2d 40.

Three Checks Taken From the Bank

[11] It is not true that the three checks (Ex. 12) were obtained by an illegal search. They were obtained from the bank on which they had been drawn by Allen for the payment from his funds of the amounts specified.

[12, 13] The typewriter Titus hid behind the fence was recovered by the officers and was received in evidence as exhibit 10. The expert witness Sloan, identified it as the typewriter he had used in writing an exemplar (Ex. 23) at the police crime laboratory. Such testimony was sufficient foundation for the introduction of both exhibits. A reviewing court accepts the implied finding of the trial court with reference to the veracity and truth of a witness who has testified concerning the authenticity of a questioned document or to the identity of the machine on which the document was written. The witness had no doubt that exhibit 10 was used in writing the four checks. No error in receiving in evidence either of such exhibits. Exhibit 10 was an important item in that after Tyhurst's capture, Allen told Titus to destroy it and the latter led the officers to recover it.

Accomplices Corroborated

There was sufficient corroboration of the confederates who testified against appellants. Allen corroborated Titus and Ogan by his admission that Titus brought a package to him at his office the very day he had conversed with them about it. It was proved by the expert witnesses that exhibit 23 had been prepared on Allen's typewriter and the check protector was used in preparing the forged checks. Also, Allen testified that the check protector (Ex. 9) and the typewriter (Ex. 10) were his own and were in his office in November 1954. That corroborated the testimony of Ogan and Titus to the effect that Allen told Titus, Tyhurst and Ogan when Ogan came to Allen's office to take (1) the check forms Ogan had printed on safety check paper, (2) the paper cutter, (3) the typewriter and (4) the check protector from Allen's to a downstairs office to begin the preparation of the checks.

Tyhurst testified that the "Ideal Payroll Record and Tax Statement" (Ex. 14) was given to him by Titus at Allen's office, November 26. A duplicate (Ex. 11) of exhibit 14 was taken from a pad of such forms in Allen's desk. Also, Mrs. Mollot testified that only Allen had its key. Those items of testimony corroborate the testimony that Allen participated in the conspiracy.

Titus testified that he hid the typewriter on Allen's instructions. It was stipulated that the check protector (Ex. 9) was sent out of Allen's office November 30, 1954, the day of Titus' arrest, and that it remained away for several days. The stipulation tended to corroborate the testimony of Titus that it was on Allen's instructions that he hid the typewriter.

Ogan had testified to conversations he and Meyer had concerning the printing of the checks. Meyer gave similar testimony and, also, testified, as did Titus, about their conversation with reference to Meyer's persuading Ogan to print the checks. After Meyer had admitted to Officer Smith that Titus had originated the idea to pass forged checks, Smith testified to Meyer's admission.

Not only did Smith testify that Meyer admitted to him that the latter had requested

Ogan to print the checks, but also that Meyer had made calls on Ogan to do the printing. That corroborated the testimony of Ogan and Titus on the same subjects.

Meyer told Smith that he, Meyer, did not recall how many checks he asked Ogan to print. Also, he told Smith he did not recall what Ogan was to be paid. That corroborated testimony of Ogan and Titus as to Meyer's conversations with reference to the same subjects.

Meyer admitted to Smith that Ogan's statements were correct in so far as they told the part Meyer had played in the conspiracy; also that he had agreed to have the checks printed. Smith's testimony of such admissions corroborated testimony of Ogan and Titus. Also, Meyer admitted to Ogan that the latter notified him that the paper was ready and that he was at Allen's office November 26, 1954 and saw Titus and Tyhurst preparing the checks in the basement.

[14, 15] Such testimony fully meets the requirements of section 1111 of the Penal Code. Standing alone, it does not with exactness establish the facts as testified by accomplices, but it tends to connect appellants with the conspiracy and makes them accessories to the forgeries by Titus and Tyhurst. It is, therefore, sufficient corroboration. People v. MacEwing, 45 Cal.2d 218, 224, 288 P.2d 257; People v. Santo, 43 Cal.2d 319, 327, 273 P.2d 249; People v. Simpson, 43 Cal.2d 553, 563, 275 P.2d 31; People v. Perry, 123 Cal.App.2d 74, 80, 266 P.2d 515; People v. Califro, 120 Cal.App.2d 504, 514, 261 P.2d 332. Corroborating evidence is not required to support every fact testified to by the accomplice. It has served its purpose if it merely connects the defendant with the commission of the crime, People v. Gallardo, 41 Cal.2d 57, 62, 257 P.2d 29; People v. Simpson, supra, and it is sufficient if its combined accumulative weight tends to connect the defendant with the crime charged, even though no single isolated act is sufficient. People v. Trujillo, 32 Cal.2d 105, 111, 194 P.2d 681; People v. Henderson, 34 Cal.2d 340, 342, 209 P.2d 785; People v. Lindsey, 90 Cal.App.2d 558, 562, 203 P.2d 572. The proof that Allen had in his office the typewriter (Ex. 10) and the check protector (Ex. 9) used in making the checks was excellent corroboration of the testimony of Titus, Tyhurst and Ogan. People v. Keene, 128 Cal.App.2d 520, 525, 275 P.2d 804; People v. Morris, 110 Cal. App.2d 469, 477, 243 P.2d 66. In People v. Flood, 41 Cal.App. 373, 376, 182 P. 766, the accused was charged with forging checks. His accomplice testified as to the manner in which the checks had been prepared. The corroborative evidence was the typewriter used in writing the checks and that was established by comparing the checks with an exemplar taken from the machine and by proof that the defendant had possessed the typewriter at a particular time.

Inasmuch as no statute has been enacted defining what constitutes corroboration, except that it must tend to connect the defendant with the commission of the crime, the several decisions of the appellate courts have settled that the corroboration of the accomplices in this action is abundant and complies with the evident intention of the Legislature. It is neither imagination nor suspicion, but substantial.

Instructions

The court instructed the jury at the request of appellants as follows:

"It is the law that the testimony of an accomplice ought to be viewed with distrust. This does not mean that you may arbitrarily disregard such testimony, but you should give to it the weight to which you find it to be entitled after examining it with care and caution and in the light of all the evidence in the case."

[16, 17] Appellants says the instruction is erroneous in that it omits the phrase "if any" and that it implies that weight should be given to the testimony of accomplice. No such construction could reasonably be given the instruction. It did not preclude the jury from giving little weight or no weight to the accomplices' testimony. Under it the jury could accept or reject all the testimony of accomplices. Appellant Meyer has no cause for complaint even if the instruction had been erroneous for he invited it. Saltzen v. Associated Oil Co., 198 Cal. 157, 161, 244 P. 338; Bates v. Newman, 121 Cal.App.2d 800, 808, 264 P.2d 197. He who induces an error by his own proposed

instruction is estopped from attacking it. Shapiro v. Equitable Life Assurance Society, 76 Cal.App.2d 75, 94, 172 P.2d 725; Jackson v. Superior Court, 10 Cal.2d 350, 358, 74 P.2d 243, 113 A.L.R. 1422.

The court gave the following instruction:

"The corroboration of the testimony of an accomplice required by the law is not sufficient if it merely shows the commission of the offense or some or all of the circumstances thereof, or if it does no more than raise a suspicion of the guilt of the defendant. On the other hand, it is not necessary that the corroboration extend to every fact and detail covered by the testimony of the accomplice [nor need it show the commission of the crime].

"The corroboration of the testimony of an accomplice is sufficient if, of itself alone, it tends to connect the defendant with the commission of the offense, although it may be slight and although if, standing by itself, it would be entitled to but little consideration.

"The corroborating evidence required by the law may be circumstantial as well as direct and the entire conduct of the accused himself [both as a witness in his own behalf and at times other than at the trial], as shown by the evidence, along with all other evidence in the case, may be looked to for corroborative circumstances."

[18–22] The first part is taken from California Jury Instructions Criminal (CALJIC); the italicized portion was added by the court and it is a correct statement of the law. It is not susceptible of the construction that the jury is instructed to believe that corroborative evidence was sufficient although it proved only the circumstances of the offense. It is held that Penal Code section 1111 is correctly interpreted as stating that evidence of circumstances is sufficient corroboration of an accomplice's testimony. People v. Temple, 102 Cal.App. 2d 270, 277, 227 P.2d 500. Corroborating evidence may be inferences drawn from the circumstances of the crime. Any circumstantial evidence is sufficient to corroborate under section 1111 if it proves that the accused was connected with the criminal act. People v. Santo, 43 Cal.2d 319, 327, 273 P.2d 249; People v. Berger, 128 Cal.App.2d 509, 513, 275 P.2d 799. Since appellants have not shown that injury to appellants resulted from the instruction, a reversal could not be ordered because of its contents. Const. art. VI, § 4½; People v. Wheeler, 65 Cal. 77, 78, 2 P. 892; People v. Malley, 49 Cal.App. 597, 606, 194 P. 48.

Limit on Voir Dire Examination

[23] Appellant Meyer contends that the court erred in limiting the voir dire examination of Officer Smith who testified to certain admissions of Meyer at the Venice Police Station. Meyer's counsel then undertook to show that prior to the "confession" or admissions of Meyer, he had been deprived of food and had not been taken before a magistrate. He now argues that he was denied the right of due process of law and that his statements to Smith were not free and voluntary. If his rights had been violated by the officer in not more speedily taking him before the magistrate, he should have sought relief through the proper channels. He cannot escape the penalties for a felony because he imagines that he was not conveyed promptly before the magistrate at the time of his apprehension. There is no claim by appellant Meyer that his admissions were forced by fear or menace or promise of reward. If made freely and voluntarily at any time after arrest, they are admissible. 19 A.L.R.2d 1332, 1336. A voluntary admission is not a necessary product of the illegal detention. While a coerced confession gives the victim no chance to speak his own thoughts, one who voluntarily announces his own conclusions or narrates his own experience has been deprived of nothing. Therefore, if Meyer made admissions to Smith of his own free will, the exclusionary rule is not applicable. Rogers v. Superior Court, 46 Cal. 2d 3, 291 P.2d 929. When first asked by the officer whether he cared to tell about his part in the passing of the fictitious checks, he said he did not care to make a statement until he had seen his attorney. His prior with the law had acquainted him with his constitutional rights.

Now, as to abbreviating the voir dire examination by Meyer's counsel, there was

no such thing. Three questions were asked, whereupon Meyer's lawyer announced: "I have no further questions." He chose to abandon his quest; was not ordered to desist.

The judgments are affirmed.

FOX and ASHBURN, JJ., concur.



142 Cal.App.2d 367

Dolores Irene PROVOST and George Francis Provost, Plaintiffs and Respondents,

v.

Richard Owen WORRALL, Defendant and Appellant.

Civ. 16711.

District Court of Appeal, First District, Division 1, California.

June 19, 1956.

Hearing Denied Aug. 16, 1956.

Action by passengers in automobile against driver for injuries sustained in accident in Washington. The Superior Court, City and County of San Francisco, Edward Molkenbuhr, J., rendered judgment for plaintiffs and granted new trial on issue of damages alone, and defendants appealed. The District Court of Appeal, Bray, J., held that under circumstances presented in action by automobile passengers against driver for injuries sustained in accident, including circumstances that issue of liability was close and that damages awarded were not commensurate with the injuries shown by undisputed testimony, the verdicts appeared to be compromise verdicts, and trial court abused discretion in granting new trial on issue of damages alone.

Judgment and order reversed.

1. Automobiles ⇐229½

Action in California court for injuries sustained in automobile accident in Washington was governed by Washington law, but matters of procedure were governed by law of the forum.

2. Automobiles ⇐245(24)

Under the Washington automobile guest statute, question whether an invitee in an automobile who contributes toward its operation is considered a guest without payment is primarily a matter for the jury's determination. RCW 46.08.080.

3. Automobiles ⇐245(24)

In action by automobile passengers against driver for injuries sustained in accident, evidence was sufficient to take to jury question whether driver had received payment for the transportation, within Washington guest statute which provides that a gratuitous guest may not maintain an action against host for negligence. RCW 46.08.080.

4. Negligence ⇐117

Contributory negligence must be pleaded to be an issue.

5. Pleading ⇐240

Mere leave to amend does not in itself operate as an amendment, and if a formal amendment is not filed, the issue is not properly pleaded.

6. Pleading ⇐420(3)

Where a motion to amend is made during trial, and thereafter case is tried as if amendment had been made, opposing party is estopped to complain that no formal amendment was in fact made.

7. Automobiles ⇐245(87)

In action by passengers in automobile against driver for injuries sustained in accident in Washington, wherein it was determined that passengers were not gratuitous guests within scope of Washington guest statute, evidence was insufficient to take to jury question whether passengers had been guilty of contributory negligence. RCW 46.08.080.

8. Appeal and Error ⇐1058(2)
Automobiles ⇐243(1)

In action by passengers in automobile against driver for injuries sustained in accident in Washington, wherein application of Washington guest statute depended upon driver's motivation for trip, refusing

to permit driver to testify as to why he had agreed to take passengers on trip was error, but harmless where driver otherwise testified to his reasons. RCW 46.08.080.

9. New Trial ⇐9

A new trial should not be limited to issue of damages where substantial justice requires that a new trial, if granted at all, should cover all the issues.

10. Appeal and Error ⇐977(1)
New Trial ⇐6

A decision to limit a new trial rests in discretion of trial judge and will be reversed only in event of abuse of discretion.

11. New Trial ⇐9

Where damages awarded are inadequate, and it appears that issue of liability is close, and other circumstances indicate that verdict was probably result of prejudice, sympathy or compromise or that for some other reason liability issue has not yet actually been determined, limiting a new trial to issue of damages is abuse of discretion.

12. New Trial ⇐9

Under circumstances presented in action by automobile passengers against driver for injuries sustained in accident, including circumstances that issue of liability was close and that damages awarded were not commensurate with the injuries shown by undisputed testimony, the verdicts appeared to be compromise verdicts, and trial court abused discretion in granting new trial on issue of damages alone.

James P. Shovlin, Jr., San Francisco, for appellant.

Philander Brooks Beadle, San Francisco, Abraham Setzer, San Francisco, for respondents.

BRAY, Justice.

Defendant appeals from a judgment on jury verdicts granting plaintiff Dolores $2,000 and plaintiff George $250 and from the order granting new trial on damages *alone*.

Questions Presented.

1. Were plaintiffs under Washington law guests or passengers for pay in defendant's car?

2. Was contributory negligence an issue?

3. Alleged errors in exclusion of defendant's reason for trip.

4. Was new trial on issue of damages only an abuse of discretion?

Facts.

Plaintiff George and defendant were both on active duty in the U. S. Marine Corps and were stationed at Bremerton, Washington, sleeping in the same room at the barracks. They had served together in the same company in Korea, sharing the same tent when in the rear areas. They had returned together on the same ship. Plaintiffs Dolores and George planned to get married at Bremerton on October 18th. Plaintiff George asked defendant to be best man at the wedding. On October 17th plaintiffs discovered that they could not marry the next day, as Washington had a three-day waiting law and they had neglected to obtain a license. Meeting defendant that evening, they discussed their predicament with him. The suggestion was made that plaintiffs could get married in Idaho without a waiting period. There is a conflict as to whether one of the plaintiffs or the defendant made the suggestion. Defendant owned an automobile. Plaintiffs did not. Defendant had only $7 or $8 at the time. It was agreed that if plaintiffs would pay the expenses or part of the expenses, defendant would drive them to Idaho. Defendant previously had not been to Idaho. He had no friends or relatives there and had not planned on going there. "I said that I * * * would take them considering that we were good friends and had known each other for quite some time." Plaintiff George paid the expenses of the trip such as gas and oil, food, and bridge toll.

The trip started from Bremerton by ferry about 11:55 p. m. Defendant's car then contained about a full tank of gasoline for which he received no reimbursement.

Arriving at Seattle, defendant drove the car some 65 miles to Easton, Washington. There plaintiff George took over the driving, while defendant slept. About 6:30 a. m. they reached Ritzville, Washington. Here the party had breakfast. Between 7:15 and 7:30 a. m. they left Ritzville, defendant driving. Both plaintiffs went to sleep. About 45 minutes later, while still in Washington, the car ran off the road and overturned. Plaintiff George woke up as the car was running off the road. Defendant "seemed to be grappling with the wheel as if he was trying to bring it under control * * *." Defendant was unable to give any explanation for the accident. Although he did not feel sleepy he did not know whether or not he fell asleep. There was a possibility that defendant may have suffered retrograde amnesia as a result of the accident. The evidence was conflicting as to whether the car was being driven 60–70 or 45–50 miles an hour at the time of the accident.

1. Guest or Passenger.

[1] Although this action was filed in the San Francisco Superior Court, it is governed by the laws of Washington, the jurisdiction where the tort, if any, was committed. See Loranger v. Nadeau, 215 Cal. 362, 366, 10 P.2d 63, 84 A.L.R. 1264. Matters of procedure, however, are governed by the laws of the forum. Klaffki v. Kaufman, 52 Cal.App.2d 48, 50, 198 P. 36. Defendant moved for a nonsuit which was denied. He also moved for a new trial. His motion was denied. The court, however, granted plaintiff's motion for new trial on damages alone.

Defendant contends that as a matter of law under the Washington statute plaintiffs were guests and not passengers and hence the nonsuit and his motion for new trial should have been granted.

The Washington "guest statute" reads as follows: "46.08.080 Liability of host for injury to guest in motor vehicle. No person transported by the owner or operator of a motor vehicle as an invited guest or licensee, without payment for such transportation, shall have cause of action for damages against such owner or operator for injuries, death, or loss, in case of accident, unless the accident was intentional on the part of the owner or operator: *Provided,* That this section shall not relieve any owner or operator of a motor vehicle from liability while it is being demonstrated to a prospective purchaser. (1937 c 189 § 121; RRS § 6360–121.)"

The Washington courts have upheld the validity of this statute, and have stated its purpose to be the prevention of collusive suits to defraud a defendant's insurance carrier. Shea v. Olson, 1936, 185 Wash. 143, 53 P.2d 615, 620, 111 A.L.R. 998; Upchurch v. Hubbard, 1947, 29 Wash.2d 559, 188 P.2d 82, 86.

Interpretation of the statute is the major problem, and it focuses upon the meaning of the word "payment," because the presence or lack of payment determines whether a person riding in the automobile of another falls into the category of a "guest or licensee" or otherwise.

No Washington cases have been cited, nor have we found any, with facts substantially similar to this case. The interpretation of the statute must therefore be made upon a basis of how it is believed, from a reading of the existing Washington cases, the Washington court would interpret it.

Generally, the Washington cases hold that in order to show " 'payment for such transportation' " two requirements are necessary: (1) an actual or potential benefit in a material or business sense resulting or to result to the owner, and (2) "* * * that the transportation * * * [be] motivated by the expectation of such benefit." Fuller v. Tucker, 4 Wash.2d 426, 103 P.2d 1086, 1088. The expectation of receiving such benefit need not be the sole motivating factor. McUne v. Fuqua, 42 Wash.2d 65, 253 P.2d 632.[1]

1. This is similar to the rule in California. "Under these cases there can be no doubt that the courts have now applied the tangible benefit rule to social journeys. Under these cases, 'compensation' can be found if there is an intent to receive compensation or if there is the conferring of an actual tangible substantial benefit on

[2] A review of the Washington cases shows that primarily the determination of whether the invitee in an automobile who contributes towards its operation is considered a guest "without payment" is a matter for the jury's determination. See Parrish v. Ash, 32 Wash.2d 637, 203 P.2d 330, where the plaintiff who requested to ride home with the defendant, paid the defendant a dime for the ride. In upholding the jury's finding that this was "payment" the court said in 203 P.2d at page 338: "It is for the jury to determine, from the evidence and upon proper instructions by the court, whether an amount paid, an article of property furnished, or a thing done was intended by the parties concerned as compensation for the transportation * * or whether on the contrary the consideration or benefit was proffered and accepted merely as a gratuity or expression of appreciation for a favor extended." See also McUne v. Fuqua, supra, 253 P.2d 632, at page 636, where the court said: "* * * where it has been shown that the passenger contributed, or promised to contribute, to the actual expenses of the trip, then, notwithstanding the fact that the trip was solely for social purposes, we have held that it is for the trier of the facts to find whether such contribution constitutes an actual or potential benefit in a material or business sense." [2]

[3] Applying the Washington rule to the facts of this case it is clear that it cannot be said as a matter of law that defendant was to receive "payment for such transportation" in the sense required. The jury could have found either that the trip was purely a social one in which defendant through friendship offered to help his friend out of a predicament by supplying transportation, but because of lack of finances required the cost of the trip to be borne by the latter, or one in which a substantial motive was a trip for himself to a place he had never seen financed by the other.[3] The court properly left to the jury the question of the motivation for the trip.

2. Contributory Negligence.

[4] Defendant contends that because plaintiffs planned a trip of some 600–700 miles to be completed in less than 24 hours, driving all night and all day, and were asleep at or immediately prior to the time of the accident, there was evidence of contributory negligence to go to the jury. Towards the end of the trial defendant moved for permission to file a supplementary answer on contributory negligence to conform to the proof (contributory negli-

the driver where the benefit conferred is at least 'a' motivating influence for taking the trip. But the Whitmore case [Whitmore v. French, 37 Cal.2d 744, 235 P.2d 3] expressly excluded 'extending customary courtesies of the road' from the category of tangible benefits, and reaffirmed the 'exchange of social amenities' rule stated in McCann v. Hoffman, supra [9 Cal.2d 279, 70 P.2d 909]." Brandis v. Goldanski, 117 Cal.App.2d 42, 49, 255 P.2d 36, 40.

2. It is unnecessary to detail the holdings in the various Washington cases dealing with the subject. Each case depends upon the particular facts and upon whether the jury felt that the invitation to ride was due to the expectancy by the invitor of a substantial business benefit or a tangible advantage or whether the invitor was motivated by friendship or the social amenities. Washington cases holding that the invitee was a guest without payment are Syverson v. Berg, 1938, 194 Wash. 86, 77 P.2d 382 mother riding as chaperon of daughter and driver; Fuller v. Tucker, supra, 103 P.2d 1086, the plaintiff asked the defendant for a ride to a football game; Pratt v. Strever, 39 Wash.2d 515, 236 P.2d 779, complaint failed to allege facts showing payment; McUne v. Fuqua, supra, 253 P.2d 632, comembers of a lodge drill team going to a state convention and sharing cost of gasoline; Hayes v. Brower, 1951, 39 Wash.2d 372, 235 P.2d 482, 25 A.L.R.2d 1431, invitees had missed their bus and requested invitor to drive them to their destination, they offering to pay for some gas.

Those holding invitee to be a paying quest are Parrish v. Ash, supra, 203 P.2d 330, dime paid for the ride; Peterson v. Thorvaldsen, 1954, 45 Wash.2d 376, 274 P.2d 844, fishing boat crew members riding in a member's car to jointly protest amount of their pay checks; Scholz v. Leuer, 1941, 7 Wash.2d 76, 109 P.2d 294, invitee rode to help invitor deliver newspapers.

3. The jury impliedly found the latter motive to be the true one.

gence had not theretofore been pleaded). The court granted permission, expressly reserving the right to determine before instructing on the subject whether there was any evidence of such negligence. No supplementary answer was filed. The court refused to give defendant's offered instructions on the subject, but instructed that there was no issue of contributory negligence in the case. Upon motion for new trial defendant requested permission to file the amendment in accordance with the previous order. This was denied. It is well settled that contributory negligence to be an issue must be pleaded. Rhodes v. Amor, 119 Cal.App.2d 98, 101, 259 P.2d 35. It is waived unless pleaded. Greene v. M. & S. Lumber Co., 108 Cal.App.2d 6, 10, 238 P.2d 87.

[5, 6] "It is a general rule that mere leave to amend does not in itself operate as an amendment, and if a formal amendment is not filed the issue is not properly pleaded. Central Cal. Creditors' Ass'n v. Seeley, 91 Cal.App. 327, 267 P. 138; see cases collected in 49 C.J. p. 548, 549. It is true that where the motion to amend is made during the trial and thereafter the case is tried as if the amendment had been made, the parties by their actions are estopped and cannot later complain that no formal amendment was in fact made." Conroy v. Perez, 64 Cal.App.2d 217, 228, 148 P.2d 680, 686.

[7] Regardless of pleading, however, the court was right in instructing that there was no issue of contributory negligence. If the jury were to find that plaintiffs were merely guests of defendant, then plaintiffs under the Washington law would have no cause of action against defendant, and hence there could be no issue of contributory negligence. If, on the other hand, the jury were to find that they were paying guests, defendant then owed to them the highest degree of care, in which event they would be entitled to sleep and to leave the driving of the car entirely to defendant unless something should occur to warn them that defendant was not exercising such degree of care. In view of that degree of care required of defendant there was no evidence of contributory negligence on the part of plaintiffs.

3. Defendant's Reason for the Trip.

[8] As we have pointed out, the motivation for the trip was of primary importance. Therefore defendant was entitled to give his reasons for taking it. The court sustained an objection to a question asked defendant as to why he agreed to take plaintiffs to Idaho. The question should have been allowed. However, it appears that the error was harmless, as defendant had already testified that when asked by plaintiffs if he would take them he stated that he would "considering that we were good friends and had known each other for quite some time." Defendant also testified: "I considered we had known each other for quite some time, and we were fairly good friends."[4]

4. New Trial.

There can be no question but that the jury verdicts were compromise ones. The question of liability, that is, whether the motivation for the trip was the expectation of receipt by defendant of the expenses of the trip or a friendly gesture to enable the plaintiffs to get married immediately, was a close one,[5] and the injuries received by plaintiffs in the action were serious. Defendant introduced no medical testimony. Plaintiffs offered the testimony of a doctor and the records of the hospitals in which plaintiffs respectively were hospitalized as a result of the accident. Dolores' injury resulted in the removal of a kidney, severe injury to the ligaments of her back which were still so painful at the time of the trial she could not bend backwards, some superficial scars on her chest and some large permanent scars on her leg that were ugly, deforming and painful, persistent inflam-

4. The error might have been serious had defendant made an offer of proof showing other reasons than those disclosed.

5. Even though the court in its "Order Granting New Trial on Single Issue of Damages" stated that as a matter of law plaintiffs were guests for pay. Actually, however, the court left this question to the jury.

mation of the bladder which caused her to urinate about every 30 minutes, dizziness and headaches continuing to the time of trial. No effort was made to contradict the testimony of the doctor that these conditions resulted from the accident, other than to question the doctor as to whether the pain in the back and the inflammation of the bladder were not attributable to conditions resulting from prior pelvic inflammatory disease or diseases. The doctor denied that they were and there was no evidence that they were. Dolores was confined to the hospital for 11 days. Her special damages were about $1,343.33. The jury allowed her a total sum of $2,000, or about $656.67 for general damages. No wonder the court stated that the damages were "wholly inadequate" and "the amount of damages awarded was the result of a compromise." [6]

Plaintiff George's injuries were not as serious as those of Dolores. His right knee was injured. It was diagnosed at the Fairchild, Washington, Air Force Base Hospital, where he was confined for 9 days, as an impaired medial cartilage tear. Thereafter for approximately three months he was confined in the U. S. Naval Hospital at Bremerton, Washington. His knee was then in a cast. The record shows that plaintiff's complaints and "all other objective signs pointed to a tearing of the medial collateral ligament." About 15 days later this diagnosis was changed to sprain. His knee remained in a cast for approximately another 40 days. A few days later he was discharged as fit for duty. A couple of months later his enlistment in the Marines expired. He was examined by Navy doctors, pronounced fit for duty, and reenlisted. He has had headaches and occasionally dizzy spells which the doctor related to the accident. He has persistent pain in his knee on walking or standing. The doctor diagnosed his present condition as a "derangement of the knee," an injury which has not healed. He finally became nervous and was confined to Oak Knoll Hospital for several months, all of which the doctor ascribed to the effects of the accident. There is no contradiction of the doctor's testimony, defendant contenting himself with claiming that the Navy doctors' diagnosis of a sprain and his reenlistment in the Marines contradicts that testimony. However, there is no evidence that his present condition is not as testified to and since his reenlistment he was in the hospital for several months. Because he received government medical care his special damage was only $2.50. The jury awarded him $250, or $247.50 general damages. Obviously, this sum is grossly inadequate. The jury were out seven hours. The only instructions they requested be read again were those explaining the Washington guest statute. The awards to both plaintiffs can be explained only upon the grounds of compromise.

[9] "It has been declared, however, that where the plaintiff has requested a new trial on the issue of damages alone the question of limiting a new trial to that issue is a 'very serious one.' A limited new trial should not be granted, where substantial justice requires that a new trial, if granted at all, should cover all the issues." Keogh v. Maulding, 52 Cal.App.2d 17, 19, 125 P.2d 858, 859; see also Bencich v. Market St. Ry. Co., 20 Cal.App.2d 518, 528–529, 67 P.2d 398.

[10, 11] In Leipert v. Honold, 39 Cal.2d 462, 247 P.2d 324, 29 A.L.R.2d 1185, the court sets forth the rule concerning review of a trial court's decision limiting a new trial. After pointing out that such a decision rests in the discretion of the trial judge and will be reversed only in the event of an abuse of that discretion, the court said, 39 Cal.2d at page 467, 247 P.2d at page 327: "Such an abuse is shown when the damages are inadequate, the record discloses that the issue of liability is close, and other circumstances indicate that the verdict was probably the result of prejudice, sympathy, or compromise or that for some other reason the liability issue has not actually been determined." See also Rose v. Melody Lane, 39 Cal.2d 481, at page 489, 247 P.2d 335, where the court held that where the damages are completely

6. See "Order Granting New Trial on Single Issue of Damages."

inadequate a conclusion contrary to one finding that the verdict was a compromise is only justified when the evidence of defendant's negligence is "overwhelming." The court also pointed out that the fact that the jury, after deliberating three hours, returned for a reading of the testimony of one of the liability witnesses, showed that it was having difficulty in determining whether or not the defendant was negligent, and in the light of the gross inadequacy of the award, was a circumstance supporting the conclusion that the verdict was the result of a compromise. In our case, the jury wanted to be further enlightened on the Washington guest statute. See also Cary v. Wentzel, 39 Cal.2d 491, 247 P.2d 341. See also Hamasaki v. Flotho, 39 Cal. 2d 602, at page 607, 248 P.2d 910, 912, where the court said: "As a general rule, it is only when the verdict allows a substantial, even though inadequate, amount for general damages that it can reasonably be concluded that the jury's error related solely to the damages issue."

[12] In view of the closeness of the question of the status of plaintiffs in the automobile, the lack of substantial verdicts, the request of the jury, and the other circumstances in the case, it is clear that the jury's verdicts were compromise ones, and therefore the new trial should not have been a limited one.

Plaintiffs cite as applying here the language in Cox v. Tyrone Power Enterprises, 49 Cal.App.2d 383, 390, 121 P.2d 829, 834: "* * * merely because we regard the award as too low we must also infer that jurors stultified themselves by bargaining inadequate damages for unjustified liability is a *non sequitur*." That case differs from ours in this: (1) The court held that the jury correctly determined the negligence issues but apparently did not consider that those issues presented a close question. (2) "* * * there was substantial contest as to the extent (permanence) of plaintiff's injuries." 49 Cal.App.2d at page 390, 121 P.2d at page 834. Although the court believed the damages to be inadequate it stated: "* * * we do not find that it is such as to justify us in concluding, contrary to the trial judge, that the jury *compromised the question of negligence* by its inadequate award of damages." 49 Cal.App.2d at page 390, 121 P. 2d at page 833. It should be pointed out further that the Cox case is one of those considered (but not discussed) in Leipert v. Honold, supra, 39 Cal.2d 462, 467, 247 P.2d 324.

Defendant has appealed not only from the order granting a limited new trial but also from the judgment. Since defendant's liability has never been properly determined, the judgment must be reversed.

The judgment and order are reversed. Each side shall bear its own costs.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; CARTER, J., dissenting.



142 Cal.App.2d Supp. 865

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Paul W. COWLES, Defendant and Appellant.

Cr. 50.

Appellate Department, Superior Court, Alameda County, California.

June 18, 1956.

Prosecution for parking violation. The Municipal Court of the Oakland-Piedmont Judicial District, Homer W. Buckley, J., rendered judgment of conviction and the defendant appealed on the ground that the Municipal Court being a court of record could not take judicial notice of a city ordinance. The Superior Court, Appellate Department, Wagler, P. J., held that under statute providing that courts take judicial notice of whatever is established by law, Municipal Court which has exclusive jurisdiction of all cases involving the violation of ordinances of the localities in which it is established, could take judicial notice of those ordinances.

Judgment affirmed.

1. Criminal Law ⇐304(12)

Under statute providing that courts take judicial notice of whatever is established by law, a municipal court, which has exclusive jurisdiction of all cases involving the violation of ordinances of the locality in which it is established, could take judicial notice of the local ordinance describing the use of parking meters. West's Ann. Const. art. 6, § 12; West's Ann.Code Civ. Proc., § 1875, subd. 2; Pen.Code, § 1462.

2. Criminal Law ⇐304(12)

In prosecution for parking meter violation, although the prosecution made no attempt to prove contents or enactment of ordinance violated by defendant, the municipal court which had exclusive jurisdiction of all cases involving the violation of local ordinances could take judicial notice of the ordinance. West's Ann.Code Civ.Proc., § 1875, subd. 2; Pen.Code, § 1462.

3. Courts ⇐90(1)

Appellate Department of Superior Court is not bound by a decision of the Appellate Department of the Superior Court of neighboring county.

4. Criminal Law ⇐322

In prosecution for parking violation, although the record did not make it entirely clear that resolution of city council establishing parking meter zone was adopted pursuant to the section of the traffic code which authorized said resolution, it must be presumed that the official duty had been regularly performed. West's Ann.Code Civ.Proc., § 1875, subd. 2; § 1963, subd. 15.

Paul W. Cowles, in pro. per.

J. F. Coakley, Dist. Atty., and Ralph E. Hoyt, Deputy Dist. Atty., Oakland, for respondent.

WAGLER, Presiding Judge.

Defendant appeals from his conviction of a violation of Section 123 of the Oakland Municipal Code, which reads as follows:

"It shall be unlawful for any person to park or leave standing any vehicle in any parking meter zone on any street, at any time during which the parking meter shows, indicates, registers or displays that the parking space is illegally in use, except during the time necessary to deposit United States coins in said parking meter so as to show, indicate, register, display or permit legal parking, and excepting also during the time from 6:00 P.M. to 8:00 A.M., and excepting also on holidays as designated in Section 128 of this Code when indicated by appropriate signs located on the parking meter."

Appellant does not question the sufficiency of the evidence. He contends, however, that the Municipal Court in which he was tried is a court of record; that as such, it does not take judicial notice of ordinances and his conviction must therefore be reversed, since no attempt was made on the part of the prosecution to prove either the contents or enactment of Section 123.

That the Municipal Court in question is a court of record, there can be no doubt. It was declared to be such by constitutional amendment enacted in 1924. See California Constitution, Article VI, § 12. That numerous cases categorically state that courts of record do not take judicial notice of ordinances, also cannot be doubted. See Grant v. California Bench Co., 76 Cal.App. 2d 706, 173 P.2d 817; City of Tulare v. Hevren, 126 Cal. 226, 58 P. 530; Metteer v. Smith, 156 Cal. 572, 105 P. 735; Tilton v. Russek, 171 Cal. 731, 154 P. 860; Marysville Woolen Mills v. Smith, 178 Cal. 786, 175 P. 13.

This statement when originally made was no doubt factually correct. Its basis, however, is entirely historical, having been originally made when the only courts of record were courts of general jurisdiction. As such, they did not take judicial notice of ordinances which are private statutes.

[1, 2] Code of Civil Procedure, § 1875, subd. 2, provides that "courts take judicial notice of * * * whatever is established by law". Thus, in obedience to this section, the Superior Court as a court of general jurisdiction takes judicial notice of enactments of the State Legislature. By the same token, a Municipal Court which

has exclusive jurisdiction of cases involving the violation of ordinances of cities or towns situtated in the district in which it is established, P.C. § 1462, takes judicial notice of those ordinances.

[3] Appellant relies upon a decision of the Appellate Department of the Superior Court of a neighboring county, wherein a conviction of the violation of an ordinance was reversed because of the failure of the prosecution to introduce the ordinance in evidence. People v. Lum, Criminal Appeal 5867, Contra Costa County, February 8, 1956. This decision while persuasive is, of course, not binding upon this court. We are unable to agree with the conclusions therein reached.

The rule is correctly stated in 18 Cal. Jur. (2) 452, as follows:

> "A municipal or justice court in which a proceeding is instituted for the express purpose of enforcing a city or county ordinance, which is the peculiar law of that forum, is bound to take notice of the ordinance. In such cases the rule that judicial notice will not be taken of ordinances does not apply. A municipal court holds the same relation to ordinances that the superior court holds to acts of the legislature, and the rule as to judicial notice of 'whatever is established by law' applies." See Ex parte Davis, 115 Cal. 445, 47 P. 258; Ex parte Hansen, 158 Cal. 494, 111 P. 528; People v. Mueller, 168 Cal. 521, 143 P. 748, L.R.A.1915B, 788; Ex parte Daniels, 183 Cal. 636, 192 P. 442, 21 A.L.R. 1172; People v. Crittenden, 93 Cal.App.2d Supp. 871, 209 P.2d 161.

Appellant makes the further point that even if the Municipal Court could take judicial notice of the ordinance in question, still the parking meter zone itself was not established by ordinance, but by mere *resolution* of the City Council. The court could not, says he, take judicial notice of a mere resolution. This presents an interesting question, which we do not here decide, because the record shows that "by stipulation a certified copy of an excerpt of the resolution" designating "14th Street, both sides from Jefferson to Harrison, as a parking meter zone" was in fact offered and received in evidence.

[4] It is true, as appellant points out, that the record does not make it entirely clear that this resolution was adopted pursuant to the section of the Traffic Code which authorizes such resolutions. However, this is the only reasonable and logical inference. Furthermore, it must be presumed that official duty has been regularly performed. C.C.P. § 1963(15).

The judgment of conviction is affirmed.

LEDWICH, J., concurs.

HOYT, J., being disqualified, did not participate.

46 Cal.2d 791

Sadie I. SUTTON, Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION OF the State of CALIFORNIA, Creighton Stationery Company, and Guarantee Insurance Company, Respondents.

S. F. 19492.

Supreme Court of California, in Bank.

June 28, 1956.

Rehearing Denied July 24, 1956.

Proceeding on compensation carrier's petition to rescind or amend a compensation award. The Industrial Accident Board reduced compensation payable and the claimant petitioned for review. The Supreme Court, Carter, J., held that the Industrial Commission could not after the expiration of the limitation period on filing petitions by the insurance carrier to rescind and amend the awards act on a petition which was filed on the last day of the limitation period and that such construction did not deny due process and equal protection of the law.

Award annulled.

Opinion 292 P.2d 307, vacated.

1. Workmen's Compensation ⇐2016

An application by an employee for compensation for new and further disability if within the five-year limitation period is timely and the industrial commission may determine the question after the expiration of the period. West's Ann.Labor Code, § 5410.

2. Statutes ⇐220

The statute declaring that no compensation award "shall" be rescinded or amended after five years from the date of the injury manifests the legislative intent that it did not intend the same result as was effected in another statute wherein the legislature stated that a proceeding to amend a compensation award was timely when commenced within the period even though decided later. West's Ann.Labor Code, §§ 5804, 5410.

3. Workmen's Compensation ⇐2016

The Industrial Accident Commission could not after expiration of the limitation period on filing petition to rescind and amend compensation awards, act on the petition of the insurance carrier which was filed on the last day of the limitation period. West's Ann.Labor Code §§ 5803, 5804.

4. Statutes ⇐219

A former administrative construction contrary to the statutes cannot control in the construction thereof.

5. Constitutional Law ⇐245, 301
Workmen's Compensation ⇐34

Construction of the statute whereby the Industrial Accident Commission could not after expiration of the limitation period on filing petitions by the insurance carrier to rescind and amend awards act on a petition which was filed on the last day of the limitation period did not deny due process and equal protection of the law. West's Ann. Labor Code, §§ 5803, 5804; U.S.C.A. Const. Amend. 14, § 1; West's Ann.Const. art. 1, §§ 11, 21; art. 4.

Delger Trowbridge, San Rafael, for petitioner.

Everett A. Corten, Daniel C. Murphy, Frank J. Filippi and Mullen & Filippi, San Francisco, for respondents.

CARTER, Justice.

On April 2, 1948, petitioner was injured in the course of her employment, and on March 14, 1952, the Industrial Accident Commission awarded her a permanent disability rating of 100%. On April 1, 1953, the next to the last day of the five-year period after the injury, her employer's insurance carrier filed a petition with the commission to have the award amended to reduce the percentage of permanent disability. After proceedings were had the commission set aside its award and ordered that petitioner's permanent disability be reduced to 41½%.

Petitioner seeks to have the last mentioned order annulled on the grounds that:

(1) The commission was without jurisdiction to make the order after the five-year period under the workmen's compensation laws, Labor Code, § 5804; (2) the 1949 amendment, Stats.1949, ch. 677, § 2, to section 5804 which increased the period of time from 245 weeks to five years should not be retroactively applied to the instant proceedings; (3) the findings of the commission do not support the order sought to be annulled. In view of the result reached herein that the commission should not have made the order after the expiration of the five-year period and that the order must be annulled on the first of the grounds heretofore set forth, it is unnecessary to discuss the other contentions.

Section 5803 of the Labor Code provides generally that the commission has continuing jurisdiction over its awards and at any time upon notice and opportunity to be heard it may rescind, alter or amend such award, good cause appearing therefor. This power includes the right to diminish, increase or terminate, within the limits mentioned in the workmen's compensation laws, any compensation awarded on the ground that the disability of the person in whose favor the award was made has recurred, increased, diminished or terminated. That section is qualified, however, by section 5804 which reads: "No award of compensation shall be rescinded, altered, or amended after five years from the date of the injury. Provided, however, that after an award has been made finding that there was employment and the time to petition for a rehearing or reconsideration or review has expired or such petition if made has been determined, the commission upon a petition to reopen shall not have the power to find that there was no employment." (See Subsequent, etc., Fund v. Industrial Accident Comm., 39 Cal.2d 83, 244 P.2d 889.) There is another provision which should be considered in connection with section 5804. Section 5410 of the Labor Code provides: "Nothing in this chapter shall bar the right of any injured employee to institute proceedings for the collection of compensation within five years after the date of the injury upon the ground that the original injury has caused new and further disability. The jurisdiction of the commission in such cases shall be a continuing jurisdiction at all times within such period. This section does not extend the limitation provided in Section 5407." The "chapter" referred to is that dealing with "Limitations of Proceedings" commencing with section 5400.

[1] The commission claims that inasmuch as the carrier's application to amend the award was filed with it within the five-year period, the commission could make the amendment after the five years had expired. It has been held in considering section 5410, supra, that an application by an employee for new and further disability, if filed within the five-year period, is timely and the commission may determine the question after the expiration of the period. Gobel v. Industrial Accident Comm., 1 Cal.2d 100, 33 P.2d 413; Furness Pacific Ltd. v. Industrial Accident Comm., 74 Cal.App.2d 324, 168 P.2d 761; Cowell Lime & Cement Co. v. Industrial Accident Comm., 211 Cal. 154, 294 P. 703, 72 A.L.R. 1118; Westvaco, etc., Corp. v. Industrial Accident Comm., 136 Cal.App.2d 60, 288 P.2d 300; Pacific Indemnity Co. v. Industrial Accident Comm., 85 Cal.App.2d 490, 193 P.2d 117; see, Douglas Aircraft Co. v. Industrial Accident Comm., 31 Cal.2d 853, 193 P.2d 468.

This holding is in accord with the express wording of section 5410, supra. That section provides that an "injured employee" may "institute," that is, commence proceedings for compensation within five years after the date of the injury on the ground that the original injury has caused new and further disability. There is no restriction on the time within which the commission may act, hence it may act on the proceedings commenced within the five years after the five years have elapsed. Section 5410 is in that portion of the workmen's compensation laws dealing with "Limitations of Proceedings." Lab.Code, Div. 4, Pt. 4, ch. 2.

[2] On the other hand, sections 5803 and 5804, supra, which are applicable in the instant case, are in the part of the code

dealing with "Findings and Awards" [1] and there is nothing in section 5804 about the time within which proceedings to amend or rescind an award may be commenced. The restriction is a flat declaration that no award "shall" be rescinded or amended after five years from the date of injury. The different language in the two sections (5410 and 5804) indicates that a different rule was intended. When the Legislature intended that a proceeding was timely when commenced within the period, even though decided later, it so stated, Lab. Code, § 5410, supra. Its failure to so provide in section 5804 indicates that it did not intend the same result.[2] It is true that the foregoing interpretation of section 5804 means that five years' time is not given in which to apply for relief under section 5803, because obviously an application on a date such as the next to last day could not be decided until after the time limited, but section 5804 does not purport to allow five years in which application may be made for relief (as does section 5410). On the contrary, it provides that the commission may not amend or rescind its award after that time.

The distinction between the two sections was recognized in Westvaco, etc., Corp. v. Industrial Accident Comm., supra, 136 Cal. App.2d 63, 64, 67, 288 P.2d 300, 302, where the court, after stating that the question was whether the proceeding was under section 5410 or 5803 and 5804, said: "The petition of April 9, 1953, was barred by the provisions of section 5410 expressly limiting the time within which a petition for new and further disability may be filed to five years after the injury. If the commission were attempting to exercise under section 5803 a continuing jurisdiction to amend or alter an order, the order amending would be void because of the limitation of such power expressed in section 5804. * * * The commission, within the five year period, is authorized by section 5803 'to review, grant or regrant, diminish, increase or terminate' and therefore could make a new order increasing or decreasing the percentage of permanent disability and the award therefor, and of course, if the commission, proceeding under section 5410, should find that there was new and further disability, it could then make an award therefor. This latter award could be made after the expiration of the five year period, as the petition for it had been filed within that period.

"It is well settled that the commission has power to continue its jurisdiction to determine new and further disability beyond the five year period, where application is made within that period. * * *

"If the true and exclusive meaning of section 5410 is that there can be no new and further disability application where there was a permanent disability award, then the employee here must be denied any increase in permanent disability over the percentage found in the first order, because the commission failed to amend that order within the five year period and his present condition does not constitute 'new and further disability' within the meaning of that section. * * * During the five year period the commission could under section 5803 amend or alter its previous order, or could act under section 5410. *After the five year period, only section 5410 can be used, and then, only if a prior proceeding is filed under it.*" (Emphasis added.) (See, also, Broadway-Locust Co. v. Industrial Accident Comm., 92 Cal.App. 2d 287, 206 P.2d 856; Furness Pacific Ltd. v. Industrial Accident Comm., supra, 74 Cal.App.2d 324, 168 P.2d 761.) Douglas Aircraft Co. v. Industrial Accident Comm., supra, 31 Cal.2d 853, 193 P.2d 117, while not entirely clear, merely follows Gobel v. Industrial Accident Comm., supra, 1 Cal.2d 100, 33 P.2d 413 (decided under the earlier version of section 5410) which held that the commission could pass on an applica-

1. It (§ 5804) has been said to be a jurisdictional limitation. Douglas Aircraft Co. v. Industrial Accident Comm., supra, 31 Cal.2d 853, 855, 193 P.2d 468.

2. Compare section 473 of the Code of Civil Procedure which provides that an application for relief from default must be made in six months and section 660 which provides that the court has no power to pass on a motion for a new trial after 60 days after notice of entry of judgment, etc.

tion for new and further disability after the specified period if the application was filed within it. Larsen v. Industrial Accident Comm., 125 Cal.App. 13, 13 P.2d 850, is distinguishable but the language therein contrary to the foregoing interpretation is hereby disapproved.

[3] In the instant case the proceeding could not have been taken under section 5410 because the employer's carrier filed the application. It was necessarily under sections 5803 and 5804. Section 5410 refers only to a proceeding by the "injured employee." By no device may that phrase be held to include an employer or his carrier.

[4] The employer's insurance carrier claims that the foregoing interpretation of the sections discussed is contrary to that heretofore given to them by the commission. That is at least doubtful, but in any event, a former administrative construction contrary to the statutes cannot control. Groves v. City of Los Angeles, 40 Cal.2d 751, 256 P.2d 309.

[5] The carrier urges that the foregoing construction is a denial of due process and equal protection of the law[3] because a different period of time is given to employees (§ 5410, infra) than to employers or their carriers (§ 5804, supra) in which an award may be altered. There are manifest differences between an injured employee and his employer and the latter's insurance carrier upon which the Legislature could base a reasonable classification. The whole theory of workmen's compensation laws recognizes such a distinction. The distinction has been made in statutes regulating attorney's fees which have been upheld. (See, Marczeski v. Pittsburgh Steel Ore Co., 154 Minn. 536, 191 N.W. 743; Marshall v. Foote, 81 Cal.App. 98, 252 P. 1075; Ahmed's Case, 278 Mass. 180, 179 N.E. 684, 79 A.L.R. 669; Norman's Case, 278 Mass. 464, 180 N.E. 238, 82 A.L.R. 885.)

The award is annulled.

GIBSON, C. J., and SHENK, SCHAUER, SPENCE and McCOMB, JJ., concur.

3. (U.S.Const. Fourteenth Amendment § 1; see, Cal.Const. art IV, § 25 art. I, §§ 11, 21.)

46 Cal.2d 757

Clara CRANEY, Plaintiff and Appellant,

v.

Elizabeth B. LOW, alias Elizabeth B. Craney, alias Mrs. Jack Gander, Mildred Allis and Bernard Shapiro, Defendants and Respondents.

L. A. 24010.

Supreme Court of California, In Bank.

June 28, 1956.

Action seeking to impose a trust on the estate of the plaintiff's deceased son which was distributed to a defendant as the son's widow. General demurrers were sustained in the Superior Court, Los Angeles County, Philbrick McCoy, J., and the plaintiff appeals. The Supreme Court, Gibson, C. J., held that the demurrers of the widow's attorney and his secretary were properly sustained, that the first count of the complaint stated a cause of action against the widow and that the second count was not sufficient to entitle plaintiff to make a collateral attack on a Nevada divorce decree.

Judgment reversed as to the defendant widow and affirmed as to the other defendants.

Opinion, 288 P.2d 915, vacated.

1. Judgment ⇐511

A party may attack a judgment when an extrinsic fraud of the other party has deprived him of an opportunity to present his case or obtain a fair adversary hearing.

2. Trusts ⇐371(6½)

In action by a mother against deceased son's widow and daughter to have property already distributed in probate proceedings declared the son's separate property and to impose a trust thereon, where there was no allegation that either the widow's attorney or his secretary participated in any of the alleged misrepresentations or had any knowledge of them, their demurrers were properly sustained.

3. Trusts ⇐371(2)

In action by mother against deceased son's widow to have property already distributed in probate proceedings be declared the son's separate property and to impose a trust thereon, count stated a cause of action where it alleged that plaintiff relied upon representations made by the widow and that deception practiced on the plaintiff presented her appearance in the probate proceedings.

4. Trusts ⇐371(2)

In action by mother against deceased son's widow to have property already distributed in probate be declared the son's separate property and to impose a trust thereon, complaint respecting misrepresentations was not defective because the allegations were allegedly contrary to averments in prior pleadings and no explanation was made for the changes.

5. Judgment ⇐470

A judgment of a court of general jurisdiction is presumed to be valid, and burden is on one attacking the decree to show lack of jurisdiction.

6. Divorce ⇐410

It was to be presumed on collateral attack in support of a Nevada divorce decree that the defendant's former husband was personally served in Nevada or that he appeared in the divorce action and contested or admitted the fact of domicile.

7. Divorce ⇐405

In action by mother against deceased son's widow to impose trust on estate of a son which was distributed to the widow, complaint was insufficient to entitle plaintiff to make a collateral attack on Nevada decree, by which widow obtained a divorce from another.

E. C. Mahoney, Burlingame, for appellant.

Pacht, Ross, Warne & Bernhard, Isaac Pacht, Leo Altshuler and Jerry Pacht, Los Angeles, for respondents.

GIBSON, Chief Justice.

Plaintiff is seeking to impose a trust on the estate of her deceased son which was distributed to defendant Gander as the son's widow.[1] The other defendants are Mrs. Gander's attorney in the probate matter and his secretary, who acted as administratrix of the estate. General demurrers to plaintiff's third amended complaint were sustained, and she has appealed from the ensuing judgment.

The complaint contains two counts, which will be discussed separately. The first count may be summarized as follows: Decedent owned certain property, including a lease on a hotel with a renewal option. Plaintiff, an elderly woman of limited means, lived about 500 miles from the place where probate proceedings were had. Decedent had contributed to her support at regular intervals, and for about a year after his death she received small amounts of money from Mrs. Gander. In correspondence with plaintiff and decedent's brother and sister after his death, Mrs. Gander made various statements such as that plaintiff should not worry about her son's affairs and that Mrs. Gander would carry out the son's wishes and would keep plaintiff "posted" as to everything that went on concerning his estate. A short time prior to the date plaintiff received notice of the probate proceedings, Mrs. Gander requested decedent's sister to inform plaintiff that she would do everything possible to protect plaintiff's interest in the estate, that plaintiff need not retain an attorney and could put as much trust and confidence in her as in decedent, and that, after the six months' waiting period required by law, plaintiff could expect a handsome share of decedent's assets. Plaintiff relied on these representations, and the deception practiced on her by Mrs. Gander prevented her from appearing in the probate proceedings. The administratrix made no effort to renew the lease on behalf of the estate. Instead Mrs. Gander, aided by her attorney, made use of the option for her personal advantage. De-

1. She is made a defendant under the name "Low," which was her name prior to her marriage to decedent. She remarried after his death, and her name is now "Gander."

fendants caused all the estate to be distributed to Mrs. Gander, and by virtue of their acts plaintiff was deprived of her right to inherit one half of decedent's separate property.

[1] A party may attack a judgment when the extrinsic fraud of the other party has deprived him of an opportunity to present his case or obtain a fair adversary hearing. Gale v. Witt, 31 Cal.2d 362, 365, 188 P.2d 755; Larrabee v. Tracy, 21 Cal. 2d 645, 649, 134 P.2d 265; Westphal v. Westphal, 20 Cal.2d 393, 397, 126 P.2d 105; Olivera v. Grace, 19 Cal.2d 570, 576 et seq., 122 P.2d 564, 140 A.L.R. 1328; Caldwell v. Taylor, 218 Cal. 471, 479, 23 P.2d 758, 88 A.L.R. 1194; see Jorgensen v. Jorgensen, 32 Cal.2d 13, 18–19, 193 P.2d 728.

[2] There is no allegation that either Mrs. Gander's attorney or his secretary participated in any of the alleged misrepresentations or had any knowledge of them, and their demurrers to the first count were properly sustained.

[3, 4] It is clear that the first count states a cause of action against Mrs. Gander. Sufficient facts are alleged to show that plaintiff relied upon the representations made by Mrs. Gander and that the deception practiced on her prevented her appearance in the probate proceedings. It is contended, however, that the complaint is defective because the allegations are assertedly contrary to averments in prior pleadings and no explanation was made for the changes. (See Wennerholm v. Stanford Univ. School of Medicine, 20 Cal.2d 713, 716, 128 P.2d 522, 141 A.L.R. 1358; Owens v. Traverso, 125 Cal.App.2d 803, 808, 271 P.2d 164; Rhode v. Bartholomew, 94 Cal.App.2d 272, 278, 210 P.2d 768.) In the original complaint it was alleged that "plaintiff heard nothing from the defendants" after receiving notice of the probate, whereas in the present complaint it is alleged that certain representations were made after such notice was given. These representations, however, were contained in letters from Mrs. Gander to decedent's brother and sister, and the claimed inconsistency may be explained by the fact that the communications were not made directly to plaintiff. Moreover, the major representations relied on by plaintiff were made prior to the receipt of the notice of probate, and as to those there was no inconsistency in the pleadings.

The second count of the complaint alleges that, in 1948, prior to her marriage to decedent, Mrs. Gander secured a divorce in Nevada from John C. Low who was then domiciled in this state, that Mrs. Gander had also been domiciled in this state within six weeks before the decree and that immediately thereafter she resumed her residence in this state. It is contended that by reason of the foregoing facts the divorce decree had no force or effect in this state, that the marriage between decedent and Mrs. Gander was void and that it was not possible for them to acquire community property.

[5–7] The facts alleged are not sufficient to entitle plaintiff to make a collateral attack on the Nevada decree. A judgment of a court of general jurisdiction is presumed to be valid, and the burden is on one attacking the decree to show lack of jurisdiction. Cook v. Cook, 342 U.S. 126, 127, 72 S.Ct. 157, 159, 96 L.Ed. 146; see 3 Witkin, California Procedure, 2046. It is to be presumed in support of the divorce decree that Mrs. Gander's former husband was personally served in Nevada or that he appeared in the divorce action and contested or admitted the fact of domicile, and in the absence of contrary allegations the second count of the complaint is clearly defective. (See Cook v. Cook, 342 U.S. 126, 127, 72 S.Ct. 157, 159, 96 L.Ed. 146; Johnson v. Muelberger, 340 U.S. 581, 587, 71 S.Ct. 474, 476–477, 95 L.Ed. 552; Sherrer v. Sherrer, 334 U.S. 343, 351–352, 68 S.Ct. 1087, 1091, 1097, 92 L.Ed. 1429.)

The judgment is reversed as to defendant Gander and affirmed as to the other defendants.

SHENK, CARTER, SCHAUER, SPENCE and McCOMB, JJ., concur.

46 Cal.2d 786

Lloyd R. WENDLAND, Respondent,

v.

CITY OF ALAMEDA, a municipal corporation, et al., Appellants.

S. F. 19410.

Supreme Court of California, in Bank.

June 28, 1956.

Mandamus proceeding to compel city to pay a pension. The Superior Court, Alameda County, Marvin Sherwin, J., entered a judgment adverse to city and city appealed. The Supreme Court, Gibson, C. J., held that under ordinance providing that whenever any member of police department shall have served for period of 25 years or more, he shall, upon request, be retired and paid monthly pension, chief of police who after more than 25 years as police officer was discharged for conduct unbecoming an officer was entitled to pension.

Affirmed.

Opinion 287 P.2d 393, vacated.

1. Municipal Corporations ⇐187(2)

Under ordinance providing that whenever any member of police department shall have served for period of 25 years or more he shall, upon request, be retired and paid monthly pension, discharge of member for cause after he has served for required period does not preclude him from receiving pension.

2. Municipal Corporations ⇐187(2)

Under city pension ordinance section providing that if any person who has served ten years or more as member of police department be discharged for any reason except dismissal for neglect of duty, insubordination, conviction of felony or of misdemeanor involving moral turpitude, or dismissal for any offense, which offense impairs efficiency or discipline of department, such person shall be entitled to all benefits and provisions of named section of ordinance in proportion that number of years he has served bears to 25 years, distinct pension is provided and that pension is not included in other sections and does not apply to chief of police who after more than 25 years service was discharged for conduct unbecoming an officer.

3. Municipal Corporations ⇐120

If there is any doubt as to interpretation of city pension ordinance, court is required to construe provisions liberally in favor of applicant.

4. Municipal Corporations ⇐187(2)

Under ordinance providing that whenever any member of police department shall have served for period of 25 years or more he shall, upon request, be retired and paid monthly pension, chief of police who after more than 25 years service was discharged for conduct unbecoming an officer was entitled to pension.

J. P. Clark, City Attorney, Alameda, for appellants.

J. W. O'Neill, Oakland, for respondent.

GIBSON, Chief Justice.

Plaintiff, a former police officer of the city of Alameda, brought this proceeding for a writ of mandate to compel defendants to pay him a pension. Judgment was for plaintiff, and defendants have appealed.

The facts are undisputed. Plaintiff was employed by the city on February 13, 1926, and he served continuously as a police officer for more than 25 years, making monthly contributions to the city's pension fund. On December 3, 1951, he was subpoenaed as a witness before the grand jury of Alameda County in connection with an investigation of bookmaking, and he refused to testify on the ground that his testimony might tend to incriminate and degrade him. The city manager discharged him on the same day, stating that the refusal to testify was conduct unbecoming an officer. Plaintiff did not seek a review, and the question of the propriety of the discharge is not before us. Cf. Slochower v. Board of Higher Education of City of N. Y., 350 U.S. 551, 76 S.Ct. 637.

Plaintiff's application for a pension was denied by the city's pension board on the ground that he was discharged for the commission of an offense which impaired the efficiency of the police department and that, under the terms of the pension ordinance, a person who is dismissed for such an offense forfeits the right to a pension. Plaintiff thereupon commenced this proceeding.

[1] The sections of the ordinance are divided into lettered paragraphs, and, for convenience, we shall refer to each such paragraph as a separate section. Section 2(a), upon which plaintiff rests his claim, remained unchanged throughout the period of his employment. It provides, in substance, that whenever any member of the police department shall have served for a period of 25 years or more, he shall, upon request, be retired and paid a monthly pension equal to one half the salary paid to members of the rank which he held one year previous to the date of his retirement. Under a provision such as this, the discharge of a member for cause after he has served for the required period does not preclude him from receiving a pension, cf. Skaggs v. City of Los Angeles, 43 Cal.2d 497, 275 P.2d 9, and plaintiff is clearly entitled to a pension unless some other portion of the ordinance operates to exclude him. The only provision which might have such an effect is section 5.

Section 5, as it read when plaintiff entered into employment of the city, provided: "Any person having served ten (10) years or more as a member of the * * * Police Department shall, if he be removed * * * for any cause other than conviction of a felony; notorious or consecutive insubordination or neglect of duty, or in case of voluntary or involuntary resignation, be entitled to all the provisions of Section 2 of this ordinance, in the proportion that the number of years he has served * * * bears to twenty-five (25) years."

In 1943, more than 17 years after plaintiff commenced employment as a police officer, section 5 was amended to read, in part, as follows: "If any person who has served ten (10) years or more as a member of the * * * Police Department be discharged * * * for any reason, except a dismissal for neglect of duty, insubordination, conviction of a felony or of a misdemeanor involving moral turpitude, or a dismissal for any offense, which offense impairs the efficiency or discipline of the department, such person shall be entitled to all the benefits and provisions of Section 2 of this ordinance, in the proportion that the number of years he has served * * * bears to twenty-five (25) years."

[2] Plaintiff was denied a pension on the theory that his refusal to testify before the grand jury amounted to an offense which impaired the efficiency of the department, within the meaning of section 5 as amended in 1943, and that under this provision a dismissal for such an offense terminated his pension rights. Plaintiff argues that his pension rights are governed solely by section 2(a); that even if it be assumed that section 5 is applicable to him, his conduct did not amount to an offense within the meaning of the exceptions stated in the 1943 amendment; and that the amendment, if applied to him, would unconstitutionally impair his vested contractual rights. We are of the view that section 5 is not applicable to plaintiff, and, accordingly, there is no occasion for us to consider the remaining points which he urges.

Section 5 was one of several different provisions of the ordinance which created separate, complete types of pension benefits.[1] The terms of this section, as it exist-

1. Section 2(a), as we have seen, provides in effect for a retirement pension for any member of the police department who served 25 years or more. Section 2(b) provides that upon the death of "said pensioner" certain benefits should be paid to his widow or children or dependent parents.

Section 3(a) provides, in substance, for a disability pension to be paid to any member of the police department who became physically disabled as a result of

ed before the 1943 amendment, plainly show that it provided a distinct pension not included in any of the other sections, namely, a proportionate benefit payable to certain members who were discharged for cause after they had served for ten years. It is also clear that before the amendment the exceptions mentioned in section 5 applied only to the benefit there conferred and not to payments provided by any other section of the ordinance. After the amendment, the portion of the section involved here continued to provide for a separate proportionate benefit payable to a member discharged for cause after ten years' service. While the exceptions contained in this portion of the amended section are different from those set forth in the original provision, all of these exceptions, including a dismissal for an offense impairing the efficiency of the department, are applicable, as before, solely to the pension benefit authorized by section 5.[2] These exceptions, therefore, do not apply to the benefits allowed by section 2(a).

The question is whether plaintiff's rights to a pension is governed by section 2(a) or section 5. If section 2(a) applies, then plaintiff is entitled to a pension whether or not he was discharged for an offense which impaired the efficiency of the department. If, however, section 5 is controlling, then the exception with respect to such a discharge precludes plaintiff from receiving a pension unless the exception is inoperative for one of the other reasons which he urges.

Section 2(a) directly refers to a member who has served for "twenty-five * * * years or more," and, as we have seen, the language is sufficiently broad to authorize payment of a pension to a person who was discharged for cause after serving for such a period. Cf. Skaggs v. City of Los Angeles, 43 Cal.2d 497, 275 P.2d 9. Section 5, however, contains no declaration that it is applicable to a member who has served for 25 years or more. Section 2(a), of course, does not apply to anyone who has served for less than 25 years, and, when the ordinance is viewed as a whole, it may reasonably be construed to provide that all persons who have served for 25 years or more, including those discharged for cause, are covered by section 2(a), and that section 5 applies only to persons who have served for less than that period. As so interpreted, section 5 preserves a proportionate share of the accrued pension rights of a member who is dismissed for a relatively minor offense before he has been employed long enough to obtain a full retirement pension under section 2(a), but it does not operate to destroy the accumulated credits of a person who has served for the entire period required for such a pension.

injury received in the performance of his duty or from any illness or disease peculiar to the work of a policeman. Section 3(b) provides that upon the death of such a pensioner, certain benefits should be paid to his widow or children or dependent parents. Sections 3(c) and (d) impose certain limitations upon the benefits.

Section 4 in effect extends the benefits of section 3(b) to include the dependents of any member of the police department who should lose his life as a result of injury in the performance of his duty or as a result of illness or disease peculiar to his work.

Section 6 provides that certain benefits should be paid to a member of the police department or his widow or children or dependent parents in the event that he should become totally disabled or die from any sickness or accident which was not the result of a performance of duty.

2. The 1943 amendment added two new provisions which do relate to other sections of the ordinance, but these provisions, in different paragraphs, are separate from the provision containing the exceptions involved here and do not indicate that the exceptions were intended to affect the benefits allowed by other sections such as 2(a). These provisions are as follows:

"No person who has voluntarily or involuntarily resigned shall ever be entitled to a pension under any provision of this ordinance.

"Should a member of either of said departments die after he had become entitled to retirement under Section 2(a) of this ordinance but before having applied for or having been granted a pension, the persons mentioned in Section 2 (b) shall be entitled to receive a pension in the amount and otherwise under the conditions specified in Section 2 (b) of this ordinance."

The ordinance may well have been designed to place greater restrictions upon the allowance of a pension to a person who was discharged before he had served a sufficient time to entitle him to retirement than upon a person who remained in employment after service of such period. Clearly we could not hold it unreasonable for a legislative body to induce persons to remain employed after reaching retirement age by providing that they would not risk loss of their fully earned and accrued pension rights if they should do something improper while serving such additional time.

Moreover, this construction of section 5 will avoid the anomalous result which might occur if we were to assume that the benefits authorized by section 5 were available to a person who had served more than 25 years, because, in such event, a person *discharged* for cause could, under a literal application of the provision, receive a larger pension than a member who had *retired* after the same length of service. For example, under this assumption, a member discharged after serving 30 years might, by the terms of section 5, be entitled to a pension amounting to 30/25ths of one half of his salary, since the section authorizes a pension "in the proportion that the number of years he has served * * bears to twenty-five (25) years." On the other hand, a person who retired under section 2(a) after being employed for 30 years would receive a pension amounting only to half his salary.

[3, 4] If there is any doubt as to the proper interpretation of the ordinance, we are, of course, required to construe the provisions liberally in favor of the applicant so as to carry out their beneficent policy. See Terry v. City of Berkeley, 41 Cal.2d 698, 701–702, 263 P.2d 833; England v. City of Long Beach, 27 Cal.2d 343, 346–347, 163 P.2d 865; Gibson v. City of San Diego, 25 Cal.2d 930, 935, 156 P.2d 737. We conclude that section 5 is not applicable to plaintiff and that he is entitled to a pension under section 2(a).

The judgment is affirmed.

SHENK, CARTER, SCHAUER, SPENCE and McCOMB, JJ., concur.

142 Cal.App.2d 741

Dorothy THOMPSON, Plaintiff and Appellant,

v.

Matt THOMPSON, Defendant and Respondent.

Civ. 8802.

Sac. 6582.

District Court of Appeal, Third District, California.

July 2, 1956.

Child custody proceeding. The Superior Court, Mendocino County, Lilburn Gibson, J., entered order changing custody in favor of father, and mother appealed. The District Court of Appeal, Van Dyke, P. J., held that, where, at time of original custodial award of child to mother, father was ill and not only unable to care for child, but any contact with child would have been dangerous due to father's infectious condition, but father thereafter regained his health, and there was no physical risk attendant upon contact between the father and, after original custodial award, mother and child moved to place where frequent exercise of father's visitorial rights would be difficult and impractical, there was a material change of circumstances sufficient to justify modification of custodial award to allow father physical custody of child during July and August and monthly visitation rights.

Order affirmed.

1. Infants ⇐19

In determining what is best for welfare of children, not only their immediate welfare but their future should be taken into consideration.

2. Parent and Child ⇐2(4)

Where, at time of original custodial award of child to mother, father was ill and not only unable to care for child, but any contact with child would have been dangerous due to father's infectious condition, but father thereafter regained his health, and there was no physical risk attendant upon contact between the father and child, and, after original custodial

award, mother and child moved to place where frequent exercise of father's visitorial rights would be difficult and impractical, there was a material change of circumstances sufficient to justify modification of custodial award to allow father physical custody of child during July and August and monthly visitation rights.

3. **Parent and Child** ⇐2(4)

Application for change of custody of a child from one parent to another is addressed to trial judge's sound discretion, and his order will not be reversed except on a clear showing of breach of such discretion.

Kasch & Cook, Ukiah, for appellant.
Frank Petersen, Ukiah, for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from an order changing the custody of a minor girl who is now over fourteen years of age.

In 1945 an interlocutory decree of divorce, which has since become final, was granted to the appellant on the ground of extreme cruelty. At that time the respondent father was suffering from active tuberculosis but the disease is now arrested and non-contagious. Both of the parties have remarried and each has two children of such second marriage. Due to the respondent's illness, the divorce decree provided that the appellant mother should have exclusive custody of the minor without visitation rights upon the part of the respondent father. The order from which this appeal was taken modifies the custodial provision of the divorce decree by awarding the custody and control of the minor to the parties jointly and giving the respondent physical custody of the minor during July and August, and monthly visitation rights. Appellant maintains that in so doing the trial court abused its discretion as there was no change of circumstances to justify the modification and it is not for the best interest of the minor.

Appellant suggests that the fitness of the respondent to have custody of his daughter is questionable because in 1930 or 1931 he served a term of one year in San Quentin and because in 1948 he had premarital relations with his present wife. However, except for these remote incidents there is no evidence which reflects upon respondent's morality. It appears that he and his wife are leading respectable lives and maintaining a suitable home into which to bring his daughter. Appellant contends that respondent has evidenced disinterest and unconcern for his child because he has never contributed to her support or visited her. However, there is evidence that the minor's maternal grandparents objected and prevented his seeing her and that, in fact, for some time he did not know her whereabouts. Likewise, there is evidence that the respondent was ill and unable to work for several years and confined to a sanitarium for a period of time following the divorce. It was not until approximately 1953 that he regained his health. Since that time he has established a successful business and has provided well for his present family.

[1] Appellant complains that the trial court refused to question the minor as to her wishes. Such accusation is unfounded and unfair. Counsel stipulated that "she would say she would rather stay with her mother at this time, because she doesn't know her father." Such fact was not decisive "and in determining what is best for the welfare of children not only their immediate welfare but their future should be taken into consideration;" and it has been held to be an abuse of discretion to deny a minor "an opportunity to know, to learn to respect and to receive the care and affection" of one parent "for at least a part of each year." Juri v. Juri, 69 Cal. App.2d 773, 780, 160 P.2d 73, 76.

[2, 3] Appellant's argument that there was lacking the requisite change of circumstances to warrant the modification made cannot be sustained. At the time of the original custodial award respondent was ill and not only unable to care for his child but any contact with her would have been dangerous due to his infectious condition. He has now regained his health and there is no physical risk attendant upon contact between the two. This constitutes

a material change of circumstances. Robesky v. Robesky, 74 Cal.App.2d 523, 527, 168 P.2d 976. Moreover, at the time of the divorce the parties lived in Fort Bragg, where the respondent still resides, whereas appellant and the minor have moved to Monterey County, which renders difficult and impracticable the frequent exercise of visitorial rights. Such change in circumstances is sufficient to justify the modification made. Read v. Read, 103 Cal.App.2d 721, 723, 230 P.2d 46. No citation of authority is necessary to support the well established rule that:

"An application to change the custody of a child from one parent to the other is addressed to the sound discretion of the trial judge and his order will not be reversed except on a clear showing of a breach of that discretion." Robesky v. Robesky, supra, 74 Cal.App.2d at page 526, 168 P.2d at page 978.

No such showing was herein made.

The order is affirmed.

SCHOTTKY, J., and McMURRAY, Justice pro tem., concur.



142 Cal.App.2d 545

Edward OPPENHEIM, Petitioner and Respondent,

v.

Clara REITER, Appellant.

Civ. 21806.

District Court of Appeal, Second District, Division 1, California.

June 26, 1956.

Rehearing Denied Aug. 27, 1956.

Plaintiff moved to dismiss defendant's appeal on the ground that no record on appeal had been prepared or filed. The District Court of Appeal, White, P. J., held that where defendant had made efforts to prepare a settled statement on her appeal, and all the issues raised by the complaint could not be finally determined until disposition of the appeal of a codefendant, the appeal would not be dismissed even though no record on appeal had been prepared or filed, provided that defendant deposit within 30 days the amount of money necessary for preparation of a reporter's transcript.

Motion to dismiss appeal denied on condition.

1. Appeal and Error ⇐356

The burden rests upon an appellant to use reasonable diligence to perfect and prosecute his appeal.

2. Judgment ⇐92

Courts favor a determination of litigation upon the merits.

3. Constitutional Law ⇐321

All parties should have their day in court at all stages of the proceedings.

4. Appeal and Error ⇐784

When delays in complying with the rules of appellate procedure result in manifest injustice or prejudice to the moving party, a dismissal of appeal should be ordered.

5. Appeal and Error ⇐629

Where defendant had made efforts to prepare a settled statement on her appeal, and all the issues raised by the complaint could not be finally determined until disposition of the appeal of a codefendant, the appeal would not be dismissed even though no record on appeal had been prepared or filed, provided that defendant deposit within 30 days the amount of money necessary for preparation of a reporter's transcript. West's Ann.Rules on Appeal, rules 7, 10(a), 53(b).

Clara Reiter, in pro. per.

Gomer & Himmelfarb, Murray Gomer, Beverly Hills, for respondent.

WHITE, Presiding Justice.

Respondent moves to dismiss the appeal herein on the ground that no record on

appeal has been prepared or filed. Rule 10(a), Rules on Appeal.

The action with which we are here concerned was commenced by plaintiff (petitioner herein) against defendant and one I. H. Goodley to set aside a homestead and alleged fraudulent encumbrance of debtors' assets. The relief prayed for is that a purported declaration of homestead, dated January 27, 1949 by the defendant, I. H. Goodley, be declared null and void as against the plaintiff, or partially so, insofar as the residence, separate from the defendant, is concerned; that the purported mortgage, dated June 2, 1949, by defendant, I. H. Goodley, in favor of defendant, Clara Reiter, and recorded on April 24, 1950, be declared fraudulent and void as against the plaintiff; that a Receiver of all the property and effects of the defendant, I. H. Goodley, which he had at the time of the said encumbrancing by mortgage to the defendant, Clara Reiter, or at any time thereafter, be appointed; that the defendants, I. H. Goodley and Clara Reiter, be adjudged to account for all the property received by them under the purported mortgage and note, and for all proceeds arising from any sale of such property, and deliver the same to such Receiver; that the defendants, I. H. Goodley and Clara Reiter, be in the meantime enjoined from disposing of any of said property, or paying away any of the proceeds thereof, or in any way interfering therewith; that the said Receiver be directed to sell the said property, or so much thereof as may be necessary, and to pay the plaintiff out of the proceeds of said property the judgments aforesaid, and the costs of said action, and hold the balance subject to the order of the Court.

On March 22, 1955 judgment was entered for plaintiff against both defendants who duly filed their motions for a new trial. On April 15, 1955 motion for a new trial was granted as to defendant Goodley and denied as to defendant Clara Reiter. On May 17, 1955 the latter filed her notice of appeal from the foregoing judgment. On May 26, 1955 defendant Reiter filed notice under Rule 7, Rules on Appeal, to proceed on appeal by a settled statement and on June 17, 1955 a proposed settled statement was filed. On June 29, 1955 plaintiff (petitioner herein) filed objections and amendments to the proposed settled statement. Defendant Clara Reiter on July 13, 1955 filed "objections to the objections and amendments to the settled statement".

On July 13, 1955 the court entered its minute order reading in part as follows:

> "Matter re Proposed Settled Statement on Appeal comes on for hearing. * * * It appears to the Court that the Proposed Settled Statement on Appeal does not conform to Rule 7 of Rules on Appeal. In Addition thereto, the Court is unable to settle the Statement without the use of a transcript; the Court deems a complete transcript necessary and will refuse to settle any transcript herein until such transcript is provided. The Objections to the Proposed Settled Statement on Appeal are sustained."

On August 18, 1955 defendant Clara Reiter filed a notice of motion to amend her said proposed statement on appeal, and on August 26, 1955 the court entered its minute order reading in part as follows:

> "Motion for order permitting appellant to amend her proposed statement on appeal to substitute the respondent's statement of the testimony for that proposed by petitioner with additions is denied. Motion for order settling statement with or without additions is denied. It is further ordered that the appeal herein not proceed without a reporter's transcript on appeal."

Notice of denial of this motion was served on defendant Clara Reiter on August 31, 1955.

Thereafter, on or about September 23, 1955 defendant Reiter filed in this court a petition for a writ of mandate requiring the trial judge to settle statement on appeal as presented, which petition was denied by Division Three of this court on September 30, 1955 and petition for rehearing was denied on October 11, 1955. To date no engrossed settled statement or transcript has been filed.

Section 10(a), Rules on Appeal, provides in part that, "If the appellant shall fail to perform any act necessary to procure the filing of the record or to pay the filing fee within the time allowed therefor or within any valid extension of that time, and such failure is the fault of the appellant and not of any court officer or any other party, the appeal may be dismissed on motion of the respondent or on the reviewing court's own motion."

Appellant resists the motion, first on the ground that after her co-defendant Goodley was granted a new trial which resulted in a judgment adverse to him, said co-defendant "now has an appeal to this Court which is being prosecuted vigorously and a transcript is now being prepared by the County Clerk of this County. The issues of that appeal are germane and inter-related to appellants appeal, in that issues of her appeal cannot be decided by this Court unless the issues of her co-defendant are first determined." That the evidence offered at the second trial of her co-defendant was the same as that presented at the first trial, which resulted in a judgment adverse to her and from which she took this appeal.

[1–4] It is a fundamental rule of appellate procedure that the burden rests upon an appellant to use reasonable diligence to perfect and prosecute his appeal, and while the courts favor a determination of litigation upon the merits and that all parties should have their day in court at all stages of the proceedings, nevertheless, when delays in complying with the rules result in manifest injustice or prejudice to the moving party, a dismissal should be ordered.

[5] In the instant proceeding, since the denial of her aforesaid petition for a writ of mandate by Division Three of this court appellant has not ordered or filed a reporter's transcript as required by the foregoing minute order of the superior court. We cannot assume, as urged by appellant, that the issues presented on the appeal by her co-defendant from a judgment rendered in the second trial as to him are interrelated and germane" to the issues presented by appellant's appeal from an adverse judgment as to her in the first trial. As heretofore noted, the issue as to defendant Goodley was the validity of a homestead declared by him on certain property while as to defendant herein, the issue was the validity of a mortgage executed in her favor. That issue was determined in the first trial, leaving only the issue of the validity of the homestead to be determined at the second trial.

Because of the efforts made by appellant prior to October 11th to prepare and file a settled statement on appeal coupled with the fact that all of the issues presented by the complaint in this action cannot finally be determined until disposition of the appeal taken by her co-defendant from the judgment against him rendered at the second trial, we are inclined to the view that no prejudice will ensue to the moving party, and that the interests of justice will best be served if, under Rule 53(b), Rules on Appeal, we conditionally relieve appellant from her default.

It is therefore ordered that if within 30 days after the filing of this opinion appellant deposits with the Clerk of the Superior Court the amount of money necessary for preparation of a reporter's transcript, and which amount the clerk is ordered to accept, the motion to dismiss will be denied. However, if appellant fails so to do for any reason whatsoever, the motion to dismiss is to be granted without further hearing or opinion. Tobin v. Casaus, 128 Cal.App.2d 588, 593, 275 P.2d 792.

DORAN and FOURT, JJ., concur.

142 Cal.App.2d 690

Application of Velva Irene McCAUGHAN, For Bail Pending Appeal.

Cr. 2699.

District Court of Appeal,
Third District, California.
June 28, 1956.

Prosecution for involuntary manslaughter. The Superior Court, Stanislaus County, entered judgment of conviction and denied bail pending an appeal, and defendant petitioned the District Court of Appeal to grant bail. The District Court of Appeal, Van Dyke, P. J., held that where defendant was granted probation for a term of three years, with incarceration in county jail for one year as a condition thereof, and it did not appear public would be in anywise endangered if defendant was allowed liberty on bail while she tested invalidity of her conviction, trial court abused its discretion in denying bail.

Petitioner admitted to bail pending appeal.

1. Criminal Law ⇐1148

Where discretion is conferred upon a trial court as to whether or not bail should be granted on appeal, the exercise of such discretion by the trial court will not be disturbed on appeal, except in an instance of manifest abuse. West's Ann.Pen.Code, § 1272.

2. Bail ⇐44

Where defendant, after conviction for involuntary manslaughter, was granted probation for a term of three years, with incarceration in county jail for one year as a condition thereof, and it did not appear public would be in anywise endangered if defendant was allowed liberty on bail while she tested invalidity of her conviction, trial court abused its discretion in denying bail. West's Ann.Pen.Code, § 1272.

Sutter & Carter, Modesto, for petitioner.

Ernest LaCoste, Deputy Dist. Atty., Stanislaus County, Modesto, Edmund G. Brown, Atty. Gen., Doris H. Maier, Deputy Atty. Gen., for the People.

VAN DYKE, Presiding Justice.

This is an application for bail pending appeal from a felony conviction. A jury found petitioner guilty of involuntary manslaughter. The trial court made its order granting probation, and petitioner appealed. Penal Code, § 1237, subd. 1. She applied to the trial court for bail pending appeal, and it was denied. She now petitions this court to grant bail.

It appears that petitioner at the time of the offense charged was a psychiatric technician employed at the Modesto State Hospital; that she was engaged in force feeding a patient who had refused to eat; that she was being assisted by another technician who became a co-defendant, but who was acquitted by the jury at the same trial which resulted in the conviction of petitioner; that the patient died in the course of or soon after the feeding, and that an autopsy showed the presence of partially digested food in her bronchi and trachea causing death by strangulation. It appears to have been the contention of the prosecution that petitioner had been guilty of involuntary manslaughter done either (1) in the commission of an unlawful act not amounting to felony, or (2) in the commission of a lawful act which might produce death, done without due caution and circumspection. In support of the first theory of guilt the prosecution sought to prove a violation of Section 361 of the Penal Code (harsh treatment of an insane person) and/or a violation of Section 242 (battery), both misdemeanors. In support of the second theory the prosecution sought to prove that the force feeding, if lawful, was negligently done.

Rule 32(b) of the Rules on Appeal provides that:

> "An application to the reviewing court for bail * * * on an appeal * * * shall be made on such notice to the district attorney and the attorney general as the court may determine, and shall include a showing that proper application for bail * * * was made

to the superior court and that such court unjustifiably denied the application."

[1] Under Section 1272 of the Penal Code, in a case such as this, a discretion is conferred upon the trial court as to whether or not bail should be granted on appeal. The discretion being so vested, its exercise by the trial court will not be disturbed except in an instance of manifest abuse. People v. Davis, 67 Cal.App.2d 837, 839, 155 P.2d 675. We have, therefore, presented by this application a question of whether or not there was abuse of discretion in the trial court's order denying bail.

In the case of In re Torres, 80 Cal. App.2d 579, 182 P.2d 573, it was held that upon the facts there presented it was an abuse of discretion for the trial court to deny bail pending appeal, and it appears to us that this case falls within the scope of that decision. There, the applicant had been convicted of a violation of Section 347 of the Penal Code (placing poison in food or drink with the intention that it be consumed by human beings to their injury). After conviction the court had granted probation for a term of two years, but ordered incarceration in the county jail for six months as one of the conditions of probation. In this case, petitioner has been granted probation for a term of three years, with incarceration in the county jail for one year as a condition thereof. In the Torres case, the court said, 80 Cal.App.2d at page 581, 182 P.2d at page 574:

"On appeal from a judgment imposing imprisonment in a misdemeanor case, a defendant is entitled to bail as a matter of right. (Penal Code, sec. 1272.) In each instance here the length of probation and the terms of imprisonment and fine were within those which could be granted in case of a misdemeanor conviction. It therefore appears from the record that for those purposes the court believed that the rights of society were well protected, and the ends of justice met, by treating each defendant as if he were convicted of a misdemeanor rather than of a felony. It would seem, therefore, that in the matter of bail on appeal it would be an abuse of discretion to treat them more harshly than they had been treated in the matter of probation and punishment, and more harshly than other men receiving the same probation and punishment, who as a matter of right must be admitted to bail on appeal, are treated. The mere fact that the crime with which they were convicted is a felony rather than a misdemeanor should not deprive them of the right to equal treatment as to bail on appeal with men equally treated as to probation and punishment.

"It is true that the statute makes bail on appeal in misdemeanor cases a matter of right, and in felony cases only a matter of discretion, and there will be many cases in which, because of the circumstances or because of additional terms in the probation order, it may be inadvisable to admit the defendant to bail on appeal, even though the length of the probation term and the conditions thereof as to incarceration are within the limits of a misdemeanor case. Here, however, there are no additional terms of probation, and the action of the court indicates that in its judgment no severity greater than that imposed in misdemeanor cases should be imposed."

[2] We think the case here is within the embrace of the decision in the Torres case. Factually, there is no substantial difference. Neither does it appear that the public will be in anywise endangered if petitioner is allowed liberty on bail while she tests on appeal the validity of her conviction. While, of course, we cannot here judge the merits of petitioner's appeal, yet it does appear that the appeal is meritorious in the sense that it presents debatable issues of law. It would serve no useful purpose here to discuss those issues beyond what we have already said.

It appears that pending trial petitioner had been admitted to bail in the sum of $2,500, and it has been suggested here that such a sum would be adequate for bail on appeal. With this suggestion we agree.

It is ordered that petitioner be admitted to bail, pending appeal, in the sum of $2,500, cash or surety, and if surety, then the surety to be approved by the superior court in which the conviction appealed from was had, the security to be lodged with the County Clerk of Stanislaus County.

McMURRAY, Justice pro tem., concurs.



142 Cal.App.2d 808

Emmanuel DIEL and Pearl E. Diel, husband and wife, Plaintiffs and Respondents,

v.

SECURITY TITLE INSURANCE COMPANY, a California corporation, Defendant and Appellant.

Civ. 8789.

District Court of Appeal, Third District, California.

July 3, 1956.

Action to recover damages for breach of a contract of title insurance. Judgment for defendant in the Superior Court, Madera County, Stanley Murray, J., and the plaintiffs were granted a new trial and the defendant appeals. The District Court of Appeal, Van Dyke, P. J., held that the motion for new trial was properly granted on the ground of insufficiency of the evidence.

Order granting a new trial affirmed.

1. Insurance ⇐426½

Under a title policy limiting insurer's liability to damages incurred by rights or claims of persons in possession of land not shown by the "public records" defined as those that impart constructive notice, record of a lease on the premises so long as it remained a mere fugitive conveyance unconnected with the chain of title, did not impart constructive notice.

2. New Trial ⇐70

In action for breach of contract of title insurance where prior to death of deceased owner, daughters executed a lease on property and recorded it, and from record it could not be determined whether by antedating the vesting of record title in daughters lease remained a fugitive instrument of conveyance, of existence of which no constructive notice was given, or whether lease was executed after title vested in daughters, in which event there was constructive notice, trial court properly granted insured a new trial after verdict for insurer on ground of insufficiency of evidence.

Coffee & Wolfe, Madera, for appellant.

Iener W. Nielsen, Fresno, for respondents.

VAN DYKE, Presiding Justice.

This is an appeal from an order granting a new trial on the ground of the insufficiency of the evidence to support the judgment.

Respondents brought action to recover damages for a breach of contract of title insurance. Frances Polkenhorn received a patent to the subject property, issued in 1923, and the record title remained in her until it passed to her three daughters, as shown by a decree of distribution which was recorded on July 5, 1950. Prior to the making and recordation of that decree, two of the daughters of Frances Polkenhorn executed a ten-year lease of the property dated December 1, 1948 and recorded on December 20, 1948. Since the lessors had no title of record to the property they purported to lease, the lease appeared when recorded to be a mere fugitive conveyance unconnected with the chain of title. After the recordation of the decree of distribution and in 1952, respondents purchased the subject property from the three daughters and applied to appellant for a policy of title insurance, vesting the title in them as of the close of the purchase escrow. The policy, when issued, insured respondents against loss or damage by reason of "Title to the land described * * * being vested, at the date hereof [July 1, 1952], otherwise than as herein stated." The vesting state-

ments declared the title to be vested in respondents subject to certain exceptions not material here and made no mention of the lease. On discovering that the lessees were claiming a right to hold and use the property under their lease, respondents brought this action to recover damages.

Appellant pointed out that under the policy provisions, its liability was limited to damages incurred by reason of the "Rights or claims of persons in possession of said land which are not shown by the public records" and contended that when it issued its policy, the rights or claims of the lessees were not so shown. The trial court, sitting without a jury, rendered judgment in appellant's favor, whereupon respondents moved for and were granted a new trial.

[1, 2] Supplementary to the limitation of liability to claims shown by the public records the policy defined the words "public records" as being "those public records which, under the recording laws, impart constructive notice of matters relating to said land"; and it is the contention of appellant on this appeal that as a matter of law the recording of the omitted lease imparted no constructive notice to appellant and that, therefore, the court erred in granting a new trial. We do not agree. The record of the lease, so long as it remained a mere fugitive conveyance unconnected with the chain of title, did not impart constructive notice. Bothin v. California Title Ins. & Trust Co., 153 Cal. 718, 96 P. 500. This situation, however, may have changed when the decree of distribution was recorded. The decree completed the record chain of title from Frances Polkenhorn to her daughters, two of whom executed the lease. The record of the decree of distribution imparted notice of the contents of that decree. Unfortunately, no certified copy of the decree as recorded was introduced in evidence, but from the testimony concerning its contents this much appears: That Frances Polkenhorn, the original owner by patent, had died, that her three daughters were her successors in interest, and that, therefore, such title as she had when she died presumably vested in them as of the moment of her death. The order of recordation of the decree and of the lease is not conclusive as to the rights of those who take after the chain has been completed of record. Persons purchasing from the daughters had, by the recording of the decree, constructive notice that Frances Polkenhorn had died intermediate the issuance of patent to her and the recording of the decree of distribution from her estate, and that presumably on the date of death her daughters succeeded to her title and could thereafter at any time have conveyed it away in whole or in part. Since the decree was not introduced in evidence we cannot say whether or not it gave information as to the date of death of Frances Polkenhorn and, therefore, as to the date when title presumably vested in her daughters. This was the situation confronting the trial court when the motion for a new trial was made. From the record of the trial it could not be said that there was in the chain of title anything which gave constructive notice of the date of the death of Frances. From the record, therefore, it could not be determined whether or not by reason of antedating the vesting of record title in the lessor daughters the lease remained a fugitive instrument of conveyance, of the existence of which no constructive notice was given, or whether the lease was executed after title vested in the daughters, in which event there was constructive notice notwithstanding the decree was recorded after the recordation of the lease. The trial court could, therefore, properly grant a motion for new trial upon the ground of the insufficiency of the evidence, for the evidence left the matter undetermined and did not support the judgment in favor of appellant.

For the reasons given, the order granting a new trial is affirmed.

SCHOTTKY, J., and McMURRAY, J. pro tem., concur.

142 Cal.App.2d 296

James G. HAGENBUCH, Plaintiff, Cross-Defendant and Appellant,

v.

Adolph W. KOSKY, Defendant, Cross-Plaintiff and Respondent.

Adolph W. KOSKY, Plaintiff and Respondent,

v.

James G. HAGENBUCH, Defendant and Appellant.

Civ. 5138.

District Court of Appeal, Fourth District, California.

June 15, 1956.

Cross-actions, between landlord and tenant who had entered into possession of ranch under three year lease with purchase option and who had continued in possession after expiration thereof, wherein tenant contended that there had been valid oral agreement to continue lease and option agreement for additional three year period. The Superior Court of San Diego County, Joe L. Shell, J., entered judgment for landlord, and tenant appealed. The District Court of Appeal, Mussell, J., held, inter alia, that evidence sustained inference by trial court that landlord had not, in conversing with tenant, engaged in conduct which would estop him from denying that lease and option agreement had been extended for three year period.

Judgment affirmed.

1. Landlord and Tenant ⇐114(3)

Under Civil Code section providing for renewal of lease for period not to exceed year by continued possession and acceptance of rent, tenant's continued possession after expiration of three-year lease could create at most a lease from year to year and not for three-year term, in absence of enforceable agreement to contrary. West's Ann.Civ.Code, § 1945.

2. Frauds, Statute of ⇐131(2)

An oral agreement to extend a three-year lease with purchase option was within statute of frauds and invalid unless landlord was estopped to deny its validity. West's Ann.Civ.Code, §§ 1624, subd. 4, 1945; West's Ann.Code Civ.Proc. §§ 1962, subd. 3, 1973, subd. 4.

3. Estoppel ⇐118

In cross-actions between landlord and tenant who had gone into possession of ranch under three-year lease containing option to purchase and who had remained in possession after expiration of such term, evidence was sufficient to support inference by trial court that landlord had not been guilty of conduct which would estop landlord from denying oral agreement to extend agreement for another three-year period. West's Ann.Civ.Code §§ 1624, subd. 4, 1945; West's Ann.Code Civ.Proc. §§ 1962, subd. 3, 1973, subd. 4.

4. Appeal and Error ⇐1010(1)

Finding of trial court which was supported by sufficient evidence could not be disturbed on appeal.

5. Appeal and Error ⇐1052(5)

In cross-actions between landlord and tenant who had entered into possession under three-year lease with option to purchase and who had remained in possession after expiration of lease, wherein tenant sought declaration that such lease had been renewed for three-year period by oral agreement, and landlord sought rent and money had and received, in view of finding of no valid agreement to renew option evidence as to tenant's financial ability to exercise option was immaterial and admission of testimony thereon did not warrant reversal.

6. Appeal and Error ⇐1052(5)

In cross-actions between landlord and tenant who had entered into possession under three-year lease with option to purchase and who had remained in possession after expiration of lease, wherein tenant sought declaration that such lease had been renewed for three-year period by oral agreement and landlord sought rent and money had and received, in view of finding of no valid agreement to renew option, evidence as to value of property was immaterial and its admission was not prejudicial.

7. Appeal and Error ⇐1057(1)

In cross-actions between landlord and tenant who had gone into possession under three-year lease with purchase option, wherein tenant sought declaration that oral agreement had extended lease for another three-year period, and alleged that agreement came about through conversations which took place at landlord's residence when real estate agent had gone there with tenant, court committed no error prejudicial to tenant in refusing to permit real estate agent to testify as to what she personally knew to be purpose of trip, as part of res gestae, in view of fact that tenant himself testified as to the conversations.

8. Appeal and Error ⇐1050(1)

In cross-actions between landlords and tenant who had entered into possession under terms of three-year lease containing option to purchase and who contended that lease and option agreement had been extended by oral agreement of parties, court committed no error prejudicial to tenant in permitting evidence to be introduced as to amount of money spent by landlord on premises prior to execution of lease.

9. Evidence ⇐174(2)

In cross-actions between landlord and tenant wherein tenant who had entered into possession of leased ranch under three-year agreement containing option to purchase sought declaration that such agreement had been renewed by oral agreement of parties, and landlord sought rent and money had and received, court did not err in sustaining objection to tenant's testimony relative to net production of ranch where his check register and books of account were introduced showing all personal moneys that he had used in development of ranch.

10. Appeal and Error ⇐1036(3)

Where cotenant did not join with tenant in bringing action for declaration of rights under lease against landlord and landlord cross-complained for rent, money had and received and accounting, fact that judgment was entered holding that lease and option were terminated without such cotenant's being made a party was not prejudicial to plaintiff-tenant.

11. Evidence ⇐242(2)

In cross-actions between landlord and tenant who had entered into possession under terms of three-year lease with option to purchase and who had remained in possession after expiration of lease, wherein tenant sought declaration that such lease had been renewed for three-year period by oral agreement, testimony of landlord's accountant who acted with his authority as to negotiations for continued possession was material and was not inadmissible on any theory that he was only an accountant for landlord.

C. Coleman Pease, San Diego, for appellant.

Gray, Cary, Ames & Frye and John M. Cranston, San Diego, for respondent.

MUSSELL, Justice.

This is an action for declaratory relief and damages. Defendant Kosky filed a cross-complaint for rent, money had and received and for an accounting and also filed a complaint for unlawful detainer. Both causes were consolidated for trial by stipulation and plaintiff appeals from the judgment in favor of defendant and cross-complainant.

On November 10, 1948, Adolph W. Kosky, as lessor, and James G. Hagenbuch and Wyatt Wood, as lessees, entered into a lease agreement which provided, in part, as follows:

> "1. The lessor does hereby lease to the lessees 320 acres of land in Borrego Valley, San Diego County, California, owned by the lessor, for a period of three years from the date hereof. The lessees shall have the option to purchase all of said 320 acres or any portion thereof from the lessor at a price to be mutually agreed upon. If said price cannot be agreed upon between the lessor and the lessees, then each shall appoint an appraiser, and the two appraisers shall appoint a third appraiser, who shall determine the

selling price of said property. The purchase price agreed upon shall be paid by the lessees to the lessor within 3 years from the date the agreement to purchase is entered into."

Appellant's contention is "That the agreement of option and lease was renewed another three years by virtue of oral promises made by Kosky when he made a trip for that purpose with Mrs. Hillyer, from Borrego to Kosky's home in Santa Monica and requested renewal of the contract, which promises he was led by Kosky to rely on to his great prejudice."

The trial court found, in part, that:

"2. Said agreement and all provisions thereof by its terms expired November 10, 1951, and was not renewed or extended by the parties; after November 10, 1951, Hagenbuch remained upon the premises referred to in said agreement as a tenant of Kosky from year to year;

"3. It is not true that Kosky promised Hagenbuch to extend or renew either the lease of the property herein involved, or the option to purchase said property; it is not true that Hagenbuch has expended any sums in reliance upon any promise to extend or renew said lease, or said option."

The principal question involved herein is whether the trial court's findings and judgment are supported by substantial evidence under the familiar rules announced in Berniker v. Berniker, 30 Cal.2d 439, 444, 182 P.2d 557.

There is a conflict in the testimony concerning the claimed oral promises made by Kosky to appellant Hagenbuch, who, in this connection, testified that there were only two conversations between the parties; that "The first conversation was down at the ranch and the second was at Kosky's home in Santa Monica"; that the conversation at the ranch took place in the latter part of 1950 and that his wife, Mrs. Hagenbuch, was present at the time; that "At that time I asked Dr. Kosky for a renewal of my lease, a written renewal, and he said that he was satisfied with the way things were going and we didn't need any written renewal, we would just go ahead on the old basis and that as far as he was concerned, I could stay there just as long as I wanted to." Mrs. Hagenbuch was called as a witness but did not testify as to this conversation and stated that the only statement she heard Kosky make in this connection was in 1948, when he said that if they would start producing and develop the ranch that they could have it. Hagenbuch testified that at the second conversation in Santa Monica in January, 1951, Kosky made the following statement: "He said again it wasn't necessary to have a written lease, that as things stood he was satisfied with the way it was, and that we would continue on with the same old agreement, and that his word was as good as his bond, and it was not necessary to go to the trouble to have a written one made up, and that he didn't like written leases anyway, and that he had never had one before and it wasn't necessary."

Lucy Hillyer, a real estate broker, was in the Kosky home on January 19, 1951, and testified that she did not hear the private conversation between plaintiff and defendant but that after it she asked Hagenbuch if he had obtained what he came for and he replied that it was not in writing but he was satisfied with what Kosky had said; that Kosky had then said, "Jimmie, now you are satisfied my word is as good as my bond. Lucy, you know I will stick to what I say."

Kosky's testimony as to these conversations is that at the ranch in December, 1950, the conversation with Hagenbuch was as follows: That Hagenbuch said, "You have been sick, Dolph. I would like to have a written lease to protect me in case something happens to you" and that he (Kosky) said, "No." Kosky further testified that at the Santa Monica conversation in January, 1951, Lucy Hillyer stated that Hagenbuch had done such a beautiful job on the ranch that he (Kosky) should give him part of it; that he (Kosky) did not reply to this statement and Hagenbuch then asked for a written lease on the ranch to protect him in case anything happened to Kosky; that he (Kosky) stated to Hagenbuch that he would not give him a written lease and

that if he (Hagenbuch) could continue operating the ranch at a profit to himself and possibly some profit to him (Kosky), he would let him remain; that an option to purchase the property was not mentioned in the conversation at the ranch or at Santa Monica; that he did not learn that Hagenbuch claimed the right to exercise the asserted option until he was informed of that fact by Hagenbuch's counsel on December 30, 1953.

Charles L. Jones, a public accountant, testified that in December, 1951, he advised Hagenbuch that he had a conversation with Kosky and that it would be necessary, if Hagenbuch was to remain on the property, that he pay rental for its use, due to the fact that the lease had expired under which he was operating and that he and Kosky would not consider less than $5,000 rental for the year 1952; that an option to purchase was not mentioned in this conversation at any time. On January 9, 1952, Jones wrote to Hagenbuch, asking him when the $5,000 rent would be paid and Hagenbuch replied, on January 14, 1952, in part, as follows: "At the present time it would be impossible for me to set any definite date for payments on the rental, as time of cutting and sales would play an important part * * *." Jones then again wrote to Hagenbuch requesting payment of the rent and on July 1, 1952, Hagenbuch for the first time stated in a letter to Kosky that he had "never agreed, either orally or in writing, to pay rental for the ranch" and that Kosky had promised that they would continue on as in the past and let the old agreement stand "as is" for the time being, and that as a result he, Hagenbuch, had continued on with that assurance in mind. Jones replied to this letter stating that Kosky would be satisfied to let Hagenbuch remain on the ranch if he received $5,000 rental for the year 1952. In a letter dated January 5, 1953, Jones advised Hagenbuch that he make necessary plans to abandon the ranch by February 15, 1953, since Kosky did not have additional money to put into it. In December, 1953, Hagenbuch, through his counsel, wrote Kosky and his counsel purporting to exercise the option mentioned in the agreement of November 10, 1948.

It is apparent from appellant's testimony that a renewal of the option involved was not discussed in the two conversations upon which he relies. According to him, he asked twice for a written renewal of the lease and Kosky declined to give it, saying, that they would proceed "on the old basis" or would "continue on with the same old agreement". This agreement did not expire until several months later, in 1951, and Kosky stated that the old agreement would continue in force, not that it would be renewed at the expiration date or that plaintiff could exercise the option to purchase after the expiration of the written lease of November 10, 1948. Furthermore, there is nothing in the correspondence between the parties indicating that Hagenbuch claimed the right to exercise the option after the expiration of the lease until December 30, 1953, when his counsel notified Kosky that he was exercising the option.

[1-4] Under the provisions of section 1945 of the Civil Code, appellant's continued possession of the premises following the expiration of the lease created a tenancy, at the most, from year to year, not for a three-year term, in the absence of an enforceable agreement to the contrary. An oral agreement to renew or extend the lease or option is within the statute of frauds, Code Civ.Proc., Sec. 1973, subd. 4; Civil Code, Sec. 1624, subd. 4, and invalid unless appellant can establish an estoppel under subdivision 3 of section 1962 of the Code of Civil Procedure. The question of whether an estoppel existed was one of fact for the trial court, Cruise v. City & County of San Francisco, 101 Cal.App. 2d 558, 562, 225 P.2d 988, and where, as here, the evidence is sufficient to support an inference by the trial court that no estoppel existed, its finding to that effect will not be disturbed on appeal. The finding of the trial court that the lease and option was not extended for a period of three years is supported by the record.

[5] Appellant contends that the court erred in admitting evidence as to the financial ability of Hagenbuch to exercise

the option. Since the court found that there was no valid agreement to renew the option, and that finding is supported by the record, the evidence as to Hagenbuch's financial ability was immaterial.

[6, 7] The claim of appellant that the court erred in admitting evidence of the value of the ranch is likewise without merit as the value of the ranch was not an issue in the case. Appellant further argues that one of the witnesses (Lucy Hillyer) was erroneously not permitted to testify as to "what she personally knew to be the purpose of the trip" by appellant and herself to see respondent and contends that appellant's statements to Mrs. Hillyer are "part of the res gestae". Hagenbuch, himself, testified as to the conversations with Kosky and it does not appear that plaintiff was prejudiced by the ruling of the court in this connection.

[8, 9] Appellant further contends that the court erred in overruling his objection to the introduction of evidence as to the amount of money spent by Kosky on the ranch prior to the execution of the lease involved. It does not appear that the admission of this evidence was in any respect prejudicially erroneous. Likewise, the court did not err in sustaining an objection to plaintiff's testimony relative to the net production of the ranch where plaintiff's check registers and books were introduced in evidence showing all personal moneys that he used in the development and operation of the ranch.

[10] It is also claimed that the court erred in entering a judgment purporting to terminate the lease and option without making Wyatt Wood a party. Wood was not joined with plaintiff in the complaint and the record shows that while Wood was named as a defendant in the unlawful detainer action, the complaint was dismissed as to him. In any event, appellant was not injured by Kosky's failure to secure a judgment against Wood.

[11] Finally, appellant contends that the court erred in overruling his objection to evidence of statements made to Hagenbuch by Jones because it was shown that Jones was only an accountant for Kosky. This argument is without merit. The record shows that Jones was acting for Kosky and Hagenbuch did not question his authority. Hagenbuch's conversations and correspondence with Jones was material to the issues involved.

Plaintiff asks in his complaint that it be decreed that plaintiff has the right to exercise the option to purchase and to complete the purchase of the land and respondent argues that aside from the question of estoppel, it appears that the provisions of the option are too indefinite to permit specific performance, citing 23 Cal.Jur. 429; Gatley v. Shockley, 215 Cal. 604, 610, 12 P.2d 436; Klein v. Markarian, 175 Cal. 37, 40, 165 P. 3; Roberts v. Lebrain, 113 Cal. App.2d 712, 716, 248 P.2d 810. However, it is not necessary to here decide that question since the judgment is sufficiently supported on other grounds.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



142 Cal.App.2d 720

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Pete WASHINGTON, Defendant and Appellant.

Cr. 5606.

District Court of Appeal, Second District, Division 3, California.

June 29, 1956.

Defendant was prosecuted for a violation of the Narcotics Law with a charge of a prior offense. Judgment of conviction from which no appeal was taken. On defendant's petition for a writ of error coram nobis for an order vacating the judgment. From an order of the Superior Court of Los Angeles County, denying petition, Ralph K. Pierson, J., the defendant ap-

pealed. The District Court of Appeal, Shinn, P. J., held that the petition was properly denied.

Order affirmed.

1. Criminal Law ⇐997(15)

On motion for a writ of error coram nobis to vacate a judgment of conviction, evidence did not sustain the defendant's contention of misrepresentation by counsel by not informing defendant of his rights at all stages of the proceeding.

2. Criminal Law ⇐997(11)

A petition for a writ of error coram nobis to vacate judgment of conviction on the ground that the evidence was insufficient was defective where the motion contained nothing more than general statements that defendant was deprived of due process and other constitutional rights.

Pete Washington, in pro. per.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Pete Washington was indicted by the Grand Jury of Los Angeles County for violation of section 11500, Health & Safety Code in that he did sell, furnish and give away a preparation of heroin on the 12th day of April, 1954 and of a like offense committed April 16, 1954. The indictment alleged a prior conviction of an identical offense committed in June, 1951 for which the defendant served a term of imprisonment. He was represented by counsel in a jury trial, admitted the former conviction and was convicted on both counts and sentenced to state prison. No appeal was taken.

[1, 2] October 17, 1955 Washington filed a written motion for an order vacating the judgment. November 9, 1955 the motion was heard and was denied. We have now for consideration an appeal from that order. Appellant made no request for appointment of counsel on the appeal and has filed briefs prepared by himself. The motion states no grounds upon which the court would have been warranted in vacating the judgment. It reads in part: "Defendant contends misrepresentation on part of Counsel by not informing defendant of his rights at all stages of the proceedings." No facts are stated which lend any credence whatever to the assertion that appellant was not represented in a competent manner or that there was any failure of counsel to perform his professional duties to the fullest extent. It was also asserted that the evidence was insufficient to justify the convictions. The motion contained nothing more except general statements to the effect that appellant was deprived of due process of law and other constitutional rights. In the absence of any showing whatever of invalidity of the judgment the court did not err in denying the motion. Appellant's briefs contain many factual assertions but these do not go to the merits of his motion nor can they be considered on the appeal.

The order is affirmed.

WOOD and VALLÉE, JJ., concur.



142 Cal.App.2d 453

Wallace SIDNEY and Helen Sidney, Plaintiffs and Appellants,

v.

Melvin ROTBLATT, Ideal Mortgage Company, a corporation, Service Escrow Company, a corporation, Title Insurance & Trust Company, a corporation, Martha V. Opp and Robert Bergman, Defendants and Respondents.

Civ. 21695.

District Court of Appeal, Second District, Division 1, California.

June 21, 1956.

Mortgagors' suit to vacate sale of property by trustees under trust deed. The Superior Court of Los Angeles County, Wilbur C. Curtis, J., entered judgment for de-

fendants, and plaintiffs appealed. The District Court of Appeal, White, P. J., held that where plaintiffs originally pleaded no cause at law, facts that court denied their motion, made ten days before trial, to file amended and supplemental complaint alleging cause at law and their motion for trial by jury, when they could have so moved to amend their pleadings ten months before they did so, and fact that court granted their motion to amend complaint as per such proposed amended and supplemental complaint at conclusion of trial and before entering judgment against them did not constitute an unauthorized denial of jury trial to plaintiffs.

Judgment affirmed.

1. Jury ⇐31(6)

Where plaintiffs originally pleaded no cause at law, facts that court denied their motion, made ten days before trial, to file amended and supplemental complaint alleging cause at law and their motion for trial by jury, when they could have so moved to amend their pleadings ten months before they did so, and fact that court granted their motion to amend complaint as per such proposed amended and supplemental complaint at conclusion of trial and before entering judgment against them did not constitute an unauthorized denial of jury trial to plaintiffs. West's Ann.Code Civ.Proc., § 631.

2. Appeal and Error ⇐1031(1)

Prejudice cannot be presumed from fact that case was not tried to jury, but on contrary, it will be presumed that parties enjoyed benefits of fair and impartial trial, as contemplated by Constitution and statutes. West's Ann.Code Civ.Proc., § 631.

3. Mortgages ⇐74

In mortgagor's action to vacate sale made by trustees under trust deed, wherein mortgagors contended that they had signed blank instruments, evidence sustained trial court's findings that mortgagors had not been furnished with any printed blank forms which were signed by them in blank or that any documents were completed over mortgagors' signatures without their knowledge or consent.

4. Usury ⇐117

In mortgagors' suit to vacate trustees sale of property subject to trust deed, contending, inter alia, that loan and trust deed agreement violated usury law, evidence supported trial court's findings that there had been no usury, even though commissions and interests did exceed 10% of amount borrowed, where lender, mortgage broker, and escrow company were separate entities and none of them was the agent of any other.

Thomasset, Mathews & Forn, Albert J. Forn, Los Angeles, for appellants.

Hahn, Ross & Saunders, Los Angeles, for respondents.

WHITE, Presiding Justice.

Plaintiffs, Mr. and Mrs. Sidney, appeal from the judgment and from the order denying their motion for a new trial, but by their opening brief the latter appeal is abandoned. The judgment from which they appeal is in favor of defendants for their costs.

Appellants' complaint to enjoin trustees' sale was filed October 6, 1953. By their amended and supplemental complaint filed October 20, 1953, they allege that the trustees' sale sought to be enjoined has been completed and they pray that "said trustees' sale be vacated and the trustees' deed cancelled; that all proceedings thereunder be restrained; that an accounting be required * * *".

On March 2, 1955, appellants filed Notice of Motion for Leave to Amend and Supplement Complaint, and their Proposed Second Amended and Supplemental Complaint. And on March 3, 1955, they filed Notice of Motion for Order Granting Jury Trial. Both came on for hearing as noticed on March 8, 1955, which was ten days before the trial date theretofore set and noticed. Both motions were denied without prejudice.

Without notice of intention to do so, at the beginning of the trial, appellants again asked permission to file said Second Amended and Supplemental Complaint and again asked for a jury trial. Both motions were

denied. Appellants then moved to consolidate for trial an action filed by them and "served today" upon respondents. That motion was denied.

The trial then proceeded from March 18 to 24, and at its conclusion appellants again moved for leave to amend their complaint as per the proposed Second Amended and Supplemental Complaint on file, which was submitted; and they then moved for permission to amend the prayer of their complaint, which was granted. March 25, the trial court granted appellants' motion for leave to file said Second Amended and Supplemental Complaint.

The Second Amended and Supplemental Complaint so filed incorporates by reference the Amended and Supplemental Complaint as the first cause of action, alleges eight additional causes of action, prays for restitution or damages in the alternative and several other items of damage.

[1] Appellants contend on the instant appeal that the trial court erred in denying them a jury trial. It is admitted that, until the Second Amended and Supplemental Complaint was filed no cause of action at law had been pleaded and a jury trial would have been improper, but appellants urge that the effect of the denial of their motions 10 days before the trial and at the beginning thereof "was to deny plaintiffs the right of trial by jury to which they were entitled." Appellants cite and rely upon decisions to the effect that "A denial of right to jury trial to a party entitled thereto is a 'miscarriage of justice' requiring reversal".

Appellants admit that they waived their right to a jury trial under the provisions of section 631 of the Code of Civil Procedure, but, they urge that nevertheless they "were wrongfully deprived of a trial by jury when the trial court arbitrarily denied their motions to amend the pleadings". A reading of the entire record on the instant appeal, however, shows that appellants could have amended and supplemented their pleadings and requested trial by jury about ten months before they did so. No excuse for their delay is shown. Since the trial court did grant appellants' motion to file said pleading at the end of the trial, it is possible that said motion should have been granted at the beginning of the trial. However, under the circumstances of the instant action, even if the motion to file the Second Amended and Supplemental Complaint had been granted at the beginning of the trial, or ten days before, it would not have been an abuse of discretion for the trial court at the same time to have denied appellants' motion for a jury trial. Clearly in the instant action, it was the failure of appellants to take the steps required at the times provided by law, and not any error or abuse of discretion on the part of the trial court, which prevented their having a trial by jury.

[2] "Furthermore, prejudice cannot be presumed from the fact that appellants did not try their case to a jury. On the contrary, it is presumed that they enjoyed the benefits of a fair and impartial trial as contemplated by the Constitution and the statutes." Harmon v. Hopkins, 116 Cal.App. 184, 188, 2 P.2d 540; Glogau v. Hagan, 107 Cal.App.2d 313, 318, 237 P.2d 329.

[3] Appellants also urge as a ground for reversal that "A deed executed in blank is void", and rely upon certain cited decisions. The trustees' sale which appellants seek to vacate, according to appellants' pleadings, was under a trust deed and note procured by misrepresentations, "usurious and invalid" and "the result of duress and oppression", intended to be "sham instruments having no value or meaning * * *", and the "other documents were printed blank forms" when signed by them. Nowhere have appellants pleaded that either the note or trust deed was incomplete when signed by them. The trial court found appellants' said averments untrue and "that it is not true that any one of said defendants furnished plaintiffs with any documents which were printed blank forms or which were signed by plaintiffs in blank; that it is not true that said documents or any one of them were completed over plaintiffs' signatures or without plaintiffs' knowledge or consent". The finding has ample support in the record and cannot be disturbed on appeal.

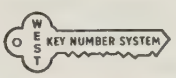
[4] Appellants further claim that the judgment should be reversed because "the evidence is clear * * * that defendants were operating a scheme or device for the

purpose of evading the usury law". That statement is supported by no reference to the evidence which is "clear". The total of the interest and commission paid by plaintiffs for the loan which gave rise to this action did exceed 10% of the amount borrowed. The evidence is that the three defendants who were the lender, the mortgage broker and the escrow company were separate entities; that none was the agent of any other; that the lender had no money invested in, or interest or authority in either of the corporations; and that the lender did not receive any portion of the fees paid to either of the corporations or share in any way in the profits of either. An examination of the entire record fails to disclose any evidence of usury and shows that the trial court found contra.

The appeal from the order denying motion for new trial is dismissed.

The judgment is affirmed.

DORAN and FOURT, JJ., concur.



142 Cal.App.2d 814

C. W. CARLSTROM, Plaintiff and Appellant,

v.

CITY OF SAN DIEGO, a Municipal corporation, et al., Defendant and Respondent.

Civ. 5156.

District Court of Appeal, Fourth District, California.

July 3, 1956.

Action by owner of certain housing units for a judgment declaring that a municipal Board of Appeals had power to determine the suitability of a type of construction which did not meet the standards of a Municipal Building Code. The Superior Court, San Diego County, Joe L. Shell, J., entered judgment adverse to owner and he appealed. The District Court of Appeal, Mussell, J., held that section of municipal building code giving Board of Appeals power to determine suitability of alternative materials and types of construction did not include the power to authorize construction of buildings with 2" x 3" exterior wall studs or to authorize their relocation in the city contrary to specific provisions of building code requiring such studs to be 2" x 4".

Judgment affirmed.

1. Municipal Corporations ⇐601(27)

Section of Municipal Building Code giving Board of Appeals power to determine suitability of alternative materials and types of construction did not include the power to authorize construction of buildings with 2" x 3" exterior wall studs or authorize their relocation in the city contrary to specific provisions of building code requiring such studs to be 2" x 4".

2. Municipal Corporations ⇐621.8

Where building code of a municipality required 2" x 4" studding on the exterior walls of buildings constructed within the city action by Board of Appeals in attempting to authorize relocation within the municipality of buildings constructed with 2" x 3" exterior walls was an attempt to change the specific requirements of said code, was contrary to Municipal Charter requiring all legislative action to be by ordinance, and therefore was invalid. Charter of the City of San Diego, § 13, St.1931, p. 2855.

3. Municipal Corporations ⇐621.47

Where Board of Appeals granted a housing owner application for permission to relocate certain housing units constructed with 2" x 3" studs even though building code of the municipality required 2" x 4" studs, but made such authorization subject to an opinion of the city attorney as to the legality of such action, and his opinion was to the effect that the board had no authority to authorize the variation, owner's request, under such circumstances, was not granted by the board.

Levenson, Levenson & Block, San Diego, for appellant.

J. F. DuPaul, City Atty. and Aaron W. Reese, Deputy City Atty., San Diego, for respondent.

MUSSELL, Justice.

This is an action for declaratory relief. On or about June 4, 1954, plaintiff purchased certain housing units from the United States government, which units had been previously used during the war years as emergency housing. The exterior walls of these units were 8′ high and 2″ x 3″ wooden studs were used in their construction. Plaintiff desired to relocate these units in the city of San Diego and on or about August 15, 1954, applied for permits from the city so to do. His application was denied on the ground that the units would not meet the requirements of the Uniform Building Code of the city providing that the exterior stud walls for buildings of two (2) stories or less, in the city, shall consist of not less than 2″ x 4″ studs. On or about October 11, 1954, plaintiff appealed to the Board of Appeals appointed by the City Manager under the provisions of section 91.02(a) of the San Diego Municipal Code, requesting authorization to use 2″ x 3″ studs in those housing units for which application for relocation was made. After hearing, the board, on October 11, 1954, orally granted the request of plaintiff subject to the City Attorney's opinion, as to the legality of such action by the board. At the request of plaintiff the City Attorney's opinion, in writing, was submitted by means of a letter to the Acting Director of Building Inspection. The letter stated, in part, as follows:

"It is, therefore, the conclusion of the undersigned that the Board of Appeals had no authority to authorize the use of 2″ x 3″ studs in place of the minimum 2″ x 4″ studs as required by the Uniform Building Code. By authorizing the use of 2″ x 3″ studs, the Board of Appeals has attempted to amend the Building Code, which it has no authority to do. The Board of Appeals in this situation has only the authority to recommend a legislative change which it believes is required. You are, therefore, advised that you have no authority to issue any building permit authorizing such use."

On October 14, 1954, the building inspector of the city, acting upon the basis of the city attorney's opinion, refused to issue a building permit to plaintiff, who then filed this action to have it declared that the board of appeals had the power to determine the suitability of the alternate type of construction which he sought to have approved and to have it declared that the opinion of the city attorney was without foundation in fact or in law. The trial court rendered judgment in favor of the defendants and against the plaintiff. He appeals therefrom, contending that the action of the board of appeals in approving his request for permit was proper and such action was not an unlawful delegation of power or an attempt to legislate by said board.

The city of San Diego is a municipal corporation organized under a freeholders charter approved by the legislature on April 15, 1931, Stats.1931, p. 2838. Its charter provides that "All legislative powers of the City shall be vested, subject to the terms of this Charter and of the Constitution of the State of California in the Council, except such legislative powers as are reserved to the people by the Charter and the Constitution of the state." Charter of the City of San Diego, § 11.

Appellant bases his contention that the board of appeals had authority to approve his application for a permit on the following provisions of the Uniform Building Code as amended by the San Diego Municipal Code:

"Section 204 shall read as follows:

"In order to determine the suitability of alternate materials and types of construction and to provide for reasonable interpretations of the provisions of this Code, there shall be and is hereby created a Board of Appeals, consisting of five members who are qualified by experience and training to pass upon matters pertaining to building construction. The Building Official shall be an ex-officio member and

shall act as Secretary to the Board, but shall not have a vote. The Board of Appeals shall be appointed by the City Manager and shall hold office at his pleasure. The Board shall adopt reasonable rules and regulations for conducting its investigations and shall render all decisions and findings in writing to the Building Official with a duplicate copy to the appellant and may recommend to the City Council such new legislation as is consistent therewith.

"The City Attorney or his Deputy and a representative from the Fire Department shall attend and advise at all meetings of the Board of Appeals." (San Diego Municipal Code, Sec. 91.02 (a).

In order to determine the meaning of this section it is necessary to consider the following provisions of the Uniform Building Code of the city:

Section 102. "The purpose of this Code is to provide minimum standards to safeguard life or limb, health, property, and public welfare by regulating and controlling the design, construction, quality of materials, use and occupancy, location and maintenance of all buildings and structures within the city and certain equipment specifically regulated herein.

"Wherever in this Code reference is made to the Appendix, the provisions in the Appendix shall not apply unless specifically adopted."

Section 103. "New buildings and structures hereafter erected in the city, and buildings and structures moved into or within the city shall conform to the requirements of this code.

"Additions, alterations, repairs and changes of use or occupancy in all buildings and structures shall comply with the provisions for new buildings and structures except as otherwise provided in Sections 104, 306, and 502 of this Code.

"Where, in any specific case, different sections of this Code specify different materials, methods of construction or other requirements, the most restrictive shall govern."

Section 105: "The provisions of this Code are not intended to prevent the use of any material or method of construction not specifically prescribed by this Code, provided any such alternate has been approved.

"The Building Official may approve any such alternate provided he finds that the proposed design is satisfactory and complies with the provisions of Chapter 23, and that the material, method, or work offered is, for the purpose intended, at least the equivalent of that prescribed in this Code in quality, strength, effectiveness, fire resistance, durability, and safety.

"The Building Official shall require that sufficient evidence or proof be submitted to substantiate any claim that may be made regarding its use."

Section 2501(a). "General. The quality and design of all wood members used for load-supporting purposes in buildings or other structures shall conform to the standards specified in this Chapter."

Section 2521(d). "Size and Height. Exterior stud walls and bearing partitions for buildings of two stories or less shall consist of not less than two-inch by four-inch (2″ x 4″) studs; for building of three stories, the studding shall be not less than three-inch by four-inch (3″ x 4″) or two-inch by six-inch (2″ x 6″) to the bottom of the second floor joists and two-inch by four-inch (2″ x 4″) for the two upper stories. Maximum allowable height of two-inch by four-inch (2″ x 4″) and three-inch by four-inch (3″ x 4″) stud framing shall be fourteen feet (14′) and of two-inch by six-inch (2″ x 6″) stud framing shall be twenty feet (20′) unless the wall is supported laterally by adequate framing. No studding shall be spaced more than sixteen inches (16″) on centers, except that in lieu of this requirement the studs and plates may be designed as a system of columns and beams, provided structural grade

material is used, or such walls may be constructed of not less than four-inch by four-inch (4″ x 4″) posts spaced not more than five feet (5′) on centers or of larger members designed as required in this Chapter, or may be of post and beam framing with plank sheathing not less than one and one-half inches (1½″) thick or may be of laminated construction not less than four inches (4″) nominal in thickness with the structural assembly properly designed to support all loads.

"One-story buildings having a total floor area of not more than four hundred square feet (400 sq. ft.) may have exterior walls of vertical one-inch (1″) boards and battens without studs."

In these quoted provisions the city has provided that all buildings therein shall conform to certain standards and has specifically provided in section 2521(d) that exterior stud walls and bearing partitions of two story or less shall consist of not less than 2″ x 4″ studs. In sections 103 and 105 it is provided that where, in any specific case, different sections of the code specify different materials, methods of construction or other requirements, the most restrictive shall govern and that the provisions of the code are not intended to prevent the use of any material or method of construction not specifically prescribed by the code, provided any such alternate has been approved.

[1] We conclude that the power given the board of appeals in section 204 of said code "to determine the suitability of alternate materials and types of construction" does not include the power to authorize construction of buildings with 2″ x 3″ exterior wall studs or their relocation within the city, contrary to the plain and specific provisions of section 2521(d) of the code. It appears that the board of appeals, under section 204 of the code, has power to determine the suitability of *alternate materials and types of construction* where exterior walls of 2″ x 3″ wood studs are not used and such walls are otherwise constructed.

[2] Section 13 of the charter of the city of San Diego requires that all legislative action shall be by ordinance except where otherwise required by the constitution or laws of the state and the record herein contains no evidence of an ordinance purporting to change the requirements of said section 2521(d). The action taken by the board of appeals is an attempt to change the specific requirements of said section, contrary to the provisions of the city charter, and is therefore invalid.

[3] Appellant contends that the action of the board in approving his use of 2″ x 3″ wood studs should control for the reason that the load carrying capacity of such studs 8′ in length is greater than of 2″ x 4″ studs 14′ in length, and argues that the action of the board is binding on the city because it is an approval of an alternate type of construction. However, the building code not only regulates the types and method of construction but also regulates the materials to be used. Appellant's argument would have merit if materials other than wood were used in the exterior walls. However, in the instant case no alternate method of construction was proposed. It further appears that the board of appeals granted plaintiff's application subject to the opinion of the city attorney as to the legality of such action, and since his opinion was to the effect that the board had no authority to authorize the use of 2″ x 3″ studs, it follows that plaintiff's request was not granted by the board.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

142 Cal.App.2d 683

Manuel FRANK, as Administrator of the Estate of Elsie Tavares Frank, a.k.a., Deceased, Plaintiff and Respondent,

v.

Maria TAVARES, Defendant and Appellant.

Paul HORNUNG, Cross-Complainant and Respondent,

v.

Maria I. TAVARES, Cross-Defendant and Appellant.

Civ. 8724.

District Court of Appeal, Third District, California.

June 28, 1956.

Action was brought by administrator of deceased daughter against mother for specific enforcement of alleged oral contract by mother to convey realty to daughter if daughter would construct a dwelling thereon, or, in the alternative, to recover damages or to impress a trust on the property in the amount of the value of the dwelling and furnishings. One claiming a life interest in the realty filed a cross-complaint against the mother for the value of the furniture and the occupancy of the dwelling. The Superior Court of Sonoma County, Charles J. McGoldrick, J., entered judgments against the mother, and she appealed. The District Court of Appeal, McMurray, J. pro tem., held that evidence sustained finding of jury that there was an oral contract on the part of the mother for conveyance of the realty.

Judgments affirmed.

1. Specific Performance ⇐121(4)

In action to enforce specifically alleged oral contract of mother to convey realty to daughter if daughter should construct a dwelling house thereon, evidence sustained jury's finding that there was an oral contract for the conveyance of the realty.

2. Frauds, Statute of ⇐144

A party is estopped to plead the statute of fraud in an action for specific performance of the sale of realty, where he has permitted the other party, solely in reliance on such contract, to enter in possession of the realty and make valuable improvements thereon.

3. Specific Performance ⇐123

Where there was substantial evidence to support finding of jury that there was an oral contract between mother and daughter that mother would convey realty to daughter if daughter should erect a dwelling on the realty, and the contract was specifically enforceable because of the relationship between the parties, question whether or not any demand had been made by the daughter on her mother to convey the realty to the daughter was immaterial, and apparent inconsistency between trial court's finding that daughter made such demands and finding that daughter did not make such demands, was immaterial.

4. Limitation of Actions ⇐103(2)

If plaintiff and defendant are fiduciaries, there is no duty of inquiry with respect to performance of contract until the relationship is repudiated, and statute of limitations does not run until the relationship is repudiated.

5. Limitation of Actions ⇐102(11)

Where relationship between mother and her only daughter was a fiduciary relationship, and such relationship was not repudiated, but terminated on death of daughter on April 23, 1950, and administrator of deceased daughter brought action against the mother for specific enforcement of alleged oral contract between mother and daughter on July 27, 1951, the action was not barred by limitations.

6. Limitation of Actions ⇐44(2)

Where one person has paid a full purchase price and has otherwise performed all conditions in an agreement for purchase of realty, and the purchaser has fully performed and has entered into possession of the realty, the statute of limitations does not run while the purchaser is in possession with the acquiescence of the vendor.

7. Money Received ⇐1

A showing of wrongdoing or actual fraud is not necessary under theory of unjust enrichment.

8. Specific Performance ⇐47

Where mother orally agreed that she would convey realty to daughter, if daughter would construct a dwelling on the realty, and the daughter constructed the dwelling and then died before the mother conveyed the realty to the daughter, doctrine of quasi contract was applicable in action by daughter's administrator against the mother for specific enforcement of the contract.

9. Money Received ⇐17(1)

No particular form of pleading is necessary to invoke the doctrine of unjust enrichment.

10. Money Received ⇐17(1)

A common count is sufficient basis for finding of quasi contract in the award of damages for unjust enrichment.

11. Appeal and Error ⇐193(1)

Where a matter has been tried under certain pleadings, plaintiff's right to relief should not be denied on appeal because of defects in the pleading.

12. Appeal and Error ⇐852

It is immaterial that theory on which judgment may be affirmed is not identical with that relied on by plaintiffs or by the trial court, since the plaintiffs are required only to plead and prove facts sufficient to justify relief, and the trial court's judgment must be affirmed if the findings supported by the evidence, are sufficient to warrant the relief granted on any legal theory.

Earl C. Berger and Park Chamberlain, San Francisco, for appellant.

Lounibos & Lounibos, Petaluma, and John A. Condit, Healdsburg, for plaintiffs-respondents.

Baker, Palmer & Wall, Bakersfield, for cross-complainant-respondent.

McMURRAY, Justice pro tem.

A jury returned verdicts in favor of Manuel Frank, as administrator of the estate of Elsie Tavares Frank, his deceased wife, in the sum of $11,925 and in favor of Paul Hornung, a friend of the deceased Elsie Frank, in the sum of $3,075. Maria Tavares, the mother of Elsie, appeals from the verdicts against her and from a judgment rendered by the court which adopted these verdicts.

In 1948 Paul Hornung gave Elsie Frank approximately $25,000 with which to build and furnish a house upon the understanding that she would provide him with a home and nursing care for the rest of his life. Hornung was some 30 years Elsie's senior and did not anticipate that she would predecease him. He had first met Elsie when she nursed him through an illness some 20 or 25 years previously. The house was built upon a ranch owned by Maria Tavares who, the evidence shows, had told her only daughter Elsie, that she would deed to Elsie the property upon which the house was located. Elsie died suddenly in April of 1950, and within a week after her burial appellant, Maria Tavares, took possession of the house and asserted exclusive ownership thereof. Respondent Frank, as administrator of his wife's estate, brought the present action to specifically enforce the promise of appellant to convey the property to Elsie or in the alternative to recover $25,000 as damages or to impress a trust upon the property in the amount of the value of the house and furnishings. There was no dispute between Hornung and Frank as to Hornung's right to a life interest in the property, as Hornung had in writing disclaimed any interest in the house and in this matter only sued Maria for the value of the furniture and the occupancy of the house.

On this appeal appellant raises the following questions: (1) Where identical facts must be proved in order to entitle the plaintiff to relief at either law or equity and where the jury finds specially that such facts were not proved, but at the same time renders a general verdict in favor of plaintiff, may the trial court uphold such verdict on the theory the general verdict and special findings were applicable separately to "legal" and "equitable" issues, and that the special findings, therefore, do not control? (2) Where the statute of limitations had been pleaded as a defense, and where conflicting evidence has been presented

thereon, may the court withdraw that issue from the jury? (3) May a court instruct the jury that it may find for the plaintiff on a theory of recovery not pleaded in the complaint? (4) May a verdict based on fraud be found where there was no evidence of fraud, in fact, no relationship, contact, or communication between the alleged defrauder and her victim?

In the course of the trial certain interrogatories were submitted to the jury. These interrogatories and the jury's verdicts thereon were as follows:

"We, the jury in the above entitled matter, do find:

"1. Did Maria Tavares, on or about February 7, 1948 orally promise to give to her daughter, Elsie Tavares Frank, a portion of land on the Tavares ranch to be selected by Elsie Tavares Frank upon which a dwelling house would be built by Elsie Tavares Frank?

"Answer: Yes.

"2. Did Elsie Tavares Frank spend any money or erect any building in reliance upon the oral promise of her mother, Maria Tavares, to give land to her?

"Answer: Yes.

"3. If money was spent by Elsie Tavares Frank in reliance upon the oral promise of Maria Tavares, how much money was expended by her for the erection of the house, the furnishings of the house, the digging of a well, and the planting of a garden?

"Answer: $25,000.00.

"4. If any money was spent by Elsie Tavares Frank for the purposes mentioned in question No. 3, how much, if any, of the money was furnished Elsie Tavares Frank by Paul Hornung?

"Answer: $25,000.00.

"5. Was there an oral agreement between Paul Hornung and Elsie Tavares Frank that Paul Hornung could live in the dwelling house constructed by Elsie Tavares Frank for the remainder of his life?

"Answer: Yes.

"6. Was there a relationship of mutual trust and confidence on or about February 7, 1948, between Elsie Tavares Frank and Maria Tavares, her mother?

"Answer: Yes.

"7. Did Paul Hornung, in reliance upon the oral promise, if any, of Maria Tavares to give a deed for land to Elsie Tavares Frank, give money to Elsie Tavares Frank for the construction of the dwelling house?

"Answer: Yes.

"8. Did Elsie Tavares Frank demand of Maria I. Tavares that she transfer to her the land on which the house was erected?

"Answer: No.

"9. Did Maria I. Tavares plan to deceive and mislead her daughter by permitting her to erect a home on such property and by not intending to convey said property to her daughter?

"Answer: No.

"10. Did Maria Tavares and Elsie Tavares Frank, her daughter, agree that the ownership of the house would revert to Maria Tavares in the event that Elsie Tavares Frank ceased to occupy the same?

"Answer: No."

The trial judge made certain findings of fact after adopting the verdicts of the jury, and in one respect made a finding of fact contrary to that made by the jury. In answer to interrogatory No. 8, the jury found that there had never been a demand by Elsie upon Maria that she transfer to her the land upon which the house was erected. The court found as follows: "That following the erection of said home and the furnishing of said home, the said decedent made repeated demands, orally and in writing, upon the defendant Maria I. Tavares that the said Maria I. Tavares transfer to said decedent as per her oral agreement, the title to the land upon which this dwelling house had been erected. That the said Maria I. Tavares failed, neglected and refused to transfer the said title to the real estate, or any portion thereof, to the decedent; that up to the time

of the death of said decedent, the defendant Maria I. Tavares promised to transfer said title to the real estate, but continued to delay in the actual execution of said deed."

[1–3] Under the evidence adduced at the trial, the finding of the jury that there was an oral contract for the conveyance of the land finds substantial evidence to support it. Therefore, the apparent inconsistency between the trial court's finding and the finding of the jury is immaterial. The jury was acting within its province in so finding and the action of the trial court in finding repeated demands had been made was mere surplusage. A party is estopped to plead the statute of frauds where one party to an oral contract for the sale of real property has permitted the other party, solely in reliance upon such contract, to enter into possession of the property and make valuable improvements thereon. Rockhill v. Parker, 22 Cal.App. 367, 134 P. 720; Stepp v. Williams, 52 Cal.App. 237, 198 P. 661. In this case the close relationship between the mother and her only daughter is a fiduciary one. This being so, the apparent inconsistency complained of by appellant between the special and the general verdicts disappears. Appellant contends that under the case of Aguirre v. Alexander, 58 Cal. 21, the inconsistency between the verdicts was fatal since it could not be reconciled with the ultimate finding of the jury. That is not the case here. There was an oral contract found, and an oral contract which is enforceable because of the relationship between the parties. Whether or not any demand was made by Elsie upon her mother has no bearing whatever upon the case when the verdicts in this matter are read and considered.

[4–6] The next point urged by appellant as to the statute of limitations is without merit. She urges that the question of whether or not the statute of limitations had run should have been submitted to the jury since there was conflicting evidence. The trial court was undoubtedly aware of the rule that if the plaintiff and defendant were fiduciaries, there is no duty of inquiry until that relationship is repudiated. Here, the relationship was not repudiated, but terminated upon the death of Elsie on April 23, 1950. The complaint was, therefore, as a matter of law timely filed on July 27, 1951. Knapp v. Knapp, 15 Cal.2d 237, 100 P.2d 759; Laraway v. First National Bank, 39 Cal.App.2d 718, 104 P.2d 95; Lee v. Hensley, 103 Cal.App.2d 697, 230 P.2d 159. Furthermore, where one person has paid a full purchase price and otherwise performed all the conditions in an agreement for the purchase of land (here, the contract is tantamount to an agreement of purchase and sale, the consideration being Elsie's building the house upon Maria's land), and the vendee has fully performed and has entered into possession of the land, the statute does not run while the vendee is in possession with the acquiescence of the vendor. Hermosa Beach Land & Water Co. v. Law Credit Co., 175 Cal. 493, 166 P. 22; Fleishman v. Woods, 135 Cal. 256, 67 P. 276. Under this view of the law, there was no conflict in the evidence as to the running of the statute of limitations. The court was correct in instructing the jury in this case that they should not consider the statute of limitations. There was no testimony that the confidential relationship had been repudiated before Elsie's death or that there had been any ouster of possession during Elsie's lifetime.

[7–10] Appellant's next point is that the trial court erred in instructing the jury that it could find a verdict for plaintiff on the theory of unjust enrichment, contending that, under such a theory of recovery, there must be some wrongdoing or actual fraud. Such is not the law. Here, it is evident that a woman obtaining possession of a house to which she had contributed nothing and asserting that she should be entitled to keep the house merely because she failed to perform a promise which she made to her deceased daughter has brought herself well within the doctrine of quasi contract. (Restatement of Contracts, Sec. 90.) However, there is no reason to conclude that the jury based its verdict for respondent Frank upon a theory of quasi contract or unjust enrichment as it is apparent that the basis of that verdict was upon an oral contract performed by one party in a confi-

dential relationship to the non-performing party. An instruction to the jury upon the doctrine of unjust enrichment under the pleading here was proper in any event, as there is no particular form of pleading necessary to invoke the doctrine, and a common count is sufficient basis for the finding of a quasi contract in the award of damages for unjust enrichment. (5 Cal.Jur.2d 527.)

[11, 12] The last point urged by appellant is contained in the question: May a verdict based on fraud be found where there was no evidence of fraud, in fact no relationship, contact or communication between the alleged defrauder and her victim? This point is concerned with the fact that respondent Hornung in his pleading alleged as the basis for recovery that he had been defrauded by Maria and that the jury by its findings in the special interrogatories had found expressly against any fraud being practiced. It would seem self-evident that the jury's general verdict for respondent Hornung was based upon a theory of quasi contract founded upon the unjust enrichment of the cross-defendant and appellant by her depriving cross-complainant of the use of the property. The mere fact that recovery was not sought in the pleading in the device of pleading a common count is not in any way detrimental to the cross-complaint. The pleading is certainly sufficiently broad to allow recovery by the cross-complainant, and where, as here, a matter has been tried without any objection during the trial, the rule enunciated in Edwards v. Edwards, 90 Cal.App.2d 33, 202 P.2d 589, should be applied; that is, that where a matter had been tried under certain pleadings, plaintiff's right to relief should not be denied upon appeal because of defects in the pleading. See, also, Swanson v. Hempstead, 64 Cal.App.2d 681, 149 P.2d 404. The rule applicable here is well stated in Sears v. Rule, 27 Cal.2d 131, at page 140, 163 P.2d 443, at page 448, where it is said: "It is, of course, immaterial that the theory upon which the judgment may be affirmed is not identical with that relied upon by plaintiffs or by the trial court, since plaintiffs are required only to plead and prove facts sufficient to justify relief, and the trial court's judgment must be affirmed if the findings, supported by the evidence, are sufficient to warrant the relief granted on any legal theory." The conclusion of the jury and of the trial court that respondents should recover from Maria Tavares is certainly supported by the evidence, and there appears to be no reversible error.

The judgments appealed from are affirmed.

VAN DYKE, P. J., concurs.



142 Cal.App.2d 722

Ida UNGER, Plaintiff and Respondent,

v.

Ray C. CAMPAU and Minnie E. Campau, his wife, Defendants and Appellants.

No. 16646.

District Court of Appeal, First District, Division 1, California.

July 2, 1956.

Rehearing Denied Aug. 1, 1956.

Action by purchaser against vendors for damages for false representations allegedly made by one vendor to induce sale of certain property. The Superior Court, City and County of San Francisco, Daniel R. Shoemaker, J., entered judgment for purchaser and vendors appealed. The District Court of Appeal, Agee, J. pro tem., held, inter alia, that where purchase price for property in question included both realty and personalty, and purchaser proved only value of realty but not that of personalty, award of damages based on the difference between the sale price and the value of the property after repairs, plus the cost of repairs, without making an allowance for the personalty would be reversed for purpose of determining the value of the personalty and such allowance would be deducted from the award.

Judgment reversed in part and affirmed in part.

1. Fraud ⇐20

In order for a buyer to have a good cause of action based on false representations, there must be both reliance by the buyer upon the seller's fraululent misrepresentations, and justification for such reliance.

2. Fraud ⇐58(2, 4)

In action by purchaser against vendors for damages for false representations allegedly made by one vendor to induce sale of certain property, evidence sustained trial court's finding that vendor made false representations that the property in question consisted of three rentable residential units, and that purchaser relied on such representations and was justified in such reliance.

3. Witnesses ⇐328

In action by purchaser against vendor for damages for false representations allegedly made by one vendor to induce sale of certain property, trial court did not abuse its discretion in limiting cross-examination of purchaser to questions as to the general nature of her previous business experiences, where only legitimate purpose of such question was to establish purchaser's general knowledge and previous experience in buying and selling of realty.

4. Fraud ⇐58(1)

In action by purchaser against vendor for damages for false representations allegedly made by one vendor to induce sale of certain property, evidence sustained finding of trial court that one of the vendors did certain unsatisfactory plumbing and electrical work on property in question.

5. Fraud ⇐59(1)

Where purchase price for property sold because of fraudulent representations included both realty and personalty, and purchaser, in an action for damages because of such fraudulent representations, proved only the value of the realty but not that of the personalty, an award of damages based on the difference between the sale price and the value of the realty after repairs, plus the cost of repairs, without making an allowance for the personalty, would be reduced by the value of the personalty.

James D. Lucey, San Francisco, for appellants.

Charles P. Molinari, Joseph L. Casalnuovo, San Francisco, for respondent.

AGEE, Justice pro tem.

On June 16, 1953, plaintiff purchased from defendants, husband and wife, a parcel of real property known as 55, 55A and 55B Brosnan Street, San Francisco, together with certain furniture, for $11,794. On September 3, 1953, plaintiff filed this action against defendants for damages for false representations alleged to have been made by defendant Campau which induced plaintiff to purchase. The trial court, sitting without a jury, rendered judgment in plaintiff's favor for $3,398.04. This appeal therefrom by defendants followed. Mrs. Campau did not participate in the negotiations and Campau is the defendant hereinafter referred to as "appellant."

Respondent alleged in her complaint, and the trial court found, that, for the purpose of inducing respondent to purchase and with the intent to deceive and defraud her, appellant falsely and fraudulently represented to her that the property consisted of three separate residential units which could be rented as such, and that the plumbing and electricity had been installed according to the applicable laws and were in good condition and repair; that these representations were false in that all of the plumbing, electrical and construction work had been done in an illegal manner and without inspection or permits as required by law, the ground floor unit known as the garden apartment could not be legally used or rented as a residential unit, and said plumbing and electricity were not installed in a good and workmanlike manner; that appellant knew that these representations were false but withheld such knowledge from respondent; that respondent believed such representations to be true and relied thereon; that, but for said representations, respondent would not have purchased the property.

[1, 2] Appellants contend that the evidence is insufficient to support these findings. First, they say that respondent had had previous experience in business and

real estate transactions, that she lived next door to the property and had watched appellant as he was doing the remodeling work, and that she had consulted with her own real estate broker before the sale. Therefore, appellants contend, respondent did not rely upon and was not induced by any representations made by them. This contention is without merit. There is no showing that respondent had any technical knowledge which would have enabled her to make an inspection of the property which would have revealed the structural, electrical and plumbing defects. See Milmoe v. Dixon, 101 Cal.App.2d 257, 260, 225 P.2d 273. Appellant had listed the property as having three separate rental units. Respondent went over the listing before buying, relied upon it and believed it to be true. When she told appellant that she wanted the property for income purposes, he replied: "It will be very easy." She also testified that she would not have bought the property had she not believed it to have three rentable units. There is no quarrel between the parties as to the applicable rule of law. There must be both reliance by the buyer upon the seller's fraudulent misrepresentations and justification for such reliance. The question of reliance and justification in this case is one of fact, not of law, and the evidence is amply sufficient to support the trial court's finding thereon. In their closing brief, appellants complain that a finding was not made as to this special defense "by way of estoppel," i. e., that respondent lived next door to the property, had watched the construction, and relied upon her own knowledge and independent advice. This issue was fully covered when the trial court, after finding that the false representations were made, further found: "* * * that it is true that the plaintiff did not know the falsity of the representations made by the defendants but, to the contrary, believed that the representations so made by the defendants to the plaintiff were true and that plaintiff relied solely upon the statements and representations of said defendants, and but for such representations would not have purchased said property as aforesaid."

[3] Appellants complain that the trial court improperly restricted the cross-examination of respondent as to her previous business experiences. The trial court did allow questions as to the general nature of each of these transactions but stopped the questioning when it went beyond reasonable bounds. The only legitimate purpose of such questioning was to establish the respondent's general knowledge and previous experience in the buying and selling of real estate. The trial court did not abuse its discretion in limiting the cross-examination to this.

Appellants next contend that they did not make any misrepresentations. When appellant went to his broker he related to him the information from which the listing was then prepared. The property was described therein as being "completely remodeled" and consisting of two 4-room flats and one 2-room garden apartment, each with separate electric and gas meters. After the sale had been consummated, respondent discovered that appellant had constructed the garden apartment in an illegal manner and without any permit. It could not lawfully be used or rented as a residential unit. The major defect was that the space between the floor and the ceiling was from nine inches to thirteen inches less than the minimum allowed by law. The original electric wiring had been extended illegally and without a permit or inspection. There were no electric or gas meters for the garden apartment. The plumbing work was done without a permit and did not meet the legal requirements. There were numerous other defects. Appellant's representations in the listing that the property consisted of three rentable residential units was clearly false. His statement to respondent that the property could easily be rented was likewise false. The garden apartment could not even be legally rented at all for living purposes.

Next, however, appellants claim that any misrepresentations, if made, were not made with *intent* to deceive. This question turns mainly upon whether appellant knew that he was required to obtain permits for the "remodeling." (He admittedly did not dis-

close his failure to do so.) In Milmoe v. Dixon, supra, 101 Cal.App.2d at pages 259–261, 225 P.2d at page 274, the court said: "It was also found that while the defendants had made no affirmative misrepresentations they had concealed the fact that no building permit had been obtained and that such concealment was for the purpose of inducing respondents to enter into the agreement of purchase and that respondents would not have made the purchase if they had known the facts so concealed. * * * Certainly respondents were privileged to assume that appellants had complied with the law in securing building permits, if any were required, and in conforming with the building codes. * * * The trial court correctly concluded that this was not a privileged concealment and the failure to disclose it constituted fraud." There was ample testimony in the instant case from appellant himself that justified the trial court in finding that he knew of the necessity of obtaining permits for the remodeling work which he did on the property. Appellant had worked as a hod carrier, bricklayer and plasterer. He had obtained a permit before when doing work on other property owned by him. He said he thought labor and material had to cost $200 or more before a permit was needed. His description of the work done by him would certainly run well over this amount. Respondent had watched him do much of the work and knew that his regular occupation was in the construction field. She had a right to assume that the work was being done properly and under the required permits.

Appellants rely heavily upon Watt v. Patterson, 125 Cal.App.2d 788, 271 P.2d 200. There, the property was being operated by the defendant-seller as a rooming house, in violation of a single-family zoning restriction. She did not know this and made absolutely no representation concerning the legality of such use. All of the facts known to defendant which concerned the property were imparted to the plaintiff-buyers. The court discussed the cases of Barder v. McClung, 93 Cal.App.2d 692, 209 P.2d 808, and Milmoe v. Dixon, supra, and held that they did not apply because in each of those cases the vendor concealed knowledge which he had and should have imparted to the vendee. By plain implication Justice Wood (Fred B.), who wrote the opinion, approved the Barder and Milmoe cases, when he said, after discussing them: "That concealment of structural defects and of lack of governmental building permits, inspection and approval, is actionable, furnishes no precedent for holding the defendant's conduct actionable in the instant case." 125 Cal.App.2d at page 795, 271 P.2d at page 204.

[4] Appellant claims he did not do the plumbing and electrical work. However, the various inspectors who testified stated that the work appeared to be of recent origin and appellant admitted that he had installed a sink, toilet, and some electrical plugs. He had had the property since September 2, 1950, and it is fair to conclude that the work was done by him or someone under his direction. There was certainly sufficient evidence to sustain the trial court's finding in this respect.

[5] The amount of damages awarded was $3,398.04. This was computed by adding to the sale price, $11,794, the cost to respondent of the electrical and plumbing work, $854.04, done to comply with the law, and deducting therefrom the value of the real property as of the date of sale, $9,250. Appellants contend that, at most, they are liable only for the difference between the price for which they sold the property and its reasonable value as of the time of sale; therefore, appellants continue, the inclusion of the $854.04 item in the award is a duplication of damages. The only witness on valuation was a real estate broker produced by respondent. All of his inspections of the property were made in January, 1954, by which time the electrical and plumbing work had been installed. The discussion in the record which preceded the giving of his opinion clearly shows that his valuation was based upon the value of the real property at the time of sale, June 16, 1953, assuming it was in the *condition* as he saw it in January, 1954. The question and answer as to his valuation are as follows: "Q. What would be the reasonable market value of

that property *as you inspected it* as of June 16, 1953? * * * A. $9,250." (Emphasis added.) Thus, the property having increased in value by the amount of plumbing and electrical work done after the sale but before the inspection, such increase in value was necessarily included in the appraisal because the appraiser was assuming its condition to be the same at the time of sale as it was at the time of his inspection. The appraiser's testimony covers less than eight pages of the transcript, three of which relate to his qualifications. He then described the premises in detail, using notes made by him during his inspection in January, 1954. There was no cross-examination except to ask him if he had ever before made an appraisal for respondent, to which he replied in the negative. The trial court obviously reasoned that appellants got the benefit of an increased valuation because of the improvements and that, had such improvements not been made, the valuation as given would have been reduced to the extent of the cost thereof.

However, it is clear that the appraisal of the expert witness was of the real property alone and did not include the personal property included and described in the Agreement of Sale as "All Furniture and Furnishing as per Inventory." There does not appear in the record any valuation of this property. Whatever the amount may be, appellants are entitled to have this deducted from the amount of damages awarded. The burden of proof as to the extent of damages was upon respondent. She bought both real and personal property. The sale price was not segregated. Respondent proved the value of the real property but not that of the personal property. This will have to be determined and deducted from the award of damages.

The judgment is reversed for the sole purpose of having the trial court determine the value of the personal property, which amount, when determined, shall be deducted from the judgment. In all other respects the judgment is affirmed. Each side to bear his or her costs on appeal.

PETERS, P. J., and FRED B. WOOD, J., concur.

1'2 Cal.App.2d 719

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Alonzo Aros SUAREZ, Defendant and Appellant.

Cr. 5567.

District Court of Appeal, Second District, Division 3, California.

June 29, 1956.

A petition for writ of error coram nobis. From an order of the Superior Court, Los Angeles County, David Coleman, J., denying the petition, the petitioner appealed. The District Court of Appeal, Shinn, P. J., held that the allegations in petition that when petitioner was arrested officers used brutal force on him and "petitioner was brutally restrained and handled until the alleged narcotic was illegally taken from him" were insufficient to justify disturbance of the judgment, and petition was properly denied.

Order affirmed, and purported appeal from judgment dismissed.

1. Criminal Law ⇐997(6)

In order to present a meritorious application for vacation of judgment there must be a strong showing of existence of some fact which was unknown to petitioner at time of trial and which could not have been ascertained by him in exercise of reasonable diligence and fact must be one which, if it had been known, would have prevented a rendition of the judgment.

2. Criminal Law ⇐997(11)

Allegations in petition for writ of error coram nobis that when petitioner was arrested officers used brutal force upon him and "petitioner was brutally restrained and handled until the alleged narcotic was illegally taken from him" were insufficient to justify disturbance of judgment, and petition was properly denied.

3. Criminal Law ⇐997(16)

That petition for writ of error coram nobis was denied on day following the day when petition was filed did not show that

denial was made in summary manner and without due consideration.

4. Criminal Law ⇦1081

Where notice of appeal from judgment was filed more than one year after judgment was rendered and court rule required appeal to be taken within ten days, purported appeal would be dismissed. West's Ann.Rules on Appeal, rule 31.

Alonzo Aros Suarez, in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Appellant Suarez appeals from an order of the superior court denying his petition for a writ of error coram nobis and gave notice of appeal from the judgment. He was convicted October 7, 1954 of the possession of heroin and he was charged with having suffered two prior felony convictions. He was represented by counsel at the trial, which was to a jury; he admitted the prior convictions and was convicted and sentenced to state prison. No appeal was taken from the judgment within 10 days as required by Rule 31, Rules on Appeal. October 25, 1955 appellant filed with the superior court a petition seeking vacation of the judgment. The petition was denied. It was alleged in the petition that when defendant was arrested the officers used brutal force upon him and "petitioner was brutally restrained and handled until the alleged narcotic was illegally taken from him." The court was not required to believe these vague, general allegations, nor were they sufficient, even if true, to invalidate the judgment.

[1–3] In order to present a meritorious application for vacation of a judgment there must be a strong showing of the existence of some fact which was unknown to the petitioner at the time of trial and which could not have been ascertained by him in the exercise of reasonable diligence and the fact must be one which, if it had been known, would have prevented the rendition of the judgment. (12 Cal.Jur.2d, Coram Nobis p. 550.) The facts alleged were manifestly insufficient to justify a disturbance of the judgment and the petition was properly denied. The petition was filed with the court one day and was denied the next day. It is asserted on the appeal that the denial was made in a summary manner and without due consideration. There is no merit in this claim.

[4] The order is affirmed. The notice of appeal from the judgment was filed more than one year after judgment was rendered. Not having been filed within 10 days it was ineffectual and the purported appeal is dismissed.

PARKER WOOD and VALLÉE, JJ., concur.



142 Cal.App.2d 555

The PEOPLE of the State of California, Plaintiff and Appellant,

v.

Gilbert Arthur JAUREQUI, Defendant and Respondent.

Cr. 5564.

District Court of Appeal, Second District, Division 1, California.

June 26, 1956.

Rehearing Denied July 9, 1956.

Hearing Denied July 24, 1956.

Defendant was charged by information with offense of unlawful possession of heroin. The Superior Court of Los Angeles County, David Coleman, J., entered an order setting aside the information, and the people appealed. The District Court of Appeal, Fourt, J., held that officer, observing marks indicating use of narcotics on arms of one known to officer to be a narcotic user and dealer, was justified in arresting him without a warrant for offense of narcotic addiction committed in officer's presence.

Order reversed.

1. Arrest ⇐63(4)

Reasonable cause to justify an arrest is not necessarily limited to evidence which would be admissible at trial on issue of guilt. West's Ann.Pen.Code, § 836.

2. Arrest ⇐63(4)

"Reasonable" or "probable cause" means such a state of facts as would lead a man of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion that the person accused is guilty.

See publication Words and Phrases, for other judicial constructions and definitions of "Probable Cause" and "Reasonable Cause".

3. Arrest ⇐63(4)

There is no formula for determining the reasonableness of cause for making an arrest, and hence each case must be decided on its own facts and circumstances. West's Ann.Pen.Code, § 836.

4. Arrest ⇐63(4)

Police officers may question people who are outdoors at night and it is not unreasonable for officers to seek interviews with suspects, and, if accused in response to such inquiries voluntarily reveals evidence against himself, he may not later assert that he acted only in response to an implied assertion of unlawful authority.

5. Poisons ⇐4

A narcotic "addict" is one who unlawfully uses or is addicted to the unlawful use of narcotics. West Ann.Health & Safety Code, § 11009.

See publication Words and Phrases, for other judicial constructions and definitions of "Addict".

6. Poisons ⇐4

One who is a narcotic addict is guilty of a misdemeanor. West's Ann.Health & Safety Code, §§ 11009, 11721.

7. Poisons ⇐4

"Narcotic addiction" in violation of Penal Code is a chronic rather than an ordinary acute offense, and one may be guilty of such offense at any time and place he is found so long as his character remains unchanged, though he is then and there innocent of any act demonstrating his character. West's Ann.Health & Safety Code, §§ 11009, 11721.

See publication Words and Phrases, for other judicial constructions and definitions of "Narcotic Addiction".

8. Poisons ⇐4

One who violates Penal Code section relating to narcotic addiction is a "dissolute person", being indifferent to moral restraint, given over to dissipation or vicious courses, lawless, recklessly abandoned to sensual pleasures, profligate, wanton, lewd, dissipated. West's Ann.Health & Safety Code, § 11721; West's Ann.Pen.Code, § 647, subd. 5.

See publication Words and Phrases, for other judicial constructions and definitions of "Dissolute Person".

9. Arrest ⇐63(4)

Positive evidence that a man is a dissolute and lewd person at time of his arrest is not necessary in order to justify such arrest. West's Ann.Pen.Code, §§ 647, subd. 5, 836.

10. Arrest ⇐63(4)

Where officer, observing a man known to him to be a narcotic user and dealer walking across parking lot at night, inquired concerning his habit and marks and concluded from marks on suspect's arms voluntarily exhibited by him, that he had been using narcotics, officer was justified in arresting suspect without a warrant for offense of narcotic addiction committed in his presence, regardless of whether suspect was then under the influence of a drug. West's Ann.Health & Safety Code, §§ 11009, 11721; West's Ann.Pen.Code, §§ 647, subd. 5, 836.

11. Criminal Law ⇐304(1)

Judicial notice will be taken that the inordinate use of a narcotic tends to create an irresistible craving and forms a habit for its continued use until one becomes an addict, and respects no convention or obligation and will lie, steal, or use any other base means to gratify passion for the drug, being lost to all considerations of duty or social position. West's Ann. Health & Safety Code, §§ 11009, 11721.

12. Searches and Seizures ⇐1

Observing that which is open and patent is not a "search".

See publication Words and Phrases, for other judicial constructions and definitions of "Search".

13. Searches and Seizures ⇐7(28)

That officer without a warrant observed marks indicating use of narcotics, on arms voluntarily exhibited by suspect, did not constitute an unreasonable "search". West's Ann.Health & Safety Code, §§ 11009, 11721.

14. Arrest ⇐68

Where it is reasonably apparent from defendant's conduct at time of arrest that he knew person making arrest was an officer, it is immaterial whether officer literally complied with Penal Code section requiring that defendant be informed of arresting officer's intention to arrest him, cause of arrest, and authority to make arrest. West's Ann.Pen.Code, § 841.

15. Arrest ⇐68

Where defendant is arrested while engaged in commission of a crime, arresting officer need not inform him of intention to make arrest, cause of arrest and authority to make arrest. West's Ann.Pen. Code, § 841.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty. of Los Angeles County, Jere J. Sullivan, Fred N. Whichello, Lewis Watnick, Deputy Dist. Attys., Los Angeles, for appellant.

August J. Goebel, Arcadia, for respondent.

FOURT, Justice.

This is an appeal by the People from an order setting aside an information, pursuant to the defendant's motion under Penal Code, § 995.

In an information filed by the District Attorney of the County of Los Angeles the defendant, Gilbert Arthur Jaurequi, was charged with a violation of the Health and Safety Code, § 11500, in that on or about September 9, 1955, the defendant did unlawfully and feloniously have in his possession a preparation of heroin. A prior conviction of addiction during the year previous was for some reason or another not alleged.

The defendant was duly arraigned and made a motion under section 995 of the Penal Code which motion was granted and the defendant was discharged.

The facts of the case were substantially as follows. Lewis Nall, a police officer and one of the arresting officers in the case, on September 9, 1955, at about 8:45 o'clock p. m., just previous to the arrest, saw the defendant walking across a parking lot towards the street. The officer knew the defendant and knew very well his reputation in regard to narcotics, which was that he was a user and that he had been known to deal in narcotics. Also, the officer knew that the defendant was in that vicinity.

The officer approached the defendant and asked, "how his habit was getting along and how his marks were" and the defendant then voluntarily showed the officer his hands and arms. The officer qualified as a person who knows "something about narcotic users". The officer then observed "darkened spots on his arms, along the vein where they had been bruised" which "appeared like he had been injecting something into his vein".

As a result of the conversation and the observation of the defendant's arms, the officer placed him under arrest and thereafter searched him. On the search the officer found a piece of plastic paper containing ten capsules of a brown powder inside the defendant's right sock, partially pushed down into his shoe. When asked if he had any more on him, defendant replied, "I think I have two or three more in my other shoe", and thereafter went over to the police car, took his left shoe off and shook it and removed two more capsules.

A chemist of the police department examined the package containing the two capsules and stated that in his opinion they contained heroin. From the package containing the ten capsules he examined four

of the capsules at random and stated that in his opinion they each contained heroin.

The appellant contends that there was reasonable and probable cause for the arrest of the defendant and that the resulting search was reasonable under the facts and circumstances of the case; that the evidence was not obtained in violation of the defendant's constitutional rights, and was admissible; that the defendant was legally committed for trial in the superior court, and that therefore the trial court erroneously granted the defendant's motion to dismiss the information under section 995 of the Penal Code.

Section 836 of the Penal Code provides among other things when a peace officer can make an arrest.[1]

[1, 2] It is settled that reasonable cause to justify an arrest is not necessarily limited to evidence which would be admissible at the trial on the issue of guilt, People v. Boyles, 45 Cal.2d 652, 656, 290 P.2d 535; Willson v. Superior Court, 46 Cal. 2d 291, 294 P.2d 36.

"The term, reasonable or probable cause, has been defined: 'By "reasonable or probable cause" is meant such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion, that the person accused is guilty.' In re McCarty, 140 Cal.App. 473, 474, 35 P.2d 568.

"The term, 'probable,' has been defined as meaning 'having more evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt.' Ex parte Heacock, 8 Cal.App. 420, 421, 97 P. 77." People v. Novell, 54 Cal.App.2d 621, 623–624, 129 P.2d 453, 454.

It was stated in People v. Brite, 9 Cal.2d 666, at page 687, 72 P.2d 122, 133: "'Probable cause is a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true.' [Citing cases.] Reasonable or probable cause is a question of law, where there is no conflict to be decided by the court. [Citing cases.]"

[3] There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances. Go-Bart Importing Co. v. United States, 282 U.S. 344, 357, 51 S.Ct. 153, 75 L.Ed. 374.

[4] The appellant here contends that the officer had reasonable and probable cause for arresting the defendant for a misdemeanor being committed in his presence, namely, a violation of section 11721 of the Health and Safety Code—"Narcotic Addiction". It has been held that an officer may question people who are outdoors at night, People v. Simon, 45 Cal.2d 645, 649, 290 P.2d 531, and it is not unreasonable for officers to seek interviews with suspects, and if in such inquiries the accused voluntarily reveals evidence against him, he may not later assert that he acted only in response to an implied assertion of unlawful authority. People v. Michael, 45 Cal.2d 751, 290 P.2d 852.

In the instant case the officer observed the defendant who had been known to him as a user of narcotics and further, that he had been known to deal in narcotics. The officer asked him a straightforward, simple question with reference to "how his habit was getting along and how his marks were". The defendant responded by showing the officer his hands and arms. The officer, at that time, apparently observed the arms and, from

1. "A peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:

"1. For a public offense committed or attempted in his presence.

"2. When a person arrested has committed a felony, although not in his presence.

"3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.

"4. On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested.

"5. At night, when there is reasonable cause to believe that he has committed a felony."

what he observed and the conversation he had with the defendant, under the circumstances, concluded that the defendant had been using narcotics, and thereupon placed him under arrest and proceeded to search him with the results as heretofore set forth.

[5–7] A narcotic addict is defined as a person who unlawfully uses or is addicted to the unlawful use of narcotics, Sec. 11009, Health and Safety Code. Any person convicted of being an addict is guilty of a misdemeanor. It would appear that, under the Code, addiction is a chronic rather than an ordinary acute offense, and one may be guilty of being a "drug addict" at any time and place he is found so long as the character remains unchanged, although then and there innocent of any act demonstrating his character.

[8] Furthermore, one who violates section 11721 of the Health and Safety Code is a dissolute person, section 647, subd. 5, Penal Code, which is defined to mean "indifferent to moral restraint, given over to dissipation or vicious courses, * * *". New Century Dictionary, Vol. I, p. 438. In People v. Scott, 113 Cal. App.Supp. 778, 783, 296 P. 601, 603, the court, in discussing vagrancy, said:

> "Webster's Unabridged Dictionary defines 'dissolute' as 'loosed from restraint, unashamed, lawless, loose in morals and conduct, recklessly abandoned to sensual pleasures, profligate, wanton, lewd, debauched.' * * * Conceding that vagrancy is chronic rather than acute, * * * we think the existence of such a chronic condition may be ascertained from a single examination, if the characteristic reactions of that condition be found present."

[9, 10] It is not necessary to "'* * * have positive evidence to prove that a man is a dissolute and lewd person at the time of his arrest * * *.'" People v. Allington, 103 Cal.App.2d Supp. 911, 913, 229 P.2d 495, 496. In the instant case the facts and circumstances known to the officer would justify him in making an arrest without a warrant as fully as in the case of any other misdemeanor committed or attempted in his presence. People v. Craig, 152 Cal. 42, 46, 91 P. 997.

[11] The court will take judicial notice of the fact that the inordinate use of a narcotic drug tends to create an irresistible craving and forms a habit for its continued use until one becomes an addict, and he respects no convention or obligation and will lie, steal, or use any other base means to gratify his passion for the drug, being lost to all considerations of duty or social position. People v. Bill, 140 Cal.App. 389, 394–395, 35 P.2d 645. The unlawful use of narcotic drugs often tends to moral, mental and physical destruction. In re Hallawell, 8 Cal.App. 563, 565, 97 P. 320.

[12] In this case the officer could reasonably have believed that the defendant's status had not changed because of what he saw from the markings on the defendant's arms, and when considered with the fact that the officer knew the defendant to be a narcotic user and dealer, he was in our opinion reasonable in making the arrest. To observe that which is open and patent is not a search, Smith v. United States, 4 Cir., 2 F.2d 715. In People v. Martin, 45 Cal.2d 755, 762, 290 P.2d 855, 858, the court cited the Smith case and others and stated:

> "Since looking through a window does not constitute an unreasonable search * * * the officers were entitled to act upon what they saw and arrest defendant."

[13] What the officer saw was not a search, but an observation of what appeared on the defendant's arm. There is no merit to the contention that what the officer saw was an unreasonable search. Whether the defendant at the moment of the arrest was under the influence of a drug is unimportant. People v. Berner, 28 Cal.App.2d 392, 394, 82 P.2d 617.

The defendant contends further that the officer testified to no verbal act on the part of the defendant which could be construed as a waiver of his constitutional rights, but on the contrary, that it can be inferred that the defendant merely ac-

quiesced or submitted to the authority of the officer when he was asked how his marks were. There is nothing in the record, so far as we are able to find, which would indicate that the defendant did anything other than that which was entirely voluntary on his part, and as was said in People v. Michael, supra, 45 Cal.2d at page 754, 290 P.2d at page 854, "Neither defendant nor her mother testified at the preliminary hearing, however, and the testimony that was given indicates only that the evidence was voluntarily produced in response to a reasonable inquiry."

Counsel for the defendant contends that the court can presume that official duty has been regularly performed, Code Civ.Proc. § 1963, subd. 15, and that had the officer observed fresh marks he, in the course of his duties as a peace officer, would have made note of such evidence and testified to the fact. At the preliminary examination the officer was asked the question, "What did you observe in connection with his arms?" The officer answered, "Traces of where he had been using narcotics". A question was then started as follows: "It appeared to you as though they were marked—", but before the question was even finished counsel for the defendant moved to strike the answer of the witness to the previous question, giving no grounds or reasons therefor, and for what reason we do not know, the court granted the motion to strike the answer. It would seem therefore that counsel for the defendant himself prevented any elaboration upon what the officer observed.

[14, 15] The defendant further contends that the record is silent as to the cause of the arrest, and therefore there was no compliance with section 841 of the Penal Code. Where it is reasonably apparent from the defendant's conduct at the time of the arrest that he knew the person making the arrest was an officer, then it is immaterial whether or not the officer literally complied with section 841. Willson v. Superior Court, supra, 46 Cal.2d 291, 294 P.2d 36. Where the defendant is arrested while engaged in the commission of a crime, the arresting officer need not inform him of his intention to make an arrest, the cause of the arrest and the authority to make it. People v. Beard, 46 Cal.2d 278, 294 P.2d 29; People v. Rios, 46 Cal.2d 297, 294 P.2d 39.

For the foregoing reasons the order appealed from is reversed.

WHITE, P. J., and DORAN, J., concur.



142 Cal.App.2d 591

Charles L. ANDERSON, Plaintiff and Appellant,

v.

W. R. CHAMBERLIN & CO., a corporation, et al., Defendants and Respondents.

Civ. 21361.

District Court of Appeal, Second District, Division 1, California.

June 27, 1956.

Rehearing Denied July 24, 1956.

Hearing Denied Aug. 21, 1956.

Injured seaman's action for negligence under Jones Act and for unseaworthiness under general maritime law. A jury in the Superior Court of Los Angeles County, Fred Miller, J., found for the defendant and the seaman appealed. The District Court of Appeal, White, P. J., held, inter alia, that instructions of the general tenor that the seaman could not recover unless he was required to be at the place where he was injured were erroneous and prejudicial.

Reversed and remanded for new trial.

1. Seamen ⇐29(1)

Law applicable to an injured seaman's action for negligence under Jones Act and for unseaworthiness under general maritime law is that a seaman is at his place of work when on or off the ship for a purpose connected with his employment, and test as to whether he was acting in

course of his employment is whether at time in question he was acting in the vessel's interest. Jones Act, 46 U.S.C.A. § 688.

2. Seamen ⇐29(5.16)

In injured seaman's action for negligence under Jones Act and for unseaworthiness under general maritime law, evidence presented jury question whether seaman was in course of his employment when he was injured. Jones Act, 46 U.S.C.A. § 688.

3. Seamen ⇐29(1)

Though seaman leaves the place where he performs his primary tasks, he may, if injured, recover if he left such place to do something connected with and in aid of the task assigned to him. Jones Act, 46 U.S.C.A. § 688.

4. Seamen ⇐29(5.17)

An injured seaman's action for negligence under Jones Act and for unseaworthiness under general maritime law, instructions of general tenor that seaman could not recover unless he was required to be at place where he was injured were erroneous in that he was not barred from recovery if he was not at a place on the vessel where he was forbidden to be. Jones Act, 46 U.S.C.A. § 688.

5. Appeal and Error ⇐1064(1)
Seamen ⇐29(5.17)

In injured seaman's action for negligence under Jones Act and for unseaworthiness under general maritime law, instructions that crane on which seaman was injured could not be considered his work place unless it was supplied as work place to him by defendant or unless his duties necessarily required him to use ladder on crane as place of work or unless an officer ordered him to use crane as a place of work or unless crane was customarily used by member of his department as place of work with knowledge or consent of the defendant, were erroneous and prejudicial. Jones Act, 46 U.S.C.A. § 688.

6. Appeal and Error ⇐1064(1)
Seamen ⇐29(5.17)

In seaman's action under Jones Act, instruction which required jury to find for defendant if they found that seaman chose an unsafe way of accomplishing his object when there was a free choice of a reasonably safe way was erroneous and prejudicial. Jones Act, 46 U.S.C.A. § 688.

7. Seamen ⇐29(4)

Under Jones Act, if seaman was negligent and employer free from negligence and if negligence of employee was therefore sole proximate cause of his injury, he could not recover. Jones Act, 46 U.S.C.A. § 688.

8. Seamen ⇐29(4)

Under Jones Act, if shipowner's negligence and seaman's contributory negligence combined to cause injury, doctrine of comparative negligence became applicable. Jones Act, 46 U.S.C.A. § 688.

9. Seamen ⇐29(5.16)

In injured seaman's action for negligence under Jones Act and for unseaworthiness under general maritime law, it was for jury to determine from facts whether seaman was entitled to receive consideration of comparative negligence provisions of Jones Act. Jones Act, 46 U.S.C.A. § 688.

George E. Shibley, Long Beach, John T. McTernan, Los Angeles, for appellant.

Lasher B. Gallagher, San Francisco, for respondent.

WHITE, Presiding Justice.

Plaintiff instituted this action to recover damages for personal injuries allegedly sustained by him while employed as steward and cook on defendants' vessel the "C-Trader", particularly outfitted to transport cargoes of packaged lumber between ports in Oregon and Los Angeles Harbor. At the time of the accident which occurred about 11:30 o'clock on the night of the 28th of December, 1951, the vessel was docked at Wilmington, California unloading a cargo of lumber.

The complaint contains two causes of action, the first of which is for negligence under the Jones Act, 46 U.S.C.A. § 688, for injuries, and the second is for injuries due to the unseaworthiness of the ship under the general maritime law. The ma-

terial issues framed by the pleadings may be thus epitomized:

In Paragraph V, first cause of action, it is alleged that on the 28th day of December, 1951, plaintiff was a merchant seaman and was employed as such by the defendants in the capacity of cook-steward; and that at all times mentioned in the complaint, plaintiff was in the service of said vessel and the employ of the defendants and was acting within the scope, purpose and duties of such service and employment.

Defendant W. R. Chamberlin & Co. in its answer to the foregoing allegations admitted that on the 28th day of December, 1951, plaintiff was a merchant seaman and was employed as such by the defendant in the capacity of cook-steward. The remaining allegations in Paragraph V, hereinabove referred to, were and each thereof was denied.

Paragraph VI, first cause of action, alleges that on the 28th day of December, 1951, at or about the hour of 11:30 o'clock p. m., plaintiff was aboard the "C-Trader", then docked at Wilmington, California; that at said time plaintiff was at a point adjacent to the No. 3 Hatch and next to the crane located between the No. 2 and 3 Hatches of the said "C-Trader"; that the surface of the deck between said Hatches was raised above the level of the original main deck of said vessel and was only several inches below the top of the coaming of the No. 3 Hatch; that at said time and place the defendant negligently and carelessly failed to maintain, control and keep said vessel in a safe condition and negligently and carelessly failed to provide plaintiff with a safe place in and about which to work; that such carelessness and negligence is more particularly described as follows: At said time and place there were no safety lines or guard rails around said No. 3 Hatch, there was oil and grease on the raised deck surface and on the rungs of the ladder leading up the aforesaid crane, and there was no hatchtender on the main deck of said vessel giving signals and directions to the operator of said crane; that while plaintiff was at the base of the crane the operator started to swing said crane around; that by reason of the motion of the crane, the slippery surface of the deck and the lack of guard rails or safety lines around the No. 3 Hatch, plaintiff was forced to and did attempt to avoid the crane by hanging onto the ladder ascending it, but plaintiff was unable to maintain his hold thereon because of the slippery condition of its surface, and as a direct and proximate result of the carelessness and negligence of the defendant as aforesaid, plaintiff fell into No. 3 Hatch, thereby suffering severe injuries.

With respect to the allegations in said Paragraph VI, first cause of action, the answer of the defendant admitted that on the 28th day of December, 1951, at or about the hour of 11:30 o'clock p. m., plaintiff was aboard the "C-Trader" then docked at Wilmington, California; and that the surface of the deck between said hatches was raised above the level of the original main deck of said vessel and was only several inches below the top of the coaming of the No. 3 Hatch. The defendant denied each and every other allegation in said Paragraph VI, first cause of action.

In the second cause of action, plaintiff by reference thereto incorporated, inter alia, the allegations of Paragraph V of his first cause of action.

In Paragraph II, second cause of action, after setting forth his presence on the vessel, his location thereon, and the raised condition of the deck surface between the hatches, plaintiff alleges that at said time and place defendant "failed to maintain, control and keep said vessel in a seaworthy condition and failed to provide plaintiff with a seaworthy place in and about which to work; that said unseaworthiness is more particularly described as follows: At said time and place there were no safety lines or guard rails around said No. 3 Hatch, there was oil and grease on the raised deck surface and on the rungs of the ladder leading up the aforesaid crane, and there was no hatchtender on the main deck of said vessel giving signals and directions to the operator of said crane; that while plaintiff was at the base of the

crane, the operator started to swing said crane around; that by reason of the motion of said crane, the slippery surface of the deck and the lack of guard rails or safety lines around the No. 3 Hatch, plaintiff was forced to and did attempt to avoid the crane by hanging onto the ladder ascending it, but plaintiff was unable to maintain his hold thereon because of the slippery condition of its surface, and as a direct and proximate result of the unseaworthiness of said vessel as aforesaid, fell into said No. 3 Hatch, thereby suffering the injuries hereinabove described."

The answer of the defendant to the second cause of action admitted the allegation that on the 28th day of December, 1951, at or about the hour of 11:30 o'clock p. m. of said day, plaintiff was aboard the "C-Trader" then docked at Wilmington, California; and the allegation that the surface of the deck between said Hatches was raised above the level of the original main deck of said vessel and was only several inches below the top of the coaming of the No. 3 Hatch. The answer denied each and every other allegation in Paragraph II, second cause of action.

As a separate and special defense defendant alleged as follows: "The plaintiff negligently, carelessly and unnecessarily went to a part of the defendant's vessel where a revolving crane was actively engaged in the discharge of cargo and plaintiff negligently, carelessly and unnecessarily placed himself in close proximity thereto and negligently, carelessly and unnecessarily took hold of a ladder attached to said crane and negligently and carelessly caused himself to be carried by said revolving crane over an open Hatch and said negligence, carelessness and unnecessary conduct on the part of the plaintiff proximately caused and proximately contributed to any injury sustained by him."

The cause was tried before a jury which returned a verdict for defendant. From the judgment entered upon such verdict plaintiff prosecutes this appeal.

Since the key issue at the trial and on this appeal is whether plaintiff was injured "in the course of his employment" and because plaintiff relies only on the contention that the trial court committed prejudicial error in its instructions upon that issue, we deem it unnecessary to narrate in detail the factual background surrounding this litigation except insofar as it will prove enlightening in the determination of the single issue tendered to us.

We have carefully examined the summary of the evidence furnished by defendant in some 90 pages of its brief as well as the reporter's transcript and are satisfied that the "Statement of the Case" prepared by plaintiff, together with excerpts from defendant's summary, presents a fair epitome of the testimony necessary for a determination of the issue raised on this appeal.

Plaintiff's evidentiary statement follows:

"Between the forepeak at the bow and the house at the stern, extended the main deck of the 'C-Trader'. This deck covered three cargo holds numbered one, two and three, from forward to aft. The hatches for each of these holds were unusually large, leaving only about five feet of deck space from the port and starboard hatch coamings to the ship's sides. Between the number three and number two hatches, as well as between the number two and number one hatches, was situated a circular crane containing its own motive power and capable of rotating in a complete circle. The space between hatches numbered three and two was 59 inches, and the diameter of the number two crane was estimated at eight feet. Thus, the crane protruded over the forward coaming of number three hatch and the aft coaming of number two hatch.

"During unloading operations, the narrow space between the ship's side and the hatch coaming of the number three hatch was, as a matter of usual practice, filled to the top of the hatch coaming with the components of the hatch covering. This was the situation at the time of appellant's injury. Part of the structure of the hatch coaming was a steel beam, called a stiffener, along which crew members could walk when the deck space was filled with the hatch covering.

"In the area between the number three and number two hatches, and on either side

of the number two crane, was a platform. This was raised above the deck to a level only a few inches below the top of the hatch coamings. From its starboard end to port end the platform was 34¼ feet long. In width it was the distance between the hatch coamings or 59 inches. There was testimony that the platform was ordinarily used by the crew in going to and from the crane. On December 28, 1951, when plaintiff was injured, there was no guard rail along the edges of this platform at the forward edge of the number three hatch or the aft edge of the number two hatch.

"The state of emptiness of the number three hold at the time of appellant's injury is indicated by the photograph marked Exhibit 5. The entire area of the number three hatch, that is, between the number two crane and the 'house', was fully illuminated.

"The number two crane had a large cylindrical portion which housed the electrical motors and hydraulic machinery that provided its motor power. Below that was a flat circular structure which was the base of the crane. This was stationary and had a track on its upper side upon which the entire crane structure above it rotated. Just above the motor portion of the crane was the operator's cab. It rotated with the crane, as did the boom, so that the operator always faced the tip of the boom.

"The number two crane had two ladders going up from the platform to the crane operator's cab. The lowest rung was affixed to the stationary base and did not move; one was on the port side and one on the starboard. The upper rungs were attached to the motor part of the crane and of course rotated with it. When the boom pointed along the keel of the ship, the upper rungs were aligned over the stationary rung.

"The galley, mess rooms and unlicensed crew's quarters were situated in the 'house' on the level of the main deck. In the deck above were the officer's staterooms, including appellant's. The open deck at this level was the boat deck. There were ladders, on the port and starboard sides, from the boat deck to the main deck.

"The vessel was moored port side to on the night of the accident.

"The cables coming off the boom of the crane culminated in a blacksmith which consisted of a hook and a heavy metal ball to carry the cables down into the hold. The hook attached to the loads of lumber. The witness Dragoun was operating the number two crane when Anderson was hurt. His general description of the crane operation was this:

"The lumber was prepared in stacks or packages with slings around them. The hook of the blacksmith was passed through the eyes of the sling and the load was then lifted from dock to hold or vice versa by means of the crane. The crane rotated in a complete circle on its own axis, and the boom could be raised or lowered. In discharging cargo the crane operator worked in conjunction with a deck hand in the hold. The latter indicated the next load to be moved and the crane operator then lowered the blacksmith close enough to permit the deck hand to hook on. Before lifting, the crane operator would center the blacksmith laterally over the load to prevent its swing when it was free in the air. The load was then lifted out of the hatch, and, by a combination of rotating the crane and either raising or lowering the boom, it was passed over to the dock and deposited at a point indicated by the longshoremen. When the blacksmith was brought back empty from the dock, the crane operator rotated the crane so as to bring the boom in line with the center line of the ship and lowered into the hold. As the blacksmith neared the cargo, the crane operator rotated the crane and lowered or raised the boom sufficiently to bring the blacksmith to the next load as indicated by the deck hand.

"During the entire loading or unloading operation the operator's whole attention was fixed on the hook or blacksmith. He sat facing the blacksmith, and as the crane rotated the cab moved with it so that the operator continued to face the blacksmith at all times. While watching the blacksmith, the operator could not observe the movement of people on the deck or on the raised platform between the hatches, and he could not see behind him.

"However, it was regular procedure in the vessel for crew members, while loading

and discharging operations were going on, to move about on the deck and to climb up the ladder on the crane. In doing the latter the crew members would wait until the blacksmith was in the hold to be hooked on to the next load. This occurred on the night of December 28, 1951.

"In the loading and unloading operations there was no hatch tender or other person assigned to give the crane operator signals as to when to raise a load or rotate the crane.

"4. Standard and accepted practices in the industry concerning the use of hatch tenders and barriers around hatch openings.

"The witness Giblin, having been properly qualified as an expert, testified to the standard and accepted practices in the Los Angeles Harbor area with reference to the use of hatch tenders in the loading and discharge of cargo vessels and to barriers and obstructions around hatches and other deck openings.

"Concerning hatch tenders, Giblin testified that in December 1951 the standard and accepted practice in Los Angeles Harbor was always to use a hatch tender to work in conjunction with the winch driver. This practice applied to vessels equipped with revolving cranes like those used on the 'C-Trader'. Assuming the presence of the crane operator in a cab affixed to the revolving crane so that the crane turned with the boom (as in the case at bar), the standard and accepted practice obtaining in December 1951 called for the use of a hatch tender in the discharging operations at number three hatch on the 'C-Trader'. In such operations the standard practice is for the crane operator to focus his attention upon the load that he is moving with his crane. Because of this the hatch tender is necessary to warn the crane operator of dangers outside his line of vision. The regular duties of the hatch tender, as the job was performed in the Los Angeles Harbor in December 1951, included being responsible for the safety of any person in or about the working area of the hatch, giving signals, whenever needed, to the crane operator or winch driver, directing the lifting or lowering of loads and warning him of danger to any persons in or about the vicinity of the hatch.

"Concerning barriers around hatch openings, Giblin stated that the standard and accepted practice was to have such a barrier of at least 30 inches. This barrier would normally consist of the hatch coaming. But where that did not provide the minimal protection, guard rails were installed. Having in mind the condition existing on the 'C-Trader' at the platform between the number three and number two hatches, as shown on Exhibits 2, 4, B and F, and in particular the fact that the level of the platform between these hatches was six or seven inches below the top of the forward hatch coaming of number three hatch, and that this platform was used by members of the crew, standard and accepted practice required a railing on each side of the platform as a protection against the open hatch. Since such guard rails would be on the forward end of number three hatch and the aft end of the number two hatch, they would not interfere with the loading or discharge of cargo at either hatch.

"5. The Accident to Appellant.

"Plaintiff testified that his department performed no work directly connected with the loading and discharge of lumber. It did, however, prepare and serve meals to the deck hands who were so engaged. In addition to the three regular daytime meals, the stewards department was responsible for three night-time meals depending upon the hours worked by the deck department. If the crew worked until nine p. m., the stewards department prepared and served coffee and a cold lunch at that hour. If the work continued until midnight a hot meal was served at eleven o'clock. Should the crew work to three a. m., another cold lunch with coffee was served.

"On December 28, 1951, the deck department began to discharge cargo after the regular daytime dinner. Shortly after six p. m. the second mate told plaintiff Anderson that the crew would work past nine p. m. and that a hot meal should be served at eleven. He testified that he was not told when the crew would stop work for the night. According to his testimony, plaintiff

Anderson received no other instructions with reference to meal hours or quitting time that night.

"At eleven p. m. the crew did not appear for the hot meal. When they had not come in by eleven-fifteen, Anderson thought that they were going to work past midnight or that some change had been made in the orders given him by the mate. If the crew were going to work past midnight Anderson's department would be responsible for preparing the three a. m. meal as well as the regular breakfast and other daytime chores. This would have made it necessary for Anderson so to arrange the work assignments in his department that the nighttime meals would be readied and hands would be available for breakfast and the tasks of the day.

"Accordingly, according to his testimony, Anderson went in search of the mate on watch to ascertain the crew's quitting time and his consequent responsibilities for the balance of the night. So purposed, he ascended from the galley to the boat deck and thence to the starboard ladder to the main deck. This took him to the offshore side of the vessel. From the boat deck, and while descending the ladder to the main deck, Anderson was able to see the area of the number three hatch and the entire length of the main deck. He observed no one. He looked down into hatches three and two and found no one in either. He then went to the platform between these two hatches. Up to that time he had seen no one anywhere on deck.

"At this point Anderson determined to speak to the crane operator, Roy Dragoun, in an effort to get the information he sought. He walked along the platform toward the crane. When he was about one step from the crane, he called out 'Hey Roy' to the crane operator. The boom of the crane was pointed aft, in line with the keel of the ship, and the operator was facing aft. As he did this Anderson noticed the crane operator, who was leaning forward in his cab, look around to the starboard side, which was the side Anderson was on. At that point Anderson took hold of the ladder with both hands and stepped with one foot on the stationary rung. He looked up, calling 'Hey Roy' again. At that instant the crane was rotated, carrying Anderson out over the open hatch. He was unable to maintain his grip and he fell into the hold, a distance approximately as indicated in Exhibit 5.

"From the time Anderson walked on the stiffener along the number three hatch and while he was on the platform between the two hatches, he heard no one call out to him in any way. There was no railing along the sides of the platform.

"A deck hand, the witness Price, saw Anderson out on the main deck just before he was hurt. Price stood on the port side of the boat deck where he had a view of the number three hatch and the number two crane. He estimated that he had been there one or two minutes before he saw Anderson and the total time he was in that position was not more than five minutes. In the entire interval up to the time the crane moved with Anderson on the ladder, the crane did not move.

"Price first saw Anderson when the latter was close to the forward part of the number three hatch, starboard side. Anderson stopped there momentarily and then walked to the crane. Price's attention was drawn to Anderson by his white apron and shirt. Price saw Anderson's left hand on the ladder and left foot on the stationary rung. Then the crane rotated and Anderson was 'swung off' into the hold.

"Price saw no one between the house and the number two crane while Anderson was at that hatch and the crane.

"The crane operator, Roy Dragoun, testified that he did not see plaintiff until he had fallen into the hold. Dragoun had the blacksmith 'down at the bottom' in the hold where a deck hand was hooking on a load. Dragoun's attention was riveted on the blacksmith. He had brought it 'just a little to the port side of the keel line'. After the load was hooked on, he moved the boom about two feet clockwise or to port in order to center the blacksmith over the load. At this point he heard the third mate yell, 'look out'. He looked and saw Anderson sprawled on the lumber in the hold.

"Before hearing the words 'look out', Dragoun heard other voices hollering. He

does not recall hearing the words 'Hey Roy'. When he heard these voices he 'might have turned from left to right to see who was hollering.' But he has no recollection about it one way or the other.

"Following the accident Dragoun was relieved. He descended the ladder on the starboard side with the boom pointed aft, thus using the same ladder Anderson had grasped and fallen from. Dragoun found oil on the rungs. This was apparently a chronic (not a transitory) condition that frequently came about from the oil used in the hydraulic machinery in the motor part of the crane.

"Aside from inconsistencies and possible impeachment, there is but one substantial conflict in the evidence. Respondent's witness Hardie, the second mate, testified by deposition that he had told Anderson at 10:30 p. m. that the crew would work until midnight. As already noted, Anderson denies receiving any instructions after approximately six p. m. and then that the hot meal was to be served at eleven p. m. There is no conflict in the evidence concerning the absence of a hatch tender, the lack of guard rails along the sides of the platform and the presence of oil on the rungs of the ladder."

In support of its contention that plaintiff was not injured in the course of his employment, defendant points out that the former's employment required him to prepare breakfast, lunch and dinner every day and therefore, as a matter of law, it was not necessary for him to mount the crane ladder on the night in question to obtain any information as to the usual daily meal routine for the day following. That regardless of whether the deck crew ceased work for the night at midnight on December 28, 1951 or resumed work at 1 a. m. on December 29, 1951 and quit at some time thereafter or continued all night, the steward's department was in any event required to be on the job to take care of breakfast, lunch and supper on December 29.

That the evidence shows without conflict, including appellant's testimony, that the so-called "11:00 o'clock" hot meal was served at 11:00 p. m. only if the loading or unloading operation ceased at that time; that there was no regularity with respect to serving the "11:00 o'clock" hot meal at 11:00 p. m. That it was, however, always served at whatever time the deck crew ceased work after 11:00 p. m. up to and not later than 12:00 o'clock, midnight. That plaintiff testified that there was a variation in the time at which the "11:00 o'clock" meal would be served; that it was "never served regularly"; and that "the 11:00 o'clock meal was served whenever the deck department was going to work past 9:00 o'clock and up to 12:00 o'clock"; and that if the men worked past 12:00 o'clock (midnight) and up to 3:00 a. m. there was a 3:00 o'clock coffee time. The hot meal was loosely referred to as the "11:00 o'clock hot meal" but was served at whatever time the work of the deck department stopped between 11:00 p. m. and midnight.

That according to plaintiff's testimony the second mate told him at about 6:05 p. m. "that they were going to work past 9:00 o'clock and to have a meal ready for 11:00 o'clock" but was not told "by him (2nd mate) at what hour the crew would stop work for the night." That plaintiff knew, according to his own testimony, that the hot meal was never served at 11:00 p. m. unless the deck crew stopped work for the night at 11:00 p. m., and that if the work continued after 11:00 p. m. he would be required to serve the "11:00 o'clock" hot meal at some time between 11:00 p. m. and midnight, and in any event not later than midnight regardless of whether the work of unloading was or was not to be resumed at 1:00 a. m. or was to continue up to 3:00 a. m.

That plaintiff had finished all of the preparations for the "11:00 o'clock hot meal" with the single exception of frying the eggs, before he left the galley. That there is absolutely nothing connected with frying eggs which would require the plaintiff to know the exact minute, between 11:00 p. m. and midnight, at which the deck crew would start coming into the crew's mess room. That it therefore was unnecessary, as a matter of law, for appellant to be informed with respect to that element. That he never fried the eggs until the deck department crew members actually came

into the crew's mess room. They had not appeared up to 11:15 p. m. That he got to the starboard ladder leading from the boat deck to the main deck at about 11:28 p. m., two minutes before he took hold of the crane ladder (the accident having occurred at about 11:30 p. m.).

That he therefore had actual knowledge, without seeking information from anybody, before he left the galley, that the "11:00 o'clock" hot meal was not going to be served at 11:00 p. m., and would have to be served not later than midnight. That there is no testimony that plaintiff required any information in addition to that already within his actual knowledge in order to prepare or serve the "11:00 o'clock" hot meal at the time he left the galley. He had actual knowledge when he went out on deck, that the deck crew was then discharging lumber. He, therefore, as a matter of law, had actual knowledge when he was on the boat deck, about two minutes before 11:30 p. m., that the work of unloading the vessel was still going on, but that such work would be stopped some time between 11:28 p. m. and midnight, and that the "11:00 o'clock" hot meal would have to be served whenever the unloading operation was stopped but not later than midnight. That plaintiff did not require any information from the second mate or anyone else to enable him to know that the "11:00 o'clock" hot meal "dead-line" or zero hour was 12:00 o'clock midnight in view of the fact that the deck crew was still engaged, to his actual knowledge, at about 11:28 p. m., in the discharging of lumber.

That plaintiff testified that his reason for leaving the galley shortly before the accident was to look for the mate on watch "to find out what time the crew was going to knock off and to find out if they were going to work until 3:00 o'clock." That it was not necessary for plaintiff to know before the "11:00 o'clock" hot meal was actually served, whether or not work would be resumed at 1:00 a. m. and would continue up to 3:00 a. m. That the contractual relationship between defendant and the steward's department required the said department to prepare and serve the 3 a. m. cold lunch if the unloading was resumed at 1 a. m. and continued up to 3 a. m. The members of that department knew, before midnight, that they would have to perform this duty if the contingency arose. "That there is no testimony relating any facts showing the slightest logical reason or necessity for appellant to know before midnight whether the 3 a. m. contingency was then a probability, excepting to serve his own convenience."

That plaintiff's actual reason for wanting to know, before the serving of the "11:00 o'clock" hot meal, what time the unloading operation would be stopped for the night is obvious and is shown by his testimony that he had brought his wife to the ship at 8:30 p. m. and had her waiting in his quarters for him to get through work because he intended to go home with her that night. That he knew he could not go home with her until after the actual serving of and cleaning up following the "11:00 o'clock" hot meal, but he did not know whether or not he would be required to be on duty at 3:00 a. m. on December 29, 1951, to prepare and cause the serving of a 3:00 a. m. cold lunch. That he obviously would not have gone home with his wife after finishing the serving of and cleaning up subsequent to the "hot meal", which work would have commenced at midnight, and thereafter come back to the ship in time to prepare and serve the 3:00 a. m. cold lunch in the event his duty required him to do so. That if he had been told before serving the midnight hot lunch that he would be required to be on duty at 3 a. m. the next morning he would not have kept his wife on board the ship waiting for him to get through work. That he would have sent her home in a taxicab, the same means of transportation which had been used for getting her from home to the ship at 8:30 p. m.

In view of the foregoing, plaintiff contends that the defendant shipowner failed in its duties in these respects:

1. It failed to assign a person to the number three hatch to serve as hatch tender and perform the functions of warning persons in the vicinity of the hatch and signaling the crane operator when to set the

crane in motion, contrary to standard practice in the industry.

2. It failed to provide a guard rail at the sides of the platform between the number three and number two hatches, particularly along the forward side of number three hatch, contrary to standard practice in the industry.

3. It permitted oil to accumulate on the ladder rendering it difficult to maintain one's grip on the ladder.

Plaintiff's position is that when he went out on deck in search of the mate to ascertain the information he assertedly needed Anderson was acting in the course of his employment. That when he failed to find the officer on watch he then turned to seek information, on the same subject and for the same purpose from the crane operator. That in so doing Anderson continued to act in the course of his employment. That it was therefore the duty of defendant to use due care in providing Anderson a safe place in which to perform these functions as well as its duty to provide a seaworthy ship and appurtenances for this purpose.

Urging that the main issue for the jury was whether he was in the course of his employment when he was injured, appellant complains that his efforts to have that issue submitted to the jury on the theory that he was so engaged if he "was doing things incidental to his employment and acting in the interest of the ship" were thwarted by the court in giving certain instructions.

Appellant concedes that the court at his request gave the following instructions:

"Plaintiff's Instruction No. 4.

"You are instructed that an employee is engaged in the course of his employment whenever he is engaged in the transaction of any business which has been assigned to him for attention by his employer or whenever he is doing any reasonable thing which his contract of employment expressly or impliedly authorizes him to do and which may reasonably be said to have been contemplated by that contract as necessarily or probably incidental to the employment.", but insists that its effect was nullified by certain instructions given at respondent's request. Our attention is directed to the following two instructions:

"Defendant's Instruction No. C.

"The law imposed upon the defendant the legal duty of seeing to it that any place where the plaintiff was required to go in the performance of his work was reasonably safe for that purpose. The law did not impose upon the defendants any legal duty to make any and every place which a seaman-steward might conceivably select for the purpose of finding a mate or as a means of ascertaining when work was going to stop. The mere fact that a particular place aboard a ship is physically susceptible or possibly adaptable to a particular use as a means of enabling a seaman-steward to talk to a crane operator does not impose upon the employer of the seaman a legal duty to make such place reasonably safe for the seaman-steward. Where a place of work actually furnished by the employer is reasonably safe and reasonably suitable for the purpose for which it was intended, a servant cannot hold his master liable for personal injuries resulting from the inappropriate, unauthorized, unnecessary, careless, improper or unusual use of some other place or appliance not furnished or intended for the purpose for which a seaman-steward is using it at the time of an accident."

"Defendant's Instruction No. E.

"You are instructed that the employer of a seaman-steward is entitled to assume, in the absence of evidence to the contrary, that such seaman-steward will perform the work he is called upon to do in the manner in which such work is done by ordinarily careful seamen-stewards, and such employer of a seaman-steward is also entitled to assume, in the absence of evidence to the contrary, that such seaman-steward will perform his work in a place which is reasonably safe and suitable for the purpose if such reasonably safe place of work has actually been furnished by the employer. The employer of a seaman-steward is not required to anticipate that such seaman-steward will not do his work in a reasonably safe place, if such reasonably safe place has been furnished, or that such sea-

man-steward will negligently, carelessly or unnecessarily and voluntarily select as a place of work some particular spot or part of the vessel which was not furnished or supplied or intended for the particular use to which such seaman may attempt to put it."

"Defendant's Instruction No. G.

"You are instructed that it is a breach of an employer's duty to order a seaman-steward to perform certain work and to do such work in a particular place which is not reasonably safe. It is an entirely different thing when the employer has furnished a place which is reasonably safe and from which the required work can be done with reasonable safety. In such cases the employer's duty to exercise reasonable care to furnish a reasonably safe place to work is fully met if the employer has supplied a reasonably safe place and method of making the work reasonably safe."

"Defendant's Instruction No. J.

"You are instructed that there was no legal duty imposed upon the defendant to make crane number 2 or any part of it reasonably safe for plaintiff's use unless the plaintiff has proved by a preponderance of evidence that the said crane was supplied by the defendant as a place of work for the use of plaintiff as distinguished from members of the deck department or that the nature of plaintiff's duties necessarily required him to use the ladder of the crane as a place of work or that the plaintiff was required by an order given by an officer of the vessel directing the plaintiff to use the ladder of the crane as a place of work or that the ladder of the crane was customarily used by members of the steward's department for that purpose, with the knowledge or consent of the defendant."

"Defendant's Instruction No. K.

"You are instructed that the Jones Act does not impose upon the employer of a seaman-steward any duty to provide a place of work that is unqualifiedly safe. All that is required by the law, in this respect, is that the employer exercise reasonable care to make the place where the particular seaman-steward is required or knowingly permitted to work reasonably safe."

"Defendant's Instruction No. D.

"You are instructed that if you find from all of the evidence in this case that the proximate cause of plaintiff's injury was a voluntary and unnecessary act of stepping upon the stationary rung attached to the base of the crane and grasping a rung of the ladder affixed to the revolving part of the crane and that the plaintiff's duty as a seaman-steward did not require him to assume such position for the purpose of finding the mate on watch or of ascertaining when the work of unloading the C-Trader was scheduled to stop for the night hot lunch or that there were other absolutely safe means and methods of ascertaining where the mate was or when the work of unloading the vessel was scheduled to stop and that the use of the stationary rung attached to the base of the crane by a seaman-steward such as plaintiff was not a required or necessary act in the performance of any duty required of him in the ordinary course of his employment as a seaman-steward and that such stationary rung and the rung of the ladder were not furnished or intended for the use of a seaman-steward for the purpose of finding the mate on watch or of ascertaining when the work of unloading was scheduled to stop when there was no duty imposed by law upon the defendant to make such appliance reasonably safe for such use by the plaintiff."

"Defendant's Instruction No. 12.

"You are instructed that the mere fact that a chief steward employed aboard a vessel as such happens to be injured while he is aboard the vessel does not prove by a preponderance of evidence or otherwise that he was injured in the course of his employment. A chief steward aboard a vessel such as the "C-Trader" is not necessarily authorized to go to any or every part of the vessel and in order to show that his presence at any particular part of the vessel was in the course of his employment he is required to prove by a preponderance of evidence that the performance of his duties as chief steward required him to be in said particular part of the vessel."

Two other instructions were given to the effect that unless appellant proved by a preponderance of the evidence that he was required to take hold of the ladder attached to the revolving part of crane No. 2 in order to ascertain where a mate was or when the unloading operations would be stopped, the jury should find that appellant was not acting in the course of his employment in grasping the ladder. That if the jury found appellant was not acting in the course of his employment, and that in the performance of any duty of a Chief Steward he was not required to place himself in the position he did immediately prior to the accident, then appellant was not acting in the course of his employment and as to the first cause of action a verdict should be rendered in favor of respondent. In the second instruction the jury was advised that if they found that appellant, *"without any order or direction from any officer of the vessel to do so,* voluntarily and unnecessarily undertook to use the ladder of the number 2 crane to hold onto it and lean back to talk to the crane operator; that such ladder under the circumstances existing at the time of the accident, was not furnished or intended to be used by the plaintiff for the purpose and that there was at said time available to him a free and unfettered choice of a reasonably safe way of accomplishing his object, and if you further find from the evidence that the plaintiff, without any order or direction to do so, voluntarily, negligently, and unnecessarily chose an unsafe way of attempting to accomplish his object, and that he was injured as the sole proximate result of his own voluntary and unnecessary choice or of a negligent choice in attempting to accomplish his object in an unsafe way, then the defendant is not liable to the plaintiff for damages by reason of personal injury * * *". (Emphasis added.)

It is appellant's contention that by these instructions the jury was advised that the respondent ship owner's duty to provide for the safety of the crew was operative only as to those places on the vessel where the crew member is "required" to go. That the foregoing instructions informed the jury that the crane could not be considered a work place for appellant unless, (1) it was supplied as a work place to him by defendant; (2) Anderson's duties "necessarily required" him to use the ladder as a place of work; (3) an officer ordered Anderson to use the crane as a place of work; or (4) the crane was customarily used by a member of the stewards department as a place of work, with the knowledge or consent of defendant. Appellant earnestly asserts that by these instructions the jury was told that a seaman injured as the result of a negligently maintained condition aboard ship does not suffer "injury in the course of his employment" 46 U.S.C.A. § 688, unless that injury occurs at the seaman's work place; that according to the instructions, work place is the "required" location for the performance of assigned tasks. Appellant urges that because of the multitudinous perils created by complex machinery and the vagaries of the sea as well as other special conditions of employment on shipboard, the concept of negligence as used in the Jones Act is far broader than that used in the relation of employer and employee on land. The answer of respondent to the foregoing is thus epitomized by it: "* * appellant was not at all required to use the crane ladder as a perch from which to attract the attention of the crane operator or to hold a conversation with him, it is also established without conflict that he was using the ladder for a purpose for which it was not furnished or intended. * * * The sole proximate cause of the appellant's injury was his 'inappropriate, unauthorized, unnecessary, careless, improper' (Vileski v. Pacific-Atlantic S. S. Co., 9 Cir., 163 F.2d 553) and unusual use of the rung attached to the stationary base of the crane and the ladder attached to the crane housing".

In the case of Rouchleau v. Silva, 35 Cal.2d 355, 361, 217 P.2d 929, 932, our Supreme Court held, "The term 'negligence' as used in the Jones Act is given a liberal interpretation, and includes any conscious or careless breach of the employer's obligation to provide for the safety of the crew. Koehler v. Presque-Isle Transp.

Co., 2 Cir., 141 F.2d 490, 491. An established duty falling on employers of seamen is that they shall use due diligence to provide their employees with a safe place in which to work, and *in this respect a higher standard is required of them than of employers of workers on shore* [citing cases]." (Emphasis added.) (See also Socony-Vacuum Oil Co., v. Smith, 305 U.S. 424, 59 S.Ct. 262, 83 L.Ed. 265; Jamison v. Encarnacion, 281 U.S. 635, 50 S. Ct. 440, 74 L.Ed. 1082; Alpha S.S. Corp. v. Cain, 281 U.S. 642, 50 S.Ct. 443, 74 L. Ed. 1086). That the duty arises in all circumstances when "the shipowner or his agents should reasonably have anticipated the danger of bodily injury to a member of the crew" was the holding in Sundberg v. Washington Fish & Oyster Co., 9 Cir., 138 F.2d 801, 803, and McDonough v. Bucheye S. S. Co., D.C., 103 F.Supp. 473, 476.

[1] In construing "course of employment" the courts do not, as contended by respondent, confine it to the performance of assigned duties at a "required" place, but on the contrary, the holding is that a seaman "is considered to be in the course of his employment if engaged in any matter incidental to his required duties". Sundberg v. Washington Fish & Oyster Co., supra, 138 F.2d at page 803. For the purpose involved in the case at bar, a seaman is at his place of work when he is at a place on or off the ship for a purpose "connected with [his] employment" by the shipowner, States S. S. Co. v. Berglann, 9 Cir., 41 F.2d 456, 457. The test as to whether the seaman was acting in the course of his employment would seem to be whether at the time in question he is acting "in the vessel's interest", Wong Bar v. Suburban Petroleum Transport, 2 Cir., 119 F.2d 745, 746; Nowery v. Smith, D.C., 69 F.Supp. 755, affirmed 3 Cir., 161 F.2d 732; Pederson v. United States, D.C., 122 F. Supp. 614, 618, affirmed 2 Cir., 224 F.2d 212.

[2–4] Involved in determining whether appellant was acting in the course of his employment two questions are presented, (1) what was he doing at the time of his injury, and (2) the location, away from his regular work place, of the spot where the injury occurred. From an examination of the cases we are satisfied that the evidence in the case at bar, under proper instructions would support a finding that appellant was within the course of his employment. It is respondent's contention that appellant herein cannot recover because his injury was the result of his being at a place where he was not required to be in the performance of his duties as a chief-steward, but the weight of authority would seem to be that a seaman is entitled to recover so long as he was not at a place on the vessel where he was forbidden to be. The tenor of the foregoing instructions given in the case now under consideration is that appellant cannot recover unless he was "required" to be at the place where he was injured. Our view of the law is that though the seaman leaves the place where he performs his primary tasks, if injured, he may recover if he left such a place to do something connected with and in aid of the task assigned to him. Thompson v. Eargle, 4 Cir., 182 F.2d 717; Pederson v. United States, supra; Alden v. United States Shipping Board Emergency Fleet Corp., 5 Cir., 24 F.2d 159; Seas Shipping Co. v. Sieracki, 328 U.S. 85, 99, 66 S.Ct. 872, 90 L.Ed. 1099, 1109; Badalamenti v. United States, 2 Cir., 160 F.2d 422. These cases are all authority for the holding that a ship's employee is entitled to a safe place to work when he leaves the spot where his primary task is performed to do something connected with and in aid of that task, as was the situation contended by appellant in the present case. There is also a line of cases involving injuries occasioned when work activity was not involved, if what the seaman was doing as part of his personal activities are incidental to his employment or in the interest of his employer, Sundberg v. Washington Fish & Oyster Co., supra, 138 F.2d at page 803; Wong Bar v. Suburban Petroleum Transport, supra.

[5–9] It is at once manifest that respondent's duty to provide a reasonably safe place for appellant to work and the definition of what was within the course of the latter's employment were unduly restricted by the limited conditions set forth

in the foregoing instructions No. J, No. H, and some of the other instructions hereinbefore set forth. In confining the operation of respondent's duty to provide a reasonably safe work place to one of the four situations set forth in defendant's instruction No. J., the trial court prevented the jury from making a finding that respondent's duty could arise under other and additional circumstances alluded to above. Equally contrary to the law applicable to litigation under the Jones Act were the aforesaid defendant's instructions No. D and No. H, wherein the jury was required to find for respondent in the event they determined that appellant chose an unsafe way of accomplishing his object when there was a free choice of a reasonably safe way. It is true that if the seaman's choice of an unsafe way constituted negligence on his part, and the employer was free from negligence, and the negligence of the employee was therefore the sole proximate cause of his injury, he cannot recover. However, if the shipowner's negligence created the unsafe condition which the seaman chose to utilize, and therefore the negligence of the shipowner combined with the contributory negligence of the seaman to cause the injury, the latter is not, under the Jones Act absolutely barred from recovery, but the doctrine of comparative negligence becomes applicable, and the jury is entitled to apportion or mitigate the damages accordingly. It was for the jury to determine from the facts whether appellant was entitled to receive the consideration of the comparative negligence provisions of the Jones Act, Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424, 59 S.Ct. 262, 83 L.Ed. 265. This doctrine was recognized by our Supreme Court in Rouchleau v. Silva, supra, 35 Cal.2d at pages 361, 362, 217 P.2d at pages 932, 933.

The challenged instructions here precluded the jury from applying the foregoing applicable rules. The cases relied upon by respondent are neither applicable nor controlling. They are cases wherein the shipowner was free from negligence and the seaman's negligence was the sole proximate cause of his injury.

It seems clear to us that under proper instructions the jury could have found that on the night in question, in seeking the mate and in attempting to ascertain the work hours and consequent meal times for the remainder of the night, appellant was engaged in activities which were "incidental to" or "connected with" his required duties or "in the vessel's interest". We are unable to say that a different result would not have ensued had proper instructions been given concerning issues framed by the pleadings and raised by the evidence and therefore, the failure to properly instruct in accordance with the law herein enunciated constituted prejudicial error in this case.

Since the judgment will have to be reversed we deem it unnecessary to consider other questions raised by appellant.

The judgment is reversed and the cause remanded for a new trial.

DORAN and FOURT, JJ., concur.



142 Cal.App.2d 487

E. A. TALIAFERRO, doing business under the name and style of Davis Auto Exchange, Petitioner and Appellant,

v.

The INSURANCE COMMISSION of the State of California, et al., Respondents.

No. 16840.

District Court of Appeal, First District, Division 1, California.

June 25, 1956.

Rehearing Denied July 25, 1956.

Hearing Denied Aug. 21, 1956.

Mandamus proceeding brought by an automobile parts dealer to review a decision of the insurance commissioner which reclassified a portion of the dealer's payroll to classifications which called for higher

premium rates under a workmen's compensation policy. The Superior Court, City and County of San Francisco, Frank T. Deasy, J., upheld the decision of the insurance commissioner and the dealer appealed. The District Court of Appeal, Fred B. Wood, J., held that where dealer who was engaged in dismantling automobiles, failed to produce or keep accurate employment records and also interchanged employees between dismantling and other operations, insurance commissioner was warranted in finding that "dismantling" was the "governing classification" and reclassifying dealer's payroll accordingly.

Judgment affirmed.

1. Administrative Law and Procedure ⇐479
Workmen's Compensation ⇐1063

The fact that deputy who conducted the hearing which resulted in a reclassification of automobile parts dealer's payroll to higher rates under a workmen's compensation policy failed to comply with statute on qualification for hearing officers did not invalidate the hearing because the statutory provision did not apply to hearing officers whose function was to determine payroll classifications under workmen's compensation. West's Ann.Gov.Code, §§ 11370–11528, 11500–11528, 11501–11503; West's Ann.Insurance Code, §§ 11750–11758, 11754.1, 11754.4.

2. Workmen's Compensation ⇐1063

Statutes prescribing qualifications for hearing officers do not apply to hearing officers conducting hearings on behalf of insurance commissioner regarding the determination of payroll classification under a workmen's compensation policy. West's Ann.Gov.Code, §§ 11370–11528, 11500–11528, 11501–11503. West's Ann.Insurance Code, §§ 11750–11758, 11754.1, 11754.4.

3. Mandamus ⇐168(4)

In mandamus proceeding brought by an automobile parts dealer to review a decision of the insurance commissioner which reclassified dealer's payroll as a result of a test audit conducted by the inspection rating bureau, the evidence was sufficient to support the finding of the insurance commissioner as to the total amount of dealer's payroll that was reclassified. West's Ann. Insurance Code, §§ 11750–11758, 11750.3, subd. f, 11753.1.

4. Workmen's Compensation ⇐1067

Although insurance carrier of workmen's compensation policy audited automobile parts dealer's payroll and accepted premium payments based thereon, insurance carrier was not estopped from billing dealer for an additional premium based on a later audit authorized by the insurance commissioner. West's Ann.Insurance Code, §§ 11750–11758, 11750.3, subd. f, 11753.1.

5. Mandamus ⇐168(4)

In mandamus proceeding by an automobile parts dealer to review a decision of the insurance commissioner which reclassified a portion of the petitioner's payroll to classifications which called for higher premium rates under workmen's compensation policy, the evidence was sufficient to support the findings of the insurance commissioner that petitioner failed to keep accurate payroll records regarding the work of each employee and that there was an interchange of employees from one operation to another. West's Ann.Insurance Code, §§ 11730–11742, 11732, 11734, 11736, 11741, 11742.

6. Workmen's Compensation ⇐1063

Where automobile parts dealer, who was engaged in dismantling automobiles, failed to produce or keep accurate records regarding the compensation paid to each employee and also interchanged employees between dismantling and other operations, the insurance commissioner was warranted in finding that "dismantling" was the "governing classification" and reclassifying dealer's payroll for workmen's compensation insurance accordingly. West's Ann.Insurance Code, §§ 11730–11742, 11732, 11734, 11736, 11741, 11742.

7. Appeal and Error ⇐1012(1)

The determination of the weight of the evidence is not a function of the reviewing court.

E. A. Taliaferro in pro. per.

Edmund G. Brown, Atty. Gen. of the State of California, Harold B. Haas, Deputy Atty. Gen., for respondents.

FRED B. WOOD, Justice.

The petitioner-appellant, doing business in San Pablo under the name of Davis Auto Exchange, is engaged in the dismantling of automobiles, the repair of automobiles, and the sale of new and used parts including parts derived from his dismantling operation.

He brought this proceeding in mandamus, pursuant to the provisions of section 11754.5 of the Insurance Code, to review a decision of the Insurance Commissioner which reclassified portions of his payroll to classifications which called for higher premium rates than those which he had paid to his insurer upon a workmen's compensation insurance policy for the period October 1, 1950, to October 1, 1951.

Upon the record of the proceedings before the Insurance Commissioner, the trial court, exercising its independent judgment on the evidence as set forth in that record, found that the preponderance of the evidence supported the findings of the Commissioner "in that dismantling of automobiles was conducted at the petitioner's said premises; that many of petitioner's employees interchanged duties; and that petitioner neither kept nor produced complete and adequate records of remuneration earned by all his employees in detail sufficient to permit a determination of premium for all employees in accordance with the nature of the actual duties performed and contained in the California Workmen's Compensation Manual," and concluded that the record shows that the Commissioner proceeded within his jurisdiction, there was a fair trial, the Commissioner did not abuse his discretion, the decision is supported by the findings, and the findings are supported by the evidence.

[1, 2] (1) *Petitioner's first contention in support of his appeal to this court* is that the trial court erroneously struck from his petition allegations that the deputy who conducted the hearing on behalf of the Commissioner was not qualified to act because he did not possess the qualifications prescribed for a hearing officer by the Administrative Adjudication chapter, Government Code, §§ 11500–11528, particularly § 11502, of the Administrative Procedure Act, Gov. Code, §§ 11370–11528.

The answer is that the provisions of that chapter do not apply. Section 11501 of the Government Code states that the procedure of an agency shall be conducted pursuant to said provisions "only as to those functions to which this chapter is made applicable by the statutes relating to the particular agency." The statute which governs the administrative proceeding here involved, §§ 11750–11758, Ins. Code, does not make said chapter applicable to the function of determining payroll classifications under a workmen's compensation insurance policy; emphasized by the fact that it does make said chapter applicable to the function of denying, suspending or revoking a license of an insurer or of a rating organization, § 11754.4, Ins. Code, and adopts by reference certain notice provisions of section 11503 of that chapter, § 11754.1, Ins. Code.

[3] (2) *The portion of the reclassification to which petitioner objects upon this appeal,* is that which assigns the work of certain employees to classification No. 3821,[1] representing $17,576.40 of a total payroll of $26,722.49. Petitioner claims this was not supported by the evidence.

This reclassification came about, first, through a test audit conducted by the California Inspection Rating Bureau[2] under authority of Insurance Code, section 11750.-3, subd. f, to "make test audits of insured pay rolls and insurer's audits of such pay rolls to check the accuracy and reliability of such insurers' audits so that charging of premium at approved rates can be assured." This resulted in assigning $16,393.94 of the payroll to class No. 3821.

Petitioner then applied to the Rating Bureau for and was granted reconsideration

1. Described in the 1950 edition of the Workmen's Compensation Insurance Manual as "Automobile or Automobile Truck dismantling—including the salvaging or junking of parts, store operations and Chauffeurs and their Helpers."

2. This was a rating organization duly licensed pursuant to the provisions of sections 11750–11758 of the Insurance Code.

pursuant to section 11753.1 of the code. After a hearing by the bureau the test audit was affirmed.

Petitioner appealed to the Insurance Commissioner from the Rating Bureau's decision (pursuant to § 11753.1). The Commissioner, after a hearing, affirmed the bureau's decision as to the $16,393.94 and transferred to No. 3821 an additional $1,182.46 from No. 8389.[3] This resulted in a total of $17,576.40 assigned to No. 3821.

Petitioner directs attention to a portion of the test audit report which, considered alone, seems to indicate that the sum of $6,409.66 was transferred (from Nos. 8046, 8389 and 9015[4]) to No. 3821, and another portion which states that the sum of $6,666.30 was transferred from No. 8046 to No. 3821. He then argues that both items could not be correct and that the two taken together do not account for the $16,393.94. He overlooks the fact that these items were in addition to the amount originally classified as No. 3821 and ignores a portion of the report which lists in five columns under appropriate headings the amount of each employee's salary assigned by the test auditor to one or another of the classification. This portion shows that he assigned $9,727.64 (including the $6,409.66 above mentioned) to No. 3821, and that he first listed $6,666.30 under No. 8046 and then transferred it to No. 3821, resulting in a total of $16,393.94 assigned to No. 3821.

[4] (3) *Petitioner contends* that because he made quarterly reports during the year and his carrier made an audit of his payroll and accepted premium payments based thereon, the insurance company is estopped, should not be permitted to bill him for additional premium payments based on a later audit. Such a contention ignores the interest and concern of the state in prescribing and enforcing premium rates appropriate to the risks involved in the various kinds of operations covered by a workmen's compensation insurance policy. It is the duty of the insured employer and of his carrier, alike, to observe these rates. Neither of them acts in his own sole private right. Certainly neither of them can estop the Commissioner from enforcing the law and the regulations nor a rating organization from assisting the Commissioner in the discharge of that duty.

[5, 6] (4) *Petitioner claims that the evidence is insufficient to support the questioned reclassification,* a contention that involves the consideration of certain provisions of the Manual, which was adopted by the Insurance Commissioner in the exercise of the authority vested in him by sections 11730–11742 of the Insurance Code. Section 11732 directs the Commissioner to "approve or issue, as adequate for all admitted workmen's compensation insurers, a classification of risks and premium rates relating to workmen's compensation insurance." Section 11734 authorizes him to change any such classification. No insurance carrier can issue, renew or carry beyond the next anniversary date any workmen's compensation insurance "at premium rates which are less than the rates approved or issued by the commissioner." § 11736. Penalties for the violation of these requirements are prescribed by sections 11741 and 11742.

Especially significant is paragraph 5 of Rule VI of the Manual which states that the premium is to be based upon the total remuneration of all officials and employees covered and that "if the employer fails to keep complete and accurate records of the

3. Described in the Manual as "Automobile or Automobile Truck Repair Shops or Garages—including all engine, mechanical, electrical, body and fender repairing or rebuilding, including Drivers, Chauffeurs and their Helpers."

4. Nos. 8046 and 9015 are described in the Manual as follows:

8046. "Automobile Accessory Stores—retail—N.O.C. [not otherwise classified]—including Salesmen, Drivers, Chauffeurs and their Helpers."

9015. "Buildings N.O.C.—Operation by owner or lessee—including care, custody and maintenance of premises, the operation of elevators or heating, lighting or power apparatus; Drivers, Chauffeurs and their Helpers (Maintenance or repair work at any location where such owner or lessee does not also perform janitorial services, operation or maintenance of amusement devices to be separately rated.)"

remuneration earned by all officials and employees in sufficient detail to permit the proper determination of premium according to manual rules and to make them available for examination by the carrier, the carrier must apply to the total remuneration earned the premium rate applicable to the highest rated classification describing any part of the work."

In respect to test audits, paragraph 9 of Rule VII of the Manual provides that "The [California Inspection Rating] Bureau shall have authority to make test audits which shall include: * * * (2) An examination of an employer's entire record of payroll and all other records relating thereto in order to determine the proper amounts and allocation of such payroll as provided by this Manual. (3) An examination of an employer's records in order to determine the proper allocation of losses to their respective insurance classifications as provided by this Manual."

There was substantial evidence of interchange of employees from one operation to another and exposure to the hazards of the dismantling operations, which, coupled with the lack of adequate records in sufficient detail to permit determination in accordance with actual duties performed, supports the allocation to No. 3821, "the highest rated classification describing any portion of the work."

The test auditor, Charles Hesseltine, testified that while at petitioner's place of business he saw a clerk make sales over the counter in the store, saw a clerk take a man out into the yard and show him around where some used parts were stored in the yard behind the store; and that John Truman, petitioner's office manager (to whom petitioner had referred the witness for information) and petitioner's brother Dave (who was in petitioner's employ) told the witness that such free interchange existed; that he was informed that the men worked in one area or another as needed, a complete interchange of labor, and that all male employees would assist at one time or another in dismantling work; and "that was basically your [petitioner's] entire operation—was that it was based on the fact that you didn't have enough work to keep one man business [busy] in one particular operation, occupation, all the time, that it was a matter of peak periods where one man could be best transferred from one type of work to another. If they were sitting around doing nothing, they were sent out to help in the parts, as a regular practice."

There was evidence also that an employee reported as a janitor was injured while taking pins out of pistons; that a salesman was injured when grinding a shaft; and that another salesman fitted wrist pins and faced valves in the machine shop for a short period.

[7] Petitioner does not question that this testimony was given. He points to evidence of an opposite import and in effect asks us to weigh it in his favor. That is not our function. That was done by the Commissioner and the trial court in the proper exercise of their respective functions.

As to the inadequacy of petitioner's records, the evidence is clear. At no time did petitioner produce or make available records which showed the specific operations which any employee from time to time or at any given time performed, although he was requested and given an opportunity to do so by the test auditor, the Rating Bureau, and the Insurance Commissioner. Petitioner's records showed in terms of money the remuneration received by each employee but there was no breakdown to show, for example, when or for how long a salesman or a garage repairman worked at dismantling or otherwise exposed himself to the hazards of the dismantling operations; especially significant in view of the free interchange of labor proven.

These facts, in view of the unmistakably clear mandates declared in the Manual, compel the conclusion that the findings and the judgment of the trial court are amply supported.

Petitioner directs particular attention to paragraph 2 [5] of Rule V of the Manual;

5. Paragraph 2 reads as follows: "The Governing Classification of a risk is defined as that classification, other than the Standard Exception Classifications,

says that 90% of his payroll goes to employees who conduct his store operations (No. 8046) and only one employee is engaged in dismantling of automobiles (No. 3821); hence, that said paragraph 2 applies and makes No. 8046 the governing classification. In this, he ignores the segregation of payroll and the keeping of adequate records requirements of paragraph 5 of Rule VI, which we have just discussed.

The only California decision which he cites upon this point, United States Fidelity & Guaranty Co. v. American Building, etc., Co., 7 Cal.App.2d 683, 46 P.2d 984, involved a situation which obtained (policy periods extending from February 5, 1928, to February 5, 1930) prior to the adoption of the requirements which now appear in paragraph 5 of Rule VI of the Manual (apparently not adopted until 1931). Also, it there appeared that the employer's principal business consisted of "Building Maintenance" (which carried the lower premium rate), the Manual description of which included "care, custody and maintenance of premises," construed as including "window cleaning" (a class which drew a higher rate), an operation in which a few of the employees were exclusively engaged, representing a payroll of $8,378.77 out of a total payroll of $304,070.17.

Upon determining that, under the circumstances of the case, window-cleaning was not a separate enterprise, the court made these significant observations: "It may be, as pointed out by respondent, that to permit appellants to do all their work under one classification which has a comparatively low rate would work an injustice to other concerns which do window cleaning and nothing else. The latter would obviously take the rating found by the court here. We believe this matter is one for the rate-making authorities to consider, and not the courts." 7 Cal.App.2d at page 689, 46 P.2d at page 987.

In contrast, the requirements of paragraph 5 of Rule VI of the Manual were applicable during the policy period involved in the instant case and significantly differentiate this case from the American Building Maintenance Company case. We note, also, that here the higher classification includes the lower; No. 3821 includes "store operations," whereas No. 8046 does not include "dismantling."

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.



Virginia Bell TAYLOR, Charles R. Taylor, and Laurine R. Holibaugh, Plaintiffs,

v.

A. J. HAWKINSON, Defendant and Respondent.*

Virginia Bell Taylor, Appellant.

Civ. 21610.

District Court of Appeal, Second District, Division 1, California.

June 27, 1956.

Hearing Granted Aug. 21, 1956.

Action by husband and wife and her friend arising out of collision of defendant's automobile with automobile registered in name of husband and driven by friend. The Superior Court of Los Angeles County, Walter R. Evans, J., entered judgment on verdict for all three plaintiffs and wife alone moved for and was granted new trial to relitigate issue of damages awarded her. Prior to retrial, judgment awarding husband damages for cost of automobile repairs and the friend damages for personal injuries became final. Upon retrial, judgment was entered for defendant against wife. The wife appealed from judgment, the decision, jury verdict, and denial of motion for judgment n. o. v. and for new trial. The District Court of Appeal, White, P. J., held that where issue of negligence was determined favorably to husband and wife and friend against defendant, such defend-

which carries the largest amount of payroll exclusive of payroll of miscellaneous employees as defined elsewhere in this section."

* Opinion vacated 306 P.2d 797.

ant in the subsequent retrial was collaterally estopped from raising question of negligence.

Purported appeals from verdict and order denying motion for new trial dismissed; judgment and order denying motion for judgment n.o.v. reversed and cause remanded for new trial.

1. Courts ⇐99(1)

If judgment in action brought by husband and wife arising out of automobile collision had been in favor of defendant and against husband for damage to their automobile, and had husband failed to appeal, defendant could not have been required to relitigate issue of liability for accident on retrial of the action by wife as wife was in privity with her husband in prior litigation and determination therein would be binding on her.

2. Judgment ⇐720

By virtue of doctrine of res judicata final determination of court of competent jurisdiction necessarily affirming existence of any fact is conclusive evidence of existence of that fact when it is again in issue in subsequent litigation between same parties in same or any other court, and facts decided in first suit cannot be disputed or relitigated although later suit is upon different cause of action.

3. Judgment ⇐585(1), 720

Under doctrine of res judicata a former judgment operates as bar against second action upon same cause but in later action upon different claim or cause of action it operates as an estoppel or conclusive adjudication as to such issues in second action as were actually litigated and determined in first action.

4. Courts ⇐99(1)

Final judgments are conclusive evidence of facts determined by them and fact that judgment is in the same action instead of another and different action does not weaken its effect.

5. Judgment ⇐720

Where issues of negligence and contributory negligence in certain collision have been tried and determined by final judgment between same parties or their privies, those issues cannot be relitigated.

6. Husband and Wife ⇐264

In action for damages by husband and wife arising out of automobile collision, record disclosed that defendant failed to rebut presumption that the causes of action were community property. West's Ann. Civ.Code, § 164.

7. Judgment ⇐948(1)

Where judgment is relied upon as complete bar to maintenance of another action, it should be pleaded but, without pleading it, a judgment may be offered and should be admitted as conclusive evidence of issues previously litigated by the parties or their privies.

8. Evidence ⇐43(2)

In action for damages by husband and wife arising out of automobile collision wherein wife requested and was granted new trial on issue of damages awarded her after verdict was entered in favor of her and her husband and friend, judge who was conducting retrial was bound to take judicial notice of prior judgment when wife contended at commencement of trial that issue of negligence was res judicata, that only issue to be determined upon trial was nature and extent of personal injuries and the damages sustained by plaintiff and the compensation to be awarded her in connection therewith.

9. Appeal and Error ⇐110, 123

Appeal cannot be taken from verdict of jury or order denying motion for new trial.

10. Courts ⇐99(1)

Where wife was granted new trial in action in order to relitigate amount of damages awarded her in the action in which issue of negligence was determined favorably to both her and her husband, defendant was collaterally estopped from raising issue of negligence and having that question relitigated on the retrial.

N. E. Youngblood, Beverly Hills, and William R. Grant, Arcadia, for appellant.

Wyman & Finell, Saul Grayson, Beverly Hills, for respondent.

WHITE, Presiding Justice.

Appellant, her husband and her friend were the plaintiffs in the instant action growing out of the collision of defendant's automobile with an automobile registered in the name of appellant's husband and driven by a friend.

The trial by jury resulted in a verdict and judgment for all three plaintiffs, but the damages awarded to appellant for her personal injuries were inadequate. She alone moved for a new trial. At the time of the hearing of her motion for new trial, the judgment was not final as to any party. The motion was made on the following grounds: "1. Insufficiency of the evidence to justify the verdict, in this that the compensation awarded was inadequate. 2. That said verdict and judgment are against the law, in that the compensation awarded was inadequate." The order thereon is that "the motion for a new trial as to plaintiff Virginia Bell Taylor only, * * * is granted on the grounds of (1) insufficiency of the evidence to justify the verdict; and (2) the verdict and judgment are contrary to law and the evidence."

Before the retrial, the judgment awarding to appellant's husband the cost of automobile repairs and to their friend who had been driving at the time of the accident damages for personal injuries became final.

The instant appeal is from a judgment for defendant upon the verdict of the jury on the retrial. It comes before us on an engrossed settled statement, from which the following is quoted:

"At the commencement of the trial of this matter, the plaintiff and appellant, through her counsel, contended that the issue of negligence was res judicata; that the only issue to be determined upon the retrial of this action was the nature and extent of personal injuries and damages sustained by the plaintiff, Virginia Bell Taylor, and the compensation to be awarded to her in connection therewith; that over the objection of the plaintiff and appellant, * * * the issue of negligence was * * * submitted to the jury, and after deliberation the jury returned a verdict in favor of the defendant, A. J. Hawkinson."

Appellant's motions for judgment notwithstanding the verdict upon the theory of collateral estoppel and res judicata and for a new trial were denied.

[1] Had a judgment in a previous action been in favor of defendant and against appellant's husband for the damage to their automobile, and had appellant's husband failed to appeal, defendant could not have been required to relitigate the issue of liability for the accident, since the Supreme Court, in Zaragosa v. Craven, 33 Cal.2d 315, 316, 202 P.2d 73, 74, 6 A.L.R.2d 461, "concluded that the wife was in privity with her husband in the prior litigation and * * * the determination there is binding on" her.

In the Zaragosa case, supra, some months after the filing of the wife's action, the defendant, with leave of court, filed a supplemental answer alleging that the judgment against the husband had become final, "constitutes an estoppel, and renders res judicata against plaintiff and in favor of defendant the issues of defendant's negligence, the husband's contributory negligence, and proximate cause, raised by the pleadings in each of the two actions." The record in the husband's action was introduced over plaintiff's objection, and findings and judgment were for defendant. The reasoning of the Supreme Court there stated is that, the issues being identical, "the remaining question is whether the wife * * * was a party or in privity with a party to the prior action". It was then decided, that the wife, even when not named as a party to the action, is in privity with her husband and bound by the judgment against him.

Respondent argues that the facts in the instant action differ from those considered in the Zaragosa case, supra, in the following particulars: (1) The final judgment relied upon by appellant in the instant action is one rendered in the same action, while the Zaragosa case involved a judgment in a

separate action filed by the husband about three weeks before the wife filed her action. (2) "The automobile was the separate property of appellant's husband, as was the recovery of the damages thereto" in the instant action, while, in the Zaragosa case the judgment sought by the husband was community property. (3) Res Judicata and collateral estoppel were not pleaded in the instant action, as they were in the Zaragosa case.

Much of respondent's brief is concerned with the propriety of the granting of a new trial without limiting it to the issue of plaintiff's injuries and the damages to be awarded. Our decision hereafter stated makes it unnecessary to discuss that portion of respondent's brief.

The Engrossed Settled Statement is that "In the prior trial of this action other plaintiffs procured a judgment against said defendant arising out of the identical collision, which judgment has become and is a *final judgment*". Mr. Justice Vallée, speaking for the District Court of Appeal, in a similar action, said: "The two judgments were entered in the same action. There should have been only one judgment." Briscoe v. Pacific E. Ry. Co., 89 Cal.App. 2d 439, 441, 200 P.2d 875, 876. There are certain exceptions to the general rule that there can be but one final judgment in an action. Howe v. Key System Transit Co., 198 Cal. 525, 529, 246 P. 39; Nicholson v. Henderson, 25 Cal.2d 375, 379–380, 153 P. 2d 945. However, while considering the instant appeal, because of the settled statement, we shall assume, without deciding, that the judgment in favor of plaintiff's husband and friend has become final.

[2, 3] "By virtue of the doctrine of res judicata, the final determination of a court of competent jurisdiction necessarily affirming the existence of any fact is conclusive evidence of the existence of that fact when it is again in issue in subsequent litigation between the same parties in the same or any other court. The facts decided in the first suit cannot be disputed or relitigated, although the later suit is upon a different cause of action. * * * The doctrine of res judicata has a double aspect. A former judgment operates as a bar against a second action upon the same cause, but, in a later action upon a different claim or cause of action, it operates as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action * * *". Todhunter v. Smith, 219 Cal. 690, 694–695, 28 P.2d 916, 918. In the last cited case, it was decided that where car damages were sought in the Municipal Court, judgment for defendant in that action was a conclusive adjudication of the questions of negligence and contributory negligence in the collision and an estoppel against recovery for personal injuries in a Superior Court action.

[4, 5] Public policy requires that litigation must come to an end. Therefore, final judgments are conclusive evidence of the facts determined by them. That the judgment is in the same (instead of another and different) action does not weaken its effect. Where the issues of negligence and contributory negligence in a certain collision have been tried and determined by a *final judgment* between the same parties or their privies, those issues cannot be relitigated.

[6] The causes of action upon which appellant and her husband sought to recover in the instant action are presumed to be community property. Sec. 164, Civil Code. Respondent has pointed out nothing in the record, and by a careful examination we have found nothing therein, tending to overcome the presumption.

[7] When a judgment is relied upon as a complete bar to the maintenance of another action, it should be pleaded. However, without pleading it, a judgment may be offered and should be admitted as conclusive evidence of the issues previously litigated by the parties or their privies.

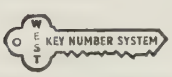
[8] The judgment relied upon by appellant was part of the record of the instant action, and the judge who was conducting the retrial was bound to take judicial notice of it when "at the commencement of the trial * * * appellant * * * con-

tended that the issue of negligence was res judicata; that the only issue to be determined upon the retrial * * * was the nature and extent of personal injuries and damages sustained by plaintiff, Virginia Bell Taylor, and the compensation to be awarded to her in connection therewith".

[9] Since an appeal cannot be taken from the verdict of the jury or the order denying a motion for new trial, the purported appeals from them are dismissed.

[10] The judgment and the order denying the motion for judgment notwithstanding the verdict are, and each is, reversed and the cause is remanded for a new trial in accordance with the views herein expressed.

DORAN and FOURT, JJ., concur.



142 Cal.App.2d 618

Frank J. SLOVICK, Plaintiff and Respondent,

v.

JAMES I. BARNES CONSTRUCTION COMPANY, a Co-Partnership, et al., Defendants and Appellants.

Civ. 21492.

District Court of Appeal, Second District, Division 2, California.

June 27, 1956.

Rehearing Denied July 24, 1956.

Hearing Denied Aug. 21, 1956.

Action by employee of subcontractor against general contractor for injuries sustained when, while walking on a catwalk constructed by general contractor across some roof girders, the catwalk collapsed causing employee to fall to the floor below. The Superior Court, Los Angeles County, John J. Ford, J., entered judgment for employee and general contractor appealed therefrom and from the verdict. The District Court of Appeal, Ashburn, J., held that evidence sustained implied finding that general contractor was negligent in its construction of the catwalk, and that such negligence was the proximate cause of employee's injuries.

Judgment affirmed; attempted appeal from verdict dismissed.

1. Appeal and Error ⇐1001(1)

Where an appellant urges the contention of insufficiency of the evidence to sustain the findings of a jury, he must demonstrate that there is no substantial evidence to support the challenged findings.

2. Appeal and Error ⇐931(1)

A reviewing court starts its consideration of an appeal with a presumption that the record contains evidence to sustain every finding of fact.

3. Appeal and Error ⇐694(1)

It is not the province of a reviewing court to search the record in order to ascertain whether it contains evidence that will sustain a contention made by either party to appeal.

4. Appeal and Error ⇐757(3)

Where an appellant claims that some particular issue of fact is not sustained by the evidence, he is required to set forth in his brief all the material evidence on the point and not merely his own evidence, and if this is not done, the error assigned is deemed waived.

5. Negligence ⇐134(5, 11)

In action by employee of subcontractor against general contractor for injuries sustained when, while walking on a catwalk constructed by general contractor across some roof girders, the catwalk collapsed causing employee to fall to the floor below, record sustained implied finding that general contractor was negligent in its construction of the catwalk and that such negligence was the proximate cause of employee's injuries.

6. Negligence ⇐121(1)

In subcontractor's employee's personal injury action against general contractor, in order to raise an inference of negligence,

it was not necessary for employee of subcontractor to exclude every possible cause of his accident other than general contractor's original negligence in constructing a catwalk across some roof girders in a defective manner.

7. Evidence ⇐67(3)

In some circumstances, an inference as to the past existence of a condition or state of facts may be proper, as, for example, where the present condition or state of facts is one that would not ordinarily exist unless it had also existed at the time as to which the presumption is invoked.

8. Evidence ⇐67(3)

An inference that a state of affairs existed at a certain time may be reinforced by evidence that it continued to exist at a subsequent time.

9. Negligence ⇐121(1)

In subcontractor's employee's personal injury action against general contractor, testimony that a catwalk constructed by general contractor across some roof girders was defective in that the planks forming such catwalk were not overlapping properly warranted an inference that the original construction of such catwalk not more than one week before its collapse was faulty and negligent.

10. Negligence ⇐50, 55

A general contractor who contracts with subcontractors not only has the duty to employees of such subcontractors to furnish a safe place to work and safe appliances, but also has the duty to make reasonable inspections to see that such appliances remain in a safe condition.

11. Negligence ⇐121(2)

The doctrine of res ipsa loquitur applies in a negligence action where the accident involved is of such a nature that it can be held, in the light of past experience, that it probably was the result of negligence by some one and that the defendant is probably the person who is responsible.

12. Negligence ⇐138(2)

In action by employee of subcontractor against general contractor for injuries sustained when, while walking on a catwalk constructed by general contractor across some roof girders the catwalk collapsed causing employee to fall to floor below, instruction as to res ipsa loquitur was properly given.

13. Negligence ⇐121(3)

In action by employee of subcontractor against general contractor for injuries sustained when, while walking on a catwalk constructed by general contractor across some roof girders, the catwalk collapsed causing employee to fall to the floor below, res ipsa inference was of itself enough to sustain verdict for employee in the absence of a successful charge of contributory negligence.

14. Negligence ⇐138(2)

In action by employee of subcontractor against general contractor for injuries sustained when, while walking on a catwalk constructed by general contractor across some roof girders, the catwalk collapsed causing employee to fall to the floor below, res ipsa instruction which used the word collapsed in describing what allegedly happened to the catwalk in question was not improper in view of fact that the word "collapsed" accurately described what happened.

15. Negligence ⇐138(2)

In subcontractor's employee's personal injury action against general contractor, giving of an instruction on the res ipsa loquitur doctrine was not error, even though the doctrine does not apply to a mere licensee, since question of whether employee of a subcontractor had the status of an invitee or licensee while working on project under general contractor and walking on a catwalk built by general contractor was for the jury.

16. Negligence ⇐121(2)

Mere fact that subcontractor's employee, in employee's personal injury action against general contractor, testified to all the facts concerning how his accident happened, did not prevent application of res ipsa loquitur doctrine.

17. Negligence ⇐136(26, 27)

In action by employee of subcontractor against general contractor for injuries sustained when, while walking on a cat-

walk constructed by general contractor across some roof girders, the catwalk collapsed causing employee to fall to the floor below, question of employee's contributory negligence in walking on catwalk or in not noticing its defective condition when such condition had been observed by another, was for the jury.

18. Negligence ⇐136(9)

Contributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such negligence exists.

19. Negligence ⇐67, 68

An employee of a subcontractor while engaged in a project for general contractor was not bound to make an inspection of the place or appliances provided for his work and was entitled to assume, until a reasonable man in his place would be apprised of the contrary, that a safe place to work had been provided by general contractor.

20. Negligence ⇐136(27)

The question of whether a dangerous condition is an obvious one is for the jury.

21. Trial ⇐260(8)

In action by employee of subcontractor against general contractor for injuries sustained when, while walking on a catwalk constructed by general contractor across some roof girders, the catwalk collapsed causing employee to fall to the floor below, trial court had discretion to give or refuse an instruction upon unavoidable accident in view of fact that other instructions covered the subject of general contractor's non-liability in the absence of a finding of negligence on its part.

22. Negligence ⇐63

"Unavoidable accident" means one which occurred without negligence on the part of either party.

See publication Words and Phrases, for other judicial constructions and definitions of "Unavoidable Accident".

23. Negligence ⇐66(1)

If some fellow workman of subcontractor's employee bringing action against general contractor for injuries sustained when a catwalk on which he was walking collapsed, had knowledge of the dangerous condition of the catwalk, such knowledge on the part of the fellow workman was not imputable to employee unless such knowledge was actually communicated to employee.

24. Negligence ⇐32(2)

A "licensee" is one who goes upon the land or premises of another, or upon a portion of said land or premises, by the express or implied permission of that other, but who is not an invitee as to that land or premises or portion thereof.

See publication Words and Phrases, for other judicial constructions and definitions of "Licensee".

25. Negligence ⇐138(1)

In action by employee of subcontractor against general contractor for injuries sustained when, while walking on a catwalk constructed by general contractor across some roof girders, the catwalk collapsed causing employee to fall to the floor below, instructions concerning industrial safety orders which covered the matter of construction of catwalks was properly given as such orders were for the protection of a class to which employee belonged.

26. Trial ⇐260(5), 261

Where requested instructions defining issues and setting forth general contractor's theory of its case were adequately covered by other instructions and requested instructions were slanted in favor of general contractor, trial court did not abuse its discretion in denying them.

27. Trial ⇐261

A trial court is not bound to modify and then give requested instructions which contain faulty statements of law.

28. Evidence ⇐242(1)

In an action by subcontractor's employee against general contractor for personal injuries, statement by foreman of subcontractor that general contractor could not be blamed for injuries sustained by an employee of subcontractor engaged in a construction project for general contractor, was not an admission of employee, since foreman was in no sense an agent of the employee, and it therefore was properly stricken.

29. Trial ⇐91

Trial court's action in instructing jury to disregard an immaterial statement of a witness was not improper even though the statement went into evidence without objection, but was mere exercise of sound judicial discretion.

30. Negligence ⇐141(3)

In action by employee of subcontractor against general contractor for injuries sustained when, while walking on a catwalk constructed by general contractor across some roof girders the catwalk collapsed causing employee to fall to the floor below, refusal to give an instruction pertaining to negligence of a person who looks but does not see obvious danger was not an abuse of discretion, since employee had a right to assume he had a safe place to work without inspection.

31. Appeal and Error ⇐757(3)

Where appellants claim an excessive verdict but fail to set forth all material evidence on the point in their brief, reviewing court would not examine record to see if such contention had support in the record, but would deem the contention waived.

32. Appeal and Error ⇐123

Attempted appeal from a verdict would be dismissed.

Lyndol L. Young, Los Angeles, for appellants.

Victor C. Rose and Alfred M. Klein; Robert P. Dockeray, Los Angeles, of counsel, for respondent.

ASHBURN, Justice.

Appellant James I. Barnes Construction Co. was general contractor for the construction of a cargo transit berth or shed on Pier A at Long Beach Harbor. Certain steel work was sublet to Bethlehem Steel Company, which in turn sublet to Rutherford & Scoubye the installation of reinforcing steel rods. Plaintiff was an iron worker employed by the last named concern and was engaged in their work at the time of the accident which gives rise to this action for personal injuries against the general contractor. Plaintiff recovered a verdict for $17,000, the trial judge denied a motion for new trial, and hence this appeal.

The accident occurred in the area which was to become office headquarters. That portion of the structure had progressed to the point where the steel work of the second floor, called the mezzanine, was in place and the floor had been laid. The roof was not yet constructed, though the girders which would form its lower or horizontal plane were in place. Those girders, or I beams, were laid in a grill pattern, being 5′ 7″ apart in one direction, and 10′ 8″ in the other. Rutherford & Scoubye's men were engaged in installing the steel in the walls and were working on the mezzanine level. They needed planks to place on top of some saw-horses or jacks which were then on that level. On the roof girders were planks which had been delivered there by Barnes' men for use by the subcontractor. Plaintiff's foreman told him the crew needed some planks, pointing to those on the roof girders, and said to go up there and pass some down to the other men. He climbed up a steel column to the roof level. There a catwalk had been laid across the I beams, obviously for use by the workmen. It consisted of planks laid end to end, with the end of each overlapping the end of the next one. It was but one plank in width, and had no railing. According to prevailing and customary practice the overlapping of the ends should have been at least six inches and of course the overlap should have coincided with the top of an I beam. Plaintiff's task required him to lift a plank, carry it along the catwalk to a place where he could lower it between girders to the floor below. To do this he had to walk sideways for four or five steps, carrying the plank. After he had lowered two of them and when in the process of carrying another, he reached a place on the catwalk which was between two of the beams or girders, had one foot on one plank and the other upon the adjoining plank, when suddenly they tipped up, he fell to the floor below; those two planks and the one he was carrying went down with him. He received serious injuries. This catwalk had been laid by defendant,

the general contractor, pursuant to contract obligation and in accordance with the custom and expectation of the particular trade. It was furnished for the use of the subcontractors and their men who were obviously defendant's invitees when using the same. Appellant's opening brief says that "the alleged catwalk did not conform in any respect to the requirements established by practice and custom."

Appellant argues insufficiency of the evidence to support a finding of negligence on its part. In pursuit of this end counsel contents himself with quoting selected passages of the transcript which are deemed favorable to his contentions. No effort is made to summarize or otherwise present the totality of evidence on the subject. For instance, counsel quotes at length the deposition of plaintiff but ignores his testimony at the trial except certain portions of his cross-examination. Likewise, the discussion of the testimony of Herman Davidson and Ernest Weinhart, fellow employees of plaintiff, consists of selected quotations from the cross-examination of each.

[1–4] The obligation of an appellant who claims insufficiency of the evidence is thus stated in Owens v. White Memorial Hospital, 138 Cal.App.2d 634, 292 P.2d 288, 290: "Where the appellant urges the contention of insufficiency of the evidence to sustain the findings of the jury, the rule is, 'Such contention requires defendants to demonstrate that there is no substantial evidence to support the challenged findings.' Nichols v. Mitchell, 32 Cal.2d 598, 600, 197 P.2d 550, 552." Tesseyman v. Fisher, 113 Cal.App.2d 404, 407, 248 P.2d 471, 473: "It is well established that a reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact. It is not the province of a reviewing court to search the record in order to ascertain whether it contains evidence that will sustain a contention made by either party to the appeal. [Citing cases.] Where an appellant claims that some particular issue of fact is not sustained by the evidence, he is required to set forth in his brief all of the material evidence on the point and not merely his own evidence. If this is not done, the error assigned is deemed waived." See, also, Kruckow v. Lesser, 111 Cal.App.2d 198, 200, 244 P.2d 19. There has been no genuine effort to comply with the requisite practice in this instance and the court is not required to make an independent inquiry as to the contents of the rest of the reporter's transcript, which consists of 903 pages.

[5] Respondent's brief sets forth evidence which is sufficient to sustain the finding of negligence on defendant's part. Further than that this court need not go. Upon the record thus presented we find support for the implied finding that defendant was guilty of negligence which was the proximate cause of the accident.

[6] Appellant argues that, assuming it to have constructed the catwalk in the first instance, the evidence shows that changes had been made in it before the day of the accident by persons not in its employ. The argument is built upon Davidson's testimony. He testified that about two days before the accident he was on the roof girders and that he moved two planks because they were not lapped on an I beam and he almost fell; that he fixed it by pushing and pulling the planks into place so they lapped properly on the I beam. But this was at a place 40 or 50 feet away from the "exact spot of the accident." At about that same time, two or three days before the accident, Ernest Weinhart, another fellow employee, observed that in the vicinity where plaintiff later fell there were several different places where the boards were not overlapping properly; that the end of the plank was not upon the I beam in such places. This catwalk had been laid by defendant about a week before the accident, perhaps only two or three days before that event. Defendant did not undertake to prove that it had been carefully and adequately built, though the evidence was in its keeping. Counsel for appellant apparently contented himself in the trial court, as here, with the contention that plaintiff was not on any catwalk at the time of the accident. It was not incumbent upon plaintiff, in order to raise the inference of negligence, to exclude every possible cause of the accident other than defendant's original faulty construction. Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 444, 447, 247

P.2d 344; Van Horn v. Pacific Refining & Roofing Co., 27 Cal.App. 105, 108–109, 148 P. 951; Biondini v. Amship Corp., 81 Cal. App.2d 751, 767, 185 P.2d 94; Price v. McDonald, 7 Cal.App.2d 77, 81, 45 P.2d 425; Prosser on Res Ipsa Loquitur, 37 Cal.Law Rev. 198. In Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 458, 150 P.2d 436, 439 (an exploding bottle case), it is said: "It is not necessary, of course, that plaintiff eliminate every remote possibility of injury to the bottle after defendant lost control, and the requirement is satisfied if there is evidence permitting a reasonable inference that it was not accessible to extraneous harmful forces and that it was carefully handled by plaintiff or any third person who may have moved or touched it. Cf. Prosser, supra, p. 300. If such evidence is presented, the question becomes one for the trier of fact (see, e. g., MacPherson v. Canada Dry Ginger Ale, Inc., 129 N.J.L. 365, 29 A.2d 868, 869), and, accordingly, the issue should be submitted to the jury under proper instructions." [1]

It affirmatively appeared that at two places, some 40 to 50 feet apart, this runway was in an unsafe condition of such nature as to suggest faulty original construction. The catwalk was so located as to be inaccessible to anyone whose business did not require his presence there (plaintiff had to climb a steel column to get to the catwalk),[2] and such persons would have no incentive other than that of seeing that it was safe. The condition of such a structure is a fact which is of a continuous nature, certainly so for a period of a week or less in a building that is far from completion. It was unsafe on the day of the accident and on the second or third day before that event, and it is reasonably inferable that such was the case when it was built one week (or less) before the catastrophe.

True, it is commonly held that a presumption of continuity of a given condition does not run backward, 18 Cal.Jur.2d § 85, p. 514. Professor Wigmore says, in the footnote on page 413 of 2 Wigmore on Evidence, Third Edition: "This fallacy that 'presumptions do not run backward' occurs again in Krantz v. Krantz (1933), 211 Wis. 249, 248 N.W. 155. It would be interesting to trace out the origin of that fallacy." In the text of § 437 on pages 413–414 he says:

> "Similar considerations affect the use of *subsequent existence* as evidence of existence at the time in issue. Here the disturbing contingency is that some circumstance operating in the interval may have been the source of the subsequent existence, and the propriety of the inference will depend on the likelihood of such intervening circumstances having occurred and been the true origin. On landing at New York it can hardly be inferred that the steamer at the next dock has been there for a week; but it may usually be inferred that the dock has been there for some years; while the particular circumstances of appearance and the like will in the latter instance affect the length of time to which the inference could be carried back. Here, as with prior indications, the *interval of time* to which any inference will be allowable must depend upon the nature of the thing and the circumstances of the particular case.
>
> "The opponent, on the principle of *Explanation* (*ante*, § 34), may always attempt to explain away the effect of the evidence by showing that in the meantime other circumstances have occurred to raise a probability of change instead of continuance.

1. These are res ipsa loquitur cases, but they are apposite to the present discussion for the res ipsa rule, when properly applied, merely gives rise to a compulsory inference, Burr v. Sherwin Williams Co., 42 Cal.2d 682, 688–691, 268 P. 2d 1041, and the present discussion relates to a permissible one.

2. Appellant argues that there "was no evidence of any kind that said alleged catwalk was used by anybody other than Davidson prior to the date of plaintiff's accident."

"This general principle that a *prior* or *subsequent* existence is evidential of a later or earlier one has been repeatedly laid down, and has even been spoken of as a Presumption (*post*, § 2530)."

[7–9] 31 C.J.S., Evidence, § 140, p. 790: "Accordingly, in some circumstances, an inference as to the past existence of a condition or state of facts may be proper, as, for example, where the present condition or state of facts is one that would not ordinarily exist unless it had also existed at the time as to which the presumption is invoked. An inference that a state of affairs existed at a certain time may be reinforced by evidence that it continued to exist at a subsequent time." In effect such was the ruling in Swarzwald v. Cooley, 39 Cal.App.2d 306, 316, 103 P.2d 580, and Crinella v. Northwestern Pac. R. Co., 85 Cal.App. 440, 448, 259 P. 774. See also, Brock v. Gulf, Mobile & Ohio Railroad Co., Mo., 270 S.W.2d 827, 831; Bolomey v. Houchins, Mo.App., 227 S.W.2d 752, 757–758; Rumbo v. Nixon, Tex.Civ.App., 241 S.W.2d 983, 985; F. W. Woolworth Co. v. Seckinger, 5 Cir., 125 F.2d 97, 98; Plumer v. Luce, 310 Mass. 789, 39 N.E.2d 961, 967; Goff v. Craft's, Inc., 67 R.I. 11, 20 A.2d 520, 522; Harrison v. St. Louis-San Francisco Ry. Co., 339 Mo. 821, 99 S.W.2d 841, 843. Actually it is an inference rather than a presumption with which we deal, and it having been proved (though appellant's counsel denies it) that defendant laid the catwalk, the circumstances above mentioned warrant an inference that the original construction, not more than one week before the accident, was faulty and negligent.

[10] The general contractor, under the circumstances at bar, had not only the duty to furnish a safe place to work or a safe appliance, Revels v. Southern Cal. Edison Co., 113 Cal.App.2d 673, 678–679, 248 P.2d 986; Raich v. Aldon Construction Co., 129 Cal.App.2d 278, 284–285, 276 P.2d 822; Martin v. Food Machinery Corp., 100 Cal. App.2d 244, 248–251, 223 P.2d 293; Miller v. Pacific Constructors, Inc., 68 Cal.App.2d 529, 545, 157 P.2d 57; McCall v. Pacific Mail S.S. Co., 123 Cal. 42, 43–46, 55 P. 706, but also to make reasonable inspections to see that same remained safe, Devens v. Goldberg, 33 Cal.2d 173, 178–179, 199 P.2d 943; Calame v. Stevens, 110 Cal. App.2d 45, 48, 242 P.2d 109. In Nolen v. F. O. Engstrum Co., 175 Cal. 464, 466, 166 P. 346, 347, it was said of a collapsing scaffolding: "The fact that while the plaintiff was at work upon the scaffold it fell and precipitated him to the ground was of itself sufficient evidence that the scaffold was defectively constructed." The inference of negligent construction is adequately supported by the record at bar.

[11–13] Defendant asserts error in giving a res ipsa loquitur instruction, claiming that the doctrine does not here apply. The ultimate test is stated in the Zentz case, 39 Cal.2d at page 446, 247 P.2d at page 349, to be whether "the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the person who is responsible." The collapse of such a catwalk ordinarily would not happen without negligence in its construction, and it being fairly inferable that there had been no change in its condition at or near the point of accident since defendant installed it, the further inference arises that the negligence was that of defendant, especially as it did not undertake to make a contrary evidential showing, see Zentz and other authorities, supra. This is a res ipsa case and such an instruction was properly given. The res ipsa inference is of itself enough to sustain the verdict in the absence of a successful charge of contributory negligence.

[14] The form of the res ipsa instruction is criticized because of the use of the word "collapse" in the following context: "If, and only in the event, you should find that there was an accidental occurrence as claimed by the plaintiff, namely: the collapse of what has been called in this case a 'catwalk', and if you should find that from that accidental event, as a proximate result thereof, plaintiff has suffered injury, you are instructed as follows." There is no virtue in this criticism, for the word

"collapse" accurately describes what happened.

[15] The claim that res ipsa does not apply because "plaintiff testified to all the facts concerning how his accident happened" is without merit. The matter is ruled adversely in Leet v. Union Pac. R. Co., 25 Cal.2d 605, 620, 622, 155 P.2d 42, 158 A.L.R. 1008; see also Freitas v. Peerless Stages, Inc., 108 Cal.App.2d 749, 756, 239 P.2d 671, 33 A.L.R.2d 778.

[16] It is urged that res ipsa does not apply in favor of a mere licensee and therefore that it was error to give the instruction at bar. The cited case of Biondini v. Amship Corp., supra, 81 Cal.App.2d 751, 767, 185 P.2d 94, 104, adequately disposes of this argument: "Amship argues that the doctrine has no application where the injured person is a bare licensee. That is undoubtedly the law. Brust v. C. J. Kubach Co., 130 Cal.App. 152, 19 P.2d 845. But, as already pointed out, it was for the jury to say whether plaintiff was an invitee or licensee. If the jury should find that plaintiff was a mere licensee, then neither defendant is liable, and the doctrine of res ipsa loquitur is not applicable. But, if the jury should find that plaintiff is an invitee as to either or both corporate defendants, then, as to such defendant or defendants, the doctrine is applicable."

[17, 18] Appellant's claim of contributory negligence is accorded the same type of treatment in its briefs as the subject of its own negligence. Again respondent's counsel meets the contention by arraying evidence sufficient to offset it. The result is that the question was one of fact for the jury to decide. It held against defendant and the trial judge denied a motion for new trial. Anthony v. Hobbie, 25 Cal.2d 814, 818, 155 P.2d 826, 829, is apposite: "True, contributory negligence may be found by the trier of fact from the plaintiffs' own evidence. But cases in which it can be said that the negligence of plaintiff contributes proximately to the accident as a matter of law are rare. The rule has been stated in various ways in a legion of cases, that contributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such negligence exists; that reasonable or sensible men could have drawn that conclusion and none other; that where there are different inferences that may be drawn, one for and one against, the one against will be followed; and that before it can be held as a matter of law that contributory negligence exists, the evidence must point unerringly to that conclusion." Bady v. Detwiler, 127 Cal.App.2d 321, 339, 273 P.2d 941, 952: "It is only where no fact is left in doubt, and no deduction or inference other than negligence can be drawn by the jury from the evidence, that the court can say, as a matter of law, that contributory negligence is established. Even where the facts are undisputed, if reasonable minds might draw different conclusions upon the question of negligence the question is one of fact for the jury."

[19, 20] The fact that one workman, Weinhart, saw that the catwalk was not safe two or three days before the accident does no more than furnish a factor to be considered by the jury. This was plaintiff's first visit to the roof girders and he saw no dangerous condition in the catwalk. It does not necessarily follow that what one workman sees every one of them will notice. The plaintiff was not bound to make an inspection of the place or appliance provided for his work, Devens v. Goldberg, supra, 33 Cal.2d 173, 180, 199 P.2d 943; Emery v. Pacific T. & T. Co., 43 Cal.App.2d 402, 409, 110 P.2d 1079; Starr v. Kreuzberger, 129 Cal. 123, 129, 61 P. 787, and he was entitled to assume, until a reasonable man in his place would be apprised of the contrary, that a safe place to work had been provided. Popejoy v. Hannon, 37 Cal.2d 159, 171, 231 P.2d 484; Emery v. Pacific T. & T. Co., supra, 43 Cal.App.2d 402, 409, 110 P.2d 1079; Moran v. Zenith Oil Co., 92 Cal.App.2d 236, 243, 206 P.2d 679; Goldsmith v. Mills, 130 Cal.App.2d 493, 496, 279 P.2d 51. The question of whether a dangerous condition is an obvious one is for the jury. Revels v. Southern Cal. Edison Co., supra, 113 Cal.App.2d 673, 679, 248 P.2d 986; Pauly v. King, 44 Cal.2d 649, 656–658, 284 P.2d 487. The doctrine of assumption of risk is not here applicable. Bickham v. Southern Cal. Edison Co., 120 Cal.App.2d 815, 823–824, 263 P.2d 32; Popejoy v. Hannon, 37 Cal.2d 159, 171, 231 P.2d 484; Austin v. Riverside Portland Cement Co.,

44 Cal.2d 225, 235, 282 P.2d 69. The last cited case explains the difference between assumption of risk and contributory negligence. Assuming that the jurors accepted Weinhart's testimony upon the unsafe condition of the runway, it was for them to say whether plaintiff's failure to notice what someone else had seen was negligence on his part.

The claim that plaintiff was a mere licensee when on the catwalk provided by defendant for use of the employees of the subcontractor is without substance. Revels v. Southern Cal. Edison Co., supra, 113 Cal.App.2d 673, 677, 248 P.2d 986. The most that can be said is that this was a jury question and was decided against appellant.

[21, 22] The court's refusal to instruct upon unavoidable accident was not error. Conceding the request to have been a proper one the court had discretion to give or refuse it. Unavoidable accident merely means one which occurred without negligence on the part of either party. Parker v. Womack, 37 Cal.2d 116, 120, 230 P.2d 823. The instructions given amply covered the fact that defendant is not liable in the absence of negligence on its part. That the refusal of an unavoidable accident instruction is not error when the subject is thus adequately covered was held in Jaeger v. Chapman, 95 Cal.App.2d 520, 522, 213 P.2d 404; McMahon v. Marshall, 111 Cal.App.2d 248, 250, 244 P.2d 481; Lloyd v. Southern Pacific Co., 111 Cal.App.2d 626, 636, 245 P. 2d 583; Goodwin v. Braden, 134 Cal.App. 2d 34, 39–40, 285 P.2d 330.

Appellant claims error in an instruction defining implied invitation "with reference to the use of that term as applied to a licensee." The text is not quoted but a casual transcript reference is given. An examination of that instruction reveals that there was no error. The same is true of refusal to give BAJI 212–A (for the text of which we must resort to the book itself in the absence of a transcript reference). Indeed we do not find that the giving of 212–A was requested.

[23] Complaint of the instruction that "if some fellow-workman of the plaintiff has knowledge of a dangerous condition, such knowledge on the part of a fellow workman is not to be imputed to the plaintiff herein, unless such knowledge was actually communicated to the plaintiff," is misplaced. It correctly states the law. Pushcart v. New York Shipbuilding Co., 81 N.J.L. 261, 81 A. 113; Glidden v. Public Service Co. of New Hampshire, 88 N.H. 4, 183 A. 865, 867; Illinois Central R. Co. v. Pirtle, 47 Ill.App. 498, 500; Covey v. Hannibal & St. J. Ry. Co., 27 Mo.App. 170, 178; Goshorn v. Wheeling Mold & Foundry Co., 65 W.Va. 250, 64 S.E. 22; Noble v. Bessemer S. S. Co., 127 Mich. 103, 86 N.W. 520, 54 L.R.A. 456; 35 Am.Jur. (Master and Servant) § 314, p. 743; 39 C.J., § 1044, p. 834; 56 C.J.S., Master and Servant, § 431, p. 1257. Appellant's counsel says that it "should have included the further element that whatever was obvious to the fellow-workmen of the plaintiff should likewise be obvious to the plaintiff in the exercise of due care." Such an addition would have been argumentative and was properly denied by the court, if indeed it was requested. Counsel does not so assert.

[24] The instruction defining a licensee is not erroneous, as claimed. It reads: "A licensee is one who goes upon the land or premises of another, or upon a portion of said land or premises, by the express or implied permission of that other, but who is not an invitee, as that term has been defined in my instructions, as to that land or premises or portion thereof."

[25] Complaint is made of the giving of instructions concerning certain industrial safety orders which cover the matter of construction of catwalks, scaffolds, and the like. The claim is that this is error per se, reliance being placed on Hard v. Hollywood Turf Club, 112 Cal.App.2d 263, 246 P.2d 716, and Hill v. Eaton & Smith, 65 Cal.App. 2d 11, 149 P.2d 762. Each of those cases turned upon the legal conclusion that the statute (in the Hard case) or the safety order (in Hill) was not provided for the protection of a class to which plaintiff belonged. The propriety of such an instruction is now settled by Armenta v. Churchill, 42 Cal.2d 448, 455, 267 P.2d 303. That case not only holds that such an instruction should be given, but also states that violation of such an order is negligence per se. See, also, Pierson v. Holly Sugar Corp., 107 Cal.App.2d 298, 302, 237 P.2d 28.

[26] Refusal of instructions defining the issues and setting forth defendant's theory of the case is assigned as prejudicial. The first request discussed by counsel was adequately covered by the giving of BAJI 113; moreover, it was definitely slanted in favor of defendant. There was no abuse of discretion in the court's refusal to give it.

[27] The next four requests tender the issue of licensee, which is adequately covered by instructions given. Moreover, each of them contains one or more faulty statements of the law. Of course, the court was not bound to modify and then give them as modified. Sloan v. Stearns, 137 Cal.App.2d 289, 300, 290 P.2d 382.

[28, 29] V. H. Newton, the foreman under whom plaintiff worked, was confronted on cross-examination by a written statement which concluded with this: "I don't see how James I. Barnes Co. or their employees could be blamed for this accident." After certain preliminaries counsel for defendant asserted that plaintiff's attorney had "stated that after the witness read the statement I may read it to the jury"; the record shows this to be correct. The statement was read to the jury and was then offered in evidence by the defendant. But the court of its own motion excluded same, saying that it could be considered only for purpose of impeachment and "you know the statement is not admissible in evidence." Later, in chambers, plaintiff's attorney moved to strike the portion which is above quoted and the court remarked, "I am inclined to believe that in the interests of justice the motion should be granted and I should instruct the jury to disregard that portion of the statement." This was done. Appellant say that this was error, but counsel is mistaken. It is argued that this was an admission of a party but clearly that is not the case, for Newton, the witness, was a foreman employed by plaintiff's employer and was in no sense the agent of plaintiff. This conclusion of Newton's was not impeachment in fact and it was properly stricken by the court for it was immaterial what the witness thought about the merits of the case and it could have been prejudicial to plaintiff's cause. The fact that it went into evidence without objection did not render the court's action improper. His ruling was but the exercise of a sound judicial discretion. See Dastagir v. Dastagir, 109 Cal. App.2d 809, 816, 819, 241 P.2d 656; Trancoso v. Trancoso, 96 Cal.App.2d 797, 798, 216 P.2d 172; Hoel v. City of Los Angeles, 136 Cal.App.2d 295, 307, 288 P.2d 989; Miller v. Republic Grocery, Inc., 110 Cal. App.2d 187, 192, 242 P.2d 396; Gantner v. Gantner, 39 Cal.2d 272, 278, 246 P.2d 923.

[30] Refusal to give BAJI 140 is urged as error. It reads: "General human experience justifies the inference that when one looks in the direction of an object clearly visible, he sees it, and that when he listens, he hears that which is clearly audible. When there is evidence to the effect that one did look, but did not see that which was in plain sight, or that he listened, but did not hear that which he could have heard in the exercise of ordinary care, it follows that either there is an irreconcilable conflict in such evidence or the person was negligently inattentive." The instruction was not appropriate for plaintiff did not say he looked and did not see. He assumed, as he had a right to do without inspection, that the place provided for him was a safe place for his work. Clearly there was no abuse of discretion in denying this request.

[31] Excessive verdict. This claim is disposed of by the following language of Leming v. Oilfields Trucking Co., 44 Cal.2d 343, 356, 282 P.2d 23, 31: "Since defendants' claim of excessive damages is primarily factual in nature, they are required to set forth in their briefs all the material evidence on the point, and unless this is done their contention is deemed to be waived. A reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact, and it is not the province of such a court to search the record in order to ascertain whether it contains evidence which will support a contention made by either party to an appeal."

Other claims of error do not require discussion.

[32] The judgment is affirmed. The attempted appeal from the verdict is dismissed. 3 Cal.Jur.2d § 52, p. 483.

MOORE, P. J., and FOX, J., concur.

WEST KEY NUMBER SYSTEM

NATIONAL UNIVERSITY LIBRARY
3 1786 10047 7444

NATIONAL UNIVERSITY LIBRARY

SAN DIEGO

NON-CIRCULATING

